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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
OAKLAND DIVISION

NATIVE VILLAGE OF KIVALINA and CITY OF KIVALINA,

Plaintiffs,

vs.

EXXON MOBIL CORPORATION; BP P.L.C.; BP AMERICA INC.; BP PRODUCTS NORTH AMERICA INC.; CHEVRON CORPORATION; CHEVRON U.S.A., INC.; CONOCOPHILLIPS COMPANY; ROYAL DUTCH SHELL PLC; SHELL OIL COMPANY; PEABODY ENERGY CORPORATION; THE AES CORPORATION; AMERICAN ELECTRIC POWER COMPANY, INC.; AMERICAN ELECTRIC POWER SERVICES CORPORATION; DTE ENERGY COMPANY; DUKE ENERGY CORPORATION; DYNEGY HOLDINGS, INC.; EDISON INTERNATIONAL; MIDAMERICAN ENERGY HOLDINGS COMPANY; MIRANT CORPORATION; NRG ENERGY; PINNACLE WET CAPITAL CORPORATION; RELIANT ENERGY, INC.; THE SOUTHERN COMPANY; AND XCEL ENERGY, INC.,

Defendants.

CASE NO. C 08-01138 SBA

REPLY IN SUPPORT OF THE MOTION OF CERTAIN OIL COMPANY DEFENDANTS TO DISMISS PLAINTIFFS' COMPLAINT PURSUANT TO FED. R. CIV. P. 12(b)(6)

Time: December 9, 2008, 1:00 P.M.
Ctrm.: Courtroom 3, 1301 Clay Street, Oakland, California
The Honorable Saundra B. Armstrong

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I. INTRODUCTION

Plaintiffs' own brief establishes that Plaintiffs are bringing claims and seeking relief without precedent in American law. This is no ordinary nuisance action. Plaintiffs have arbitrarily selected a few companies as liable for all the damages caused by more than two centuries' worth of greenhouse gas emissions, requesting that this Court apply a joint causation theory that ignores the innumerable other contributors across the globe, and alleging a hopelessly attenuated causal chain between Defendants' emissions and Plaintiffs' alleged harm. In addition to failing to plead actual or legal causation, Plaintiffs have also failed to plead a proper claim under the federal common law of nuisance, because such a claim applies only to protect a State from identifiable polluting sources beyond the State's borders. Should the Court reach the merits, therefore, Plaintiffs' claims should be dismissed under Federal Rule of Civil Procedure 12(b)(6).[1]

II. ARGUMENT

A. Plaintiffs' Brief Fails To Demonstrate The Legal Sufficiency Of Their Causation Allegations.

Plaintiffs labor to characterize their case as a typical nuisance action, no different from pollution cases involving multiple polluting sources. Plaintiffs assert that in multiple-source cases, when emissions combine to contaminate a given area, any one or any subset of the polluters generally can be sued in nuisance, with each and every polluter deemed a contributing cause of the overall contamination. Plaintiffs then contend that this case follows the same model, because the defendants are merely a subset of all the "polluters" whose emissions, over every continent and for several centuries, have combined to "contaminate" the global atmosphere with greenhouse gases, thereby forcing an artificial change in the worldwide climate. Under the causation rule applied in multiple-source pollution cases, Plaintiffs contend, it is fair and proper to hold a handful of emitters liable for the acts of everyone who contributed to the nuisance.

The problems with this legal theory of causation leap out directly from Plaintiffs' own

[1] As explained in the Oil Companies' opening brief, Plaintiffs' claims for conspiracy and concert of action must also be dismissed because they are purely derivative of their nuisance claims, and because the First Amendment prohibits courts from adjudicating the truth or falsity of viewpoints expressed in a hotly contested public policy debate, as explained further in Part II of the Utility Defendants' reply memorandum in support of their motion to dismiss Count III.

brief. If the analogy to typical joint-liability pollution cases applied here, such that Defendants could be held liable as a subset of all the tortfeasors whose combined emissions caused the "pollution," the law also would have to hold liable as a joint "polluter" *every single non-natural greenhouse gas emitter on the planet Earth over at least two centuries*. As Plaintiffs' own brief insists, under the joint causation principle they invoke, "*every polluter who contributes to a nuisance* is liable jointly and severally for the resulting indivisible injury." Pls. Br. 2 (emphasis added); *see* Pls. Br. 104 ("all emitters contribute to the injury … which is enough to establish causation"). And because all homeowners, car drivers, truckers, and farmers concededly emit non-natural greenhouse gases and thereby "contribute" to the alleged "nuisance," it necessarily follows that, under Plaintiffs' own joint causation principle, every one of these "polluters" is "liable jointly and severally for the resulting indivisible injury." Pls. Br. 2. Yet Plaintiffs insist, with no reasoning or authority, that in this case, joint liability should *not* attach to "the greenhouse gas emissions of the ordinary citizen who drives a car or owns a home that emits greenhouse gases." Pls. Br. 42. In other words, Plaintiffs do *not* want the Court actually to apply the joint causation principle they invoke to the facts of this case – or at least they do not want the Court to apply the principle in any previously recognized form.

Plaintiffs' concession that the causation rule they invoke cannot actually be applied here is, of course, fatal to their action. There is simply no recognized basis in tort for singling out a few companies as liable for all the damages caused – according to Plaintiffs' carefully worded allegations – *not* by those companies' *own* emissions, but by more than two centuries' worth of combined emissions from all non-natural human activities worldwide. *E.g.*, Compl. ¶¶ 125, 161. Plaintiffs do not even allege that the Oil Companies' greenhouse gas emissions *made a difference* in the changing pattern of the global climate. Instead they simply allege that Defendants have been large emitters in recent decades, tacitly conceding (and nowhere denying) that even absent those emissions, the combined emissions from *other* man-made industrial, commercial, and agricultural sources over the centuries and around the globe would have sufficed to increase greenhouse gas concentrations and cause the same climate change the planet has already experienced. Because neither global warming itself, nor any measure of global warming, nor any

particular consequence of global warming, can be attributed to Defendants' own emissions on the facts alleged, those facts fail to establish actual or legal causation as a matter of law.

1. Plaintiffs' Cause-In-Fact Allegations Do Not Satisfy The "Substantial Factor" Standard.

The Oil Companies' opening brief demonstrated why Plaintiffs' complaint fails to allege facts sufficient to establish that Defendants' emissions were a "substantial factor" in causing Plaintiffs' property damages. Oil Co. MTD 6-8. Plaintiffs' response does nothing to rehabilitate their complaint.

To start, Plaintiffs falsely accuse Defendants of invoking only a "but for" causation standard and of ignoring the "substantial factor" test. In fact, the Oil Companies' brief expressly invokes the "substantial factor" test and specifically notes that it is, as Plaintiffs say, "a broader rule of causality than the 'but for' test." Pls. Br. 40; *see* Oil Co. MTD 6. But the difference between the standards does not help Plaintiffs here. A plaintiff can establish causation under the "substantial factor" test "by showing either (1) but for the negligence, the harm would not have occurred, or (2) the negligence was a concurrent independent cause of the harm," that is, "sufficient in the absence of the other[] [causes] to bring about the harm." *Viner v. Sweet*, 30 Cal. 4th 1232, 1240, 1241 (2003). In other words, as Defendants explained, "a defendant's act must be either a necessary or sufficient cause of the injury." Oil Co. MTD 6. Although the substantial factor test thus accommodates cases involving two or more concurrent independent causes, where either would have been sufficient to cause the injury and thus neither was "necessary" standing alone, the standard still "generally produces the same results as does the 'but for' rule of causation." *Bank of N.Y. v. Fremont Gen. Corp.*, 523 F.3d 902, 909 (9th Cir. 2008).[2]

Plaintiffs cannot meet the substantial factor standard because they do not allege that Defendants' emissions were either a necessary ("but for") cause of global warming or were themselves sufficient to have caused global warming in the absence of the other emissions across

[2] As Defendants explained in their motion, different jurisdictions may use the vocabulary of causation in various ways, but they all generally divide the question of causation into the same factual and policy prongs. *See* Oil Co. MTD 6.

the planet over centuries. To the contrary, Plaintiffs make clear that Defendants' emissions alone were *not* enough to have caused their injuries: "Defendants' greenhouse gas emissions *combine with each others* [*sic*] *and those of others* to trap heat, which causes Kivalina's injuries." Pls. Br. 104 (emphasis added). The legal defect is one of diffusion, not just attenuation (Pls. Br. 40-41, 43) – there are far too many other sources of emissions to identify Defendants' own emissions as uniquely necessary or sufficient in any way. Plaintiffs thus have not alleged facts establishing that Defendants' emissions are a substantial factor in causing global warming.[3]

Plaintiffs also mischaracterize the factual shortcomings identified by Defendants, suggesting that Defendants rely simply on the "breathing" of billions to defeat their causation theory. Pls. Br. 1-2, 36-37. But the principal defect in Plaintiffs' complaint is not the fact of worldwide respiration, it is that Plaintiffs acknowledge, as they must, that Defendants are *only a few* of the many billions of worldwide emitters of *man-made* greenhouse gases. Plaintiffs allege that "human-made greenhouse gases" have been on the rise "since the dawn of the industrial revolution in the 18th century," and that the "human activity that releases greenhouse gases is causing a change in the earth's climate." Compl. ¶¶ 124, 125, 132. They assert that Defendants are merely "*among* the nation's largest fossil fuel interests" and merely "contribute to global warming." Pls. Br. 1 (emphasis added); *see id.* at 37.[4] Even accepting Plaintiffs' submission that

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[3] The CERCLA case cited by Plaintiffs is irrelevant, because it, too, simply applies the rule that either of two independent causes must be sufficient in itself to have caused plaintiff's injury. *See Artesian Water Co. v. Gov't of New Castle County*, 659 F. Supp. 1269, 1283 (D. Del. 1987) (allowing liability under "substantial factor" test where "two or more causes have concurred to bring about an event, and any one of them, operating alone, would have been sufficient to cause the identical result"). Plaintiffs recite a slightly different formulation of the rule quoted by the *Artesian Water* court: "when the conduct of two or more actors is so related to an event that their combined conduct, viewed as a whole, is a but-for cause of the event, and application of the but-for rule to them individually would absolve all of them, the conduct of each is a cause in fact of the event." *Id.* (quoting Prosser & Keeton on Torts, § 42, at 268). But clearly the *Artesian Water* court understood that formulation as requiring that each contributing cause at least be sufficient in itself. And even to the extent that some pollution cases do allow liability for combined conduct where each contributing cause is *not* enough in itself to have caused the contamination and injury, that principle has no application here, as explained below, *infra* at 5- 6.

[4] *See also* Pls. Br. 2 (defendants "represent most of the biggest emitters and fossil fuel producers in the United States"); Pls. Br. 10 ("defendant ExxonMobil was one of the 100 largest electric power producers in the United States in 2002"); Pls. Br. 10-11 ("The Power Companies are among the largest emitters of carbon dioxide in the United States"); Pls. Br. 36 (Kivalina is suing "most of the biggest greenhouse gas emitters and producers of fuels that contribute to such emissions in the U.S."); Pls. Br. 68 (defendants are together responsible for "more of the

global warming can be attributed only to *non-natural* human activity, it remains undisputed that billions of entities and individuals around the world have also "contributed" to global warming, through all the commercial, industrial, agricultural, transportation, technological and other non-natural human activities that produce greenhouse gases. Pls. Br. 101, 117. Plaintiffs nowhere suggest that, absent Defendants' emissions, global warming would not have happened or would come to a halt – indeed, Plaintiffs disclaim any need to allege such facts. Pls. Br. 100 ("Kivalina need not show that without defendants' emissions their injuries would not have occurred").

Plaintiffs instead contend that they need allege only that Defendants were among the world's "contributors" to global warming over the prior centuries, relying on common-law pollution cases holding that each contributor to a pollution nuisance can be held liable for the nuisance. Pls. Br. 37-38. But as explained in the Oil Companies' opening brief, those cases are critically different from this case – they all involve a discrete set of polluters together causing a nuisance in a particular location, where it is possible to identify all the polluters and hold them all liable either directly or through contribution. In *Lockwood Co. v. Lawrence*, 77 Me. 297 (1885), the nuisance was "the combined result[]" of deposits of waste in a river by several sawmills, all of whom were parties to the case. *Id.* at 309-10. Similarly, in *Woodyear v. Schaefer*, 57 Md. 1 (1881), the defendant slaughterhouse was one of several slaughterhouses upstream from the plaintiff; the slaughterhouse's discharge was "a part of one common whole, and to stop the mischief of the whole," the court reasoned, "each part in detail must be arrested and removed." *Id.* at 10. In *People v. Gold Run Ditch & Mining Co.*, 66 Cal. 138 (1884), several mines dumping debris in a river were together the cause of a nuisance, and "[n]o other mine contribute[d] annually more detritus to the river than the defendant." *Id.* at 145, 148.

The 20th-century descendants of these cases likewise involved an identifiable set of polluters causing a discrete nuisance in a specific location. *See Michie v. Great Lakes Steel Div. Nat'l Steel Corp.*, 495 F.2d 213, 218-19 (6th Cir. 1974) (allowing suit by residents near Detroit to proceed against three companies with seven plants emitting "noxious" pollutants); *City of Tulsa v.*

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problem" than any other single entity in the nation); *accord* Compl. ¶ 3 (alleging that Defendants are "*many of* the largest emitters of greenhouse gases in the *United States*.") (emphasis added).

Tyson Foods, Inc., 258 F. Supp. 2d 1263, 1270, 1297-98 (N.D. Okla. 2003) (suit by city of Tulsa against neighboring town and nearby poultry operations for causing eutrophication of two lakes from which Tulsa drew its water supply; the "separate acts" of the defendants "combin[ed] to cause" the harm); *Velsicol Chem. Corp. v. Rowe*, 543 S.W.2d 337, 338, 343-44 (Tenn. 1976) (allowing third-party complaint by defendant against other five other plants "in the Alton Park area" in action involving localized air pollution); *Landers v. E. Tex. Salt Water Disposal Co.*, 248 S.W.2d 731, 734 (Tex. 1952) (two defendants each pumped salt water into plaintiff's lake, killing his fish). In *Illinois v. Milwaukee*, 1973 U.S. Dist. LEXIS 15607 (N.D. Ill. 1973), entities other than Milwaukee may have contributed to the eutrophication of Lake Michigan, but the court emphasized that the city was "the largest point discharger," *id.* at *20-*21; *see id.* at *22-*23 ("the most significant point source on the lake"), and that further degradation of the lake was "a certainty unless [Milwaukee's] conduct is enjoined," *id.* at *25. Milwaukee thus was not one of an unknown number of otherwise innocent dischargers – Milwaukee's own emissions were causing significant harm to the lake. Finally, the CERCLA cases cited by Plaintiffs *necessarily* confine liability to pollution of a discrete area – that is the point of the statute. *See United States v. Burlington N. & Santa Fe Ry.*, 502 F.3d 781, 793 (9th Cir. 2008). Multiple parties may be liable for cleanup costs, but liability is premised on a direct relationship with the specific site, and thus involves some finite set of responsible entities. *See id.* at 799.[5]

None of those cases remotely suggests that a plaintiff could have proceeded against a few defendants for a global problem caused by billions of global sources over hundreds of years. Plaintiffs dispute that their causation principle is limited to localized pollution, *see* Pls. Br. 42, but they do not cite a single precedent applying the principle to anything other than localized pollution. That is no surprise: the cases cited above permit joint liability only because the defendants can be situated within an identifiable set of entities whose joint conduct can be

[5] The leading secondary authorities likewise contemplate joint liability only where the nuisance is isolated and has identifiable contributors. *See, e.g.*, Restatement (Second) of Torts § 881 (using, as illustrations, three mines each polluting one stream and three smelter plants emitting fumes that destroy grass on nearby land); W. Page Keeton et al., *Prosser & Keeton on Torts* § 52, at 354 (5th ed. 1984) (describing rule as applying "in cases of pollution, flooding of land, diversion of water, obstruction of a highway, or … a noise nuisance" (footnotes omitted)).

understood to have caused the nuisance. The fairness and effectiveness of joint liability depend crucially on the expectation that all responsible parties can be identified and subjected to actions for contribution. *See, e.g.*, *Landers*, 248 S.W.2d at 734 ("If fewer than the whole number of wrongdoers are joined as defendants to plaintiff's suit, those joined may by proper cross action under the governing rules bring in those omitted."); *Woodyear*, 57 Md. at 12 (allowing injunction to issue, and noting that plaintiff would "be entitled to the same relief against all the parties contributing to the injury"); *In re MTBE Prods. Liab. Litig.*, 447 F. Supp. 2d 289, 301-02 (S.D.N.Y. 2006) ("Plaintiffs need not name all potential tortfeasors, or even a substantial share of all tortfeasors, because defendants can implead other responsible parties")[6]; *cf. In re Agent Orange Prod. Liab. Litig.*, 597 F. Supp. 740, 823 (E.D.N.Y. 1984) (observing that fairness of enterprise liability often turns on whether "all possible claimants and all possible defendants are joined together in a single suit").[7] Plaintiffs therefore err in asserting that if their principle were applied here, Defendants would not be allowed to implead all other greenhouse gas emitters. Pls. Br. 68. Where joint causation is allowed, it is essential that the named defendants be allowed to pursue actions against all other contributing parties – otherwise, contributing parties not named by the plaintiffs, including (as here) parties making equivalent contributions to the alleged nuisance, would never internalize the costs of their activities and would continue to contaminate the water or land or air at issue.[8]

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[6] Plaintiffs suggest that Defendants' reliance on *MTBE* for the proposition that concurrent wrongdoing typically involves "a small number of tortfeasors" is misplaced because the *MTBE* court ultimately allowed the plaintiffs to proceed against "a large number of oil companies." Pls. Br. 39 n.11. Plaintiffs miss the point: the "large number of oil companies" in *MTBE* was still a *discrete, identifiable* set of parties that allegedly contaminated a specific area. *See* 447 F. Supp. 2d at 293. The point is not that the court proceeded against numerous defendants, it is that *only that set of defendants* was conceivably liable. And, in any event, that set was a decidedly *small* number when compared to the billions of individuals and entities that have emitted non-natural greenhouse gases into the atmosphere over the last several hundred years.

[7] Plaintiffs rely on *Agent Orange* for a statement of their nuisance principle. Pls. Br. 39. But the *Agent Orange* court was addressing the distinct problem of connecting seven manufacturers of Agent Orange with each plaintiff's injuries. It was not a case of joint causation at all, and in any event reflects another example of an identifiable set of entities potentially responsible for specific injuries. *See* 697 F. Supp. at 822. Nothing about *Agent Orange* would allow a court to assign liability to a cherry-picked handful of parties out of millions collectively responsible for plaintiffs' injuries.

[8] Plaintiffs overlook the connection to place that typifies the ordinary nuisance or

In some instances, disproportionately large emissions by a given defendant or defendants are enough to establish liability because enjoining that contributor's emissions alone will substantially mitigate or eliminate the nuisance. *See, e.g.*, *Gold Run Ditch*, 66 Cal. at 148; *Illinois v. Milwaukee*, 1973 U.S. Dist. LEXIS 15607, at *22-*23. Here, the issue is not just that each Defendant "standing alone" did not cause global warming, Pls. Br. 2, it is that even the Defendants *standing together* are not alleged to have done so. In all of the above cases liability rested on some "common whole," *Woodyear*, 57 Md. at 10, but here there is no "whole" that is "common" either to Defendants or to any plausibly identifiable set of entities that could be haled before this Court. There is simply a vast diffusion of non-natural greenhouse-gas emitters across the planet and over the centuries, all of whom have "contributed" to a long-developing, worldwide atmospheric and environmental phenomenon.

Plaintiffs ultimately recognize that the rule they invoke – that all "contributors" to the "nuisance" of global warming are tortfeasors subject to joint liability – cannot actually apply to this context. Rather than apply the rule faithfully, they try to change it, insisting that the Court need not allow the joinder of billions of other contributing entities and individuals because liability ought not attach to "the greenhouse gas emissions of the ordinary citizen who drives a car or owns a home that emits greenhouse gases." Pls. Br. 42. But they cite no precedent or authority that would explain *why* a court adjudicating liability on a joint causation theory can ignore other contributing entities in this context, when in any other pollution case *all* contributors would be deemed joint tortfeasors, as Plaintiffs themselves expressly state. Pls. Br. 2 ("every polluter who contributes to a nuisance is liable jointly and severally for the resulting indivisible injury"); Pls. Br. 44 ("as recognized by the multiple-polluter caselaw, each polluter who contributes to a nuisance is liable therefore"); Pls. Br. 104 ("all emitters contribute to the injury which is enough to establish causation"). Plaintiffs suggest that the quality and quantity of

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pollution case. Water and eutrophication-causing nutrients may generally be innocuous substances, *see* Pls. Br. 32, but when they are concentrated in or diverted from a particular location, they become a nuisance. *See Illinois v. Milwaukee*, 1973 U.S. Dist. LEXIS 15607; *Hillman v. Newington*, 57 Cal. 56, 64 (1880). Here, the relevant "place" for greenhouse-gas-induced global warming would be the entire planet, *see* Pls. Br. 101, and to carry the analogy to nuisance through, one must accept that everyone on the planet contributes to it.

Defendants' emissions are enough to distinguish Defendants for damages liability purposes from the rest of the world's greenhouse-gas emitters, Pls. Br. 42, but that suggestion has absolutely no basis in the nuisance cases on which Plaintiffs rely – not one holds that other contributors to a nuisance can be absolved of liability merely so long as some large emitters are already defendants. And as already noted, such an approach would make no sense – if other emitters can escape liability, the nuisance *will not be abated* and the damage will continue.

Plaintiffs complain that Defendants "ask, in essence, why us?" (Pls. Br. 68), as if the question were surprising. But *of course* Defendants ask "why us?" – they ask because they are aware of no existing principle of law that would allow them to be singled out from among all the non-natural greenhouse gas emitters in the world as the sole entities responsible for compensating Plaintiffs for their weather-related damages. The question is obviously difficult for Plaintiffs as well, for nowhere in their brief do they give a legal answer. Instead they simply assert that Defendants should be made to pay because, evidently, *someone* should pay, and Defendants are the largest emitters (apparently ignoring all car and truck drivers) in the largest "historical" (notably, not current) emitting nation. Pls. Br. 68. But whatever costs one believes the United States alone should bear for its role in this global phenomenon, and however one thinks those costs should be allocated among the many different U.S. sources of greenhouse gases, *none of this has anything to do with private tort law*. If standard principles of tort law could be applied here, then *every* emitter of non-natural greenhouse gases on the planet would be "a polluter who contributes to [the] nuisance [and be] liable therefor." Pls. Br. 44. But Plaintiffs' own analysis concedes that standard tort principles cannot apply here, effectively confirming that global warming is not a private tort law issue at all, but a *worldwide public policy* issue, which can be addressed fairly and effectively only by policymaking bodies properly equipped to address the global causes and effects of global warming, as well as the economic and social consequences of the many different regulatory solutions that might be invoked as a remedy.

2. Plaintiffs Fail To Demonstrate The Adequacy Of Their Proximate Cause Allegations.

Plaintiffs do little more to argue proximate cause than to cite back to their "substantial

factor" cause-in-fact arguments. Pls. Br. 42-43. They assert, however, that proximate cause "cannot be resolved on a motion to dismiss." Pls. Br. 43. Not so. As Plaintiffs acknowledge elsewhere in their brief, "proximate cause … is a question of law where the facts are uncontroverted and only one deduction or inference may reasonably be drawn from those facts." Pls. Br. 83 (quoting *Ileto v. Glock Inc.*, 349 F.3d 1191, 1206 (9th Cir. 2003)). Although Defendants very much dispute the factual allegations in Plaintiffs' complaint, they need not do so to prevail on this motion – the problem here is the *legal inadequacy* of the alleged facts. *See, e.g.*, *Canyon County v. Syngenta Seeds, Inc.*, 519 F.3d 969, 983 (9th Cir. 2008) (dismissing complaint at pleading stage: "The County's claims against the defendant companies fail for lack of proximate causation. The asserted link between the companies' hiring practices and increased demand for County services is far too attenuated."); *Ass'n of Wash. Pub. Hosp. Dists., Inc. v. Philip Morris, Inc.*, 241 F.3d 696, 701-07 (9th Cir. 2001) (dismissing complaint at pleading stage for failure to plead proximate cause where alleged injury was "too remote" from defendant's conduct). That is, even assuming the alleged facts to be true, Plaintiffs fail to establish proximate cause as a matter of law, because the alleged facts do not show a plausible connection between Defendants' greenhouse gas emissions and Plaintiffs' property damage. *See Bell Atlantic Corp. v. Twombly*, 127 S. Ct. 1955, 1960 (2007) (allegations must establish "plausible" claim to relief).

Plaintiffs suggest that proximate cause allegations need not satisfy a remoteness inquiry to survive a motion to dismiss, citing as an example a district court case from Missouri holding that remoteness did not require dismissal of a case seeking "to recoup healthcare costs against tobacco companies." Pls. Br. 43 (citing *St. Louis v. Am. Tobacco Co.*, 70 F. Supp. 2d 1008, 1014 (E.D. Mo. 1999)). Plaintiffs' reliance on that example is remarkable – the Ninth Circuit has flatly rejected Plaintiffs' theory, twice holding that federal statutory and state common law claims against tobacco companies seeking to recoup healthcare costs do *not* satisfy proximate cause requirements because the alleged injuries are too remote, thus requiring dismissal at the pleading stage. *See Wash. Pub. Hosp. Dists.*, 241 F.3d at 701; *Or. Laborers-Employers Health & Welfare Trust Fund v. Philip Morris, Inc.*, 185 F.3d 957, 964-66, 968 (9th Cir. 1999). The same result is required here. The legal flaw in the complaint is not simply that Defendants' emissions are

remote in "time or distance" from Plaintiffs' property erosion. Pls. Br. 43. It is that the two are separated by multiple wholly conjectural steps – including *particular climatic events*, from ice formation to storms, and their impact on a shoreline. Compl. ¶ 185; *see also* Oil Co. MTD 9. It is unprecedented to hold a defendant liable for weather-related harms on the theory that the defendant is responsible for the weather event itself. Finally, even beyond the endless conjectural links in Plaintiffs' hypothesized chain of causation, Plaintiffs ultimately cannot escape their own allegation that global warming is actually the product of *all* man-made emissions across the planet for more than two centuries. In other words, even accepting Plaintiffs' chain of linear causation, what that chain traces back to is *not* Defendants' own emissions, but an undifferentiated, wholly diffused mass of greenhouse gases in the atmosphere produced by all humanity's non-natural emissions since the dawn of the Industrial Revolution. Once Defendants' emissions have become "merged in the general forces that surround us," they "can be followed no further." Jeremiah Smith, *Legal Cause in Actions of Tort*, 25 Harv. L. Rev. 103, 112 (1911).

B. Plaintiffs Fail To State A Federal Nuisance Claim.

Putting aside the substantial flaws in their causation allegations, Plaintiffs argue that they have otherwise stated a proper claim under the federal common law of nuisance. In Plaintiffs' view, the federal common law of nuisance applies to any claim for interstate pollution that is unregulated by the EPA, regardless of whether a State brings the claim or even whether the rights of States are implicated. But Plaintiffs' contention that their nuisance claim is a "well-recognized species of 'federal specialized common law'" is wildly off the mark. Pls. Br. 21. Although the existence of a federal common law of nuisance is indeed "well recognized," it is equally well recognized that such federal common law exists only to protect the "'rights of *a State* from improper impairment by sources outside its domain.'" *Illinois v. City of Milwaukee*, 406 U.S. 91, 107 n.9 (1972) (*Milwaukee I*) (quoting *Texas v. Pankey*, 441 F.2d 236, 241-42 (10th Cir. 1971) (emphasis added)); *see* also *Nat'l Audubon Soc. v. Dep't of Water*, 869 F.2d 1196, 1205 (9th Cir. 1988) ("[T]he Court considers only those interstate controversies which involve *a state* suing sources outside of its own territory because they are causing pollution within the state to be

inappropriate for state law to control, and therefore subject to resolution according to federal common law.") (emphasis added). Plaintiffs are not States, nor do they genuinely contend that their claims implicate the rights of the State of Alaska. Instead, Plaintiffs ask this Court to limit the Ninth Circuit's decision in *National Audubon* to its facts. *National Audubon* could not have spoken more clearly, however, and requires dismissal of Plaintiffs' federal nuisance claim.

In *National Audubon*, the Ninth Circuit set forth the well-established framework for determining when a federal common law claim is appropriate, and applied it to pollution cases. *National Audubon* explains that federal common law applies "in a 'few and restricted' instances …: those in which a federal rule of decision is 'necessary to protect uniquely federal interests,' and those in which Congress has given the courts the power to develop substantive law.'" *Id*. at 1201 (citations omitted). Plaintiffs do not argue that Congress gave courts the power to develop nuisance law, but contend instead that this case falls into the "uniquely federal interests" category. As the Oil Companies explained in their opening brief, *National Audubon* makes clear that this category of cases is not as broad as Plaintiffs suggest. "[A] 'uniquely federal interest' exists 'only in such narrow areas as those concerned with the rights and obligations of the United States, interstate and international disputes implicating the conflicting rights of states or our relations with foreign nations, and admiralty cases.'" *Id*. at 1202 (citing *Texas Indus., Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 641 (1981)). Plaintiffs cannot fit their claim within any of the *Texas Industries* categories of "uniquely federal interests," as they must, and there is no basis for this Court to create a fourth category for Plaintiffs' global warming claim.

Plaintiffs first attempt to expand the cases involving "uniquely federal interests" to all interstate pollution cases. According to Plaintiffs, *National Audubon* "plainly recognized that under *Milwaukee I*, 'there is a federal common law when dealing with air and water in their ambient or interstate aspects.'" Pls. Br. 22 (quoting *Nat'l Audubon*, 869 F.2d at 1203). But *National Audubon* squarely rejects the claim that there is always a "'uniquely federal interest' in protecting the quality of the nation's air." 869 F.2d at 1203 ("primary responsibility for maintaining the air quality rests on the states"). Nor does *Milwaukee I* "hold[] that interstate pollution is [always] a matter of federal common law." Pls. Br. 23. *Milwaukee I* permitted the

State of Illinois to seek "a federal common law remedy to abate interstate or navigable water pollution." *Nat'l Audubon*, 869 F.2d at 1203. As *National Audubon* makes clear, *Milwaukee I*'s nuisance claim must be read in this "context." 869 F.2d at 1203. Neither case, therefore, supports Plaintiffs' novel claim that a non-State plaintiff can bring a federal global warming cause of action – for damages[9] – that has never been recognized by any court or by Congress.

Plaintiffs next seek to expand the cases involving "uniquely federal interests" not just to interstate disputes implicating "the conflicting rights of states," but to all interstate disputes, regardless of whether a State is a plaintiff. Again, *National Audubon* squarely rejects this argument. A federal nuisance claim applies only in the "limited context" in which there is an "interstate controvers[y] involv[ing] a State suing sources outside of its own territory." *Id*. at 1205; *see also Milwaukee I*, 406 U.S. at 107 ("Federal common law and not the varying common law of the individual States is, we think, entitled and necessary to be recognized as a basis for dealing in uniform standard with the environmental rights of a State against improper impairment by sources outside its domain."). Indeed, Plaintiffs concede on page 21 of their brief that the federal common law remedy they invoke applies to "interstate … disputes implicating the conflicting rights of States," but then they immediately ignore this qualifying language.

Plaintiffs attempt to distinguish *National Audubon* as a localized pollution case, suggesting that this case, in contrast, is a true "interstate dispute" that warrants creation of a federal common law remedy, despite the character of its plaintiffs. *National Audubon* cannot be so readily distinguished. The Ninth Circuit "[a]ssum[ed]" that the pollution was interstate but nonetheless held that no federal common law remedy was available because "a state [was not] suing sources outside of its own territory." *Nat'l Audubon*, 869 F.2d at 1204-1205 (discussing

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[9] Plaintiffs also attempt to read *Milwaukee I* as authorizing their *damages* suit. As *National Audubon* explained, *Milwaukee I* authorizes only an abatement suit brought by a State. The Supreme Court has never authorized a federal nuisance claim for damages; to the contrary, the Supreme Court has expressly grounded a federal nuisance claim in federal courts' *equitable* powers. *See, e.g.*, *Missouri v. Illinois*, 180 U.S. 208, 244 (1901) (*Missouri I*). The cases upon which Plaintiffs rely – *City of Evansville v. Kentucky Liquid Recycling, Inc.*, 604 F.2d 1008, 1019 (7th Cir. 1979), and two district court maritime cases – were decided before the Supreme Court made clear that the *Milwaukee* line of cases does not establish a right to recover damages in a nuisance claim. *See Middlesex County Sewerage Auth. v. Nat'l Sea Clammers Ass'n*, 453 U.S. 1, 10 (1981).

Georgia v. Tennessee Copper Co., 206 U.S. 230 (1907), and *Milwaukee I*).

Plaintiffs also attempt to ignore *National Audubon* altogether, pointing to several out-of-circuit cases for the proposition that a non-State plaintiff can bring a federal nuisance claim. Pls. Br. 25-27.[10] But Plaintiffs plainly cannot ignore controlling precedent. As Plaintiffs concede, the Supreme Court has declined to address whether a private plaintiff can bring a federal nuisance claim for damages. *See Middlesex County Sewerage Auth.*, 453 U.S. at 22. *National Audubon* is therefore binding in this circuit. In contrast to Plaintiffs' stray cases, moreover, *National Audubon* is consistent with Supreme Court doctrine, which as explained in the Oil Companies' opening brief, permits a State to bring a nuisance claim in order to vindicate the State's sovereign interest in protecting its territory from polluters beyond its borders. *See Tennessee Copper*, 206 U.S. at 237-38 ("In [its quasi-sovereign] capacity the state has an interest independent of and behind the titles of its citizens, in all the earth and air within its domain …. It is a fair and reasonable demand on the part of a sovereign that the air over its territory should not be polluted on a great scale by sulphurous acid gas, that the forests on its mountains … should not be further destroyed or threatened by the act of persons beyond its control").[11]

Recognizing the weakness of their arguments in light of *National Audubon* and Supreme Court precedent, Plaintiffs ultimately suggest that "'[i]t is not essential that one or more states be formal parties if the interests of the state are sufficiently implicated." Pls. Br. 27 (quoting *Committee for the Consideration of the Jones Falls Sewage Sys. v. Train*, 539 F.2d 1006, 1009

[10] Plaintiffs argue that non-State plaintiffs should be permitted to bring federal nuisance claims because 28 U.S.C. § 1331(a) does not distinguish between private and State plaintiffs. Pls. Br. 26. Defendants' instant motion, however, is based not on failure of jurisdiction under § 1331(a) but on Federal Rule of Civil Procedure 12(b)(6).

[11] Plaintiffs suggest that this reasoning cannot be the true reason why the Supreme Court created a federal common law nuisance remedy, because the *United States* can likewise bring federal nuisance claims, and the United States is not "driven by the *quid pro quo* for the exchange of sovereign rights." Pls. Br. 26. This argument misses the mark. The Supreme Court has explained why it is appropriate to create federal common law when a State brings a claim for abatement of a simple type of nuisance. The Supreme Court has never expanded the nuisance cause of action to claims by the United States. Assuming that other courts properly decided to do so, their decisions are distinguishable, because it is *also* appropriate to create federal common law where "the rights and obligations of the United States" are concerned." *Nat'l Audubon*, 869 F.2d at 1202. Plaintiffs, however, have not shown –and cannot show under *National Audubon* – that this lawsuit concerns "the rights and obligations of the United States."

(4th Cir. 1976) (en banc)).[12] They also suggest that a non-State can bring a claim because *Milwaukee I* stated in a footnote that in addition to "the character of the parties," "the pollution of a body of water … bounded … by four States" also "requires us to apply federal law." Pls. Br. 25. But even if it were sufficient that a case implicate the conflicting rights of States, this case is hardly analogous. Plaintiffs allege damage to an isolated barrier island that borders no State but Alaska. There is no basis for assuming that the interests of the State of Alaska are in conflict with the interests of any other State, or even with those of Defendants in this case. Plaintiffs cannot evade this problem by pointing to lawsuits filed by other States alleging harm in other States: if the theoretical possibility that a State could file a lawsuit under federal common law were sufficient to allow other parties to do so, then the Ninth Circuit in *National Audubon* would have applied federal common law on the ground that California could have sued dust polluters in Nevada for abatement under *Milwaukee I*. Instead, the Ninth Circuit stated, "[a]lthough we recognize that this case could develop into a dispute involving conflicting rights of States, that is not the case before this court, and we do not decide legal questions based on contingencies, speculation or potential conflicts." *Nat'l Audubon*, 869 F.2d at 1205.

Finally, Plaintiffs suggest that even if their case does not fit within the established case law, an "additional, alternative, basis for applying federal common law here is the unique federal interest in global warming." Pls. Br. 23. But *National Audubon* held that "there is not 'a uniquely federal interest' in protecting the quality of the nation's air." 869 F.2d at 1203. Plaintiffs suggest that *National Audubon* does not apply because the "inherently interstate" nature of greenhouse gas emissions warrants the creation of federal common law. Pls. Br. 22. But *National Audubon*'s "uniquely federal interest" finding did not turn on the localized nature of the

[12] Plaintiffs also suggest that the absence of a State plaintiff is irrelevant because the "sovereign rights" of the Native Village of Kivalina "significantly heighten[] the federal nature of this controversy." Pls. Br. 28. In contrast to the State of Alaska, however, the Native Village of Kivalina lacks *territorial* sovereignty, a point which Plaintiffs ignore. While the Village is a "sovereign entit[y] for some purposes," it is a "sovereign[] without territorial reach." *Alaska ex. rel. Yukon Flats Sch. Dist. v. Native Village of Venetie Tribal Gov.*, 101 F.3d 1286, 1303 (9th Cir. 1996) (Fernandez J. concurring), *rev'd on grounds stated in Judge Fernandez's concurrence*, *Alaska v. Native Village of Venetie Tribal Gov.*, 522 U.S. 520, 523-24 (1998). Accordingly, neither the Village nor its members possess the requisite sovereign interest in a *territory* to warrant application of the federal common law of public nuisance. *See Tennessee Copper*, 206 U.S. at 238.

dust pollution. Rather, in determining whether the "unique rights and obligations of the United States" were at issue, the court looked at the structure of the Clean Air Act and recognized that "'air pollution'" is a responsibility shared between federal, state, and local governments, *Nat'l Audubon*, 869 F.2d at 1203 (quoting 42 U.S.C. § 7401(a)(3)), and therefore is not "a uniquely federal interest," *id*. at 1203-1204.

Plaintiffs claim this case is different from the air pollutants at issue in *National Audubon* because greenhouse gas emissions affect the "climate" of every State, rather than air "quality." Pls. Br. 23. But this hardly helps Plaintiffs. If Plaintiffs' climate claim is so different from a typical pollution claim, then Plaintiffs can hardly argue that it falls within the "recognized enclave of federal common law" of "interstate pollution." Pls. Br. 21. Nor have they provided any justification for creating a new global warming claim in this case, where neither a State nor the United States is a party.[13]

Certainly the global warming claim that Plaintiffs are attempting to shoehorn into established case law is dramatically different from the "simple nuisances" the Supreme Court has recognized as cognizable causes of action under the federal common law. Plaintiffs dispute whether the federal common law is so limited, arguing that *Missouri v. Illinois*, 200 U.S. 496 (1906) (*Missouri II*), *North Dakota v. Minnesota*, 263 U.S. 365 (1923), and *Milwaukee I* were "highly complex," fact-intensive cases, and therefore not "simple" nuisances. But while these cases may have involved "a battle of the experts," and the pollutants in *Missouri II* and *Milwaukee I* may have been "odorless," Defendants have never suggested that such facts foreclose a federal nuisance claim. Rather, in each case in which the Supreme Court has allowed a federal nuisance claim to proceed, the State alleged an immediate, localized harm directly traceable to a harmful substance from an out-of-State source. *See Missouri II*, 200 U.S. at 522-23 (suit by one State to enjoin another State from discharging sewage into interstate stream containing noxious typhoid germs dangerous to health of inhabitants of plaintiff State); *North*

[13] The cases Plaintiffs cite in support of their allegation that "as a matter of policy" they should be allowed to bring their claim, all fall comfortably within the *Texas Industries* framework. *In re Exxon Valdez*, 104 F.3d 1196 (9th Cir. 1997), was an admiralty case, and *Hinderlinder v. La Plata River & Cherry Creek Ditch Co.*, 304 U.S. 92 (1938), was an apportionment dispute implicating the conflicting rights of States.

Dakota, 263 U.S. at 374 (suit by one State to enjoin another State from draining water from within its lands that increased flow of interstate stream and flooded farm lands of inhabitants of plaintiff State); and *Milwaukee I*, 406 U.S. at 93 (suit by one State to enjoin another State's municipalities from discharging sewage into interstate body of water). These cases may have involved contentious factual issues, but they provide no basis for Plaintiffs' claim, which alleges that Defendants are among millions of sources of emissions, both within and outside the State of Alaska, that mix indiscriminately in the global atmosphere and contribute in some indeterminate degree to global warming, which allegedly contributes to the erosion of Plaintiffs' land.

Plaintiffs would have this Court ignore the Supreme Court's unequivocal assertion that "[i]t is the creation of a public nuisance of simple type for which a State may properly ask an injunction." *North Dakota*, 263 U.S. at 374. But this assertion is not mere dicta or loose language, as Plaintiffs suggest. It is a description of the *only* nuisance claims the Supreme Court has allowed to proceed under federal common law. This is for good reason. *See Milwaukee v. Illinois & Michigan*, 451 U.S. 304, 317, 325 (1981) (*Milwaukee II*) (expressing concern that federal courts applying "vague and indeterminate nuisance concepts and maxims of equity jurisprudence" are ill-equipped to balance the requisite factors in addressing large-scale interstate pollution"). The Court should decline Plaintiffs' invitation to dramatically expand the federal common law nuisance cause of action.[14]

[14] Plaintiffs suggest that, if the federal common law claim is dismissed, their state law claims should be dismissed without prejudice to refiling in state court. It is premature to determine whether the Court must or should retain jurisdiction of any state law claims under the unique circumstances Plaintiffs posit. Defendants have presented multiple grounds for dismissing all claims with prejudice, and the Court would need to decide on retaining jurisdiction over the state law claims *only* if it were to reject all of Defendants' arguments *except* the argument that federal common law is unavailable. In such circumstances, the matter of how to proceed can and should be briefed at that time. In any event, Plaintiffs overlook the fact that, at a minimum, "when a court grants a motion to dismiss for failure to state a federal claim," it retains discretion to exercise supplemental jurisdiction over pendant state-law claims. *Arbaugh v. Y&H Corp.*, 546 U.S. 500, 514 (2006). Given the "efforts already expended" by the Court and counsel, dismissal without prejudice without resolving the dispositive questions raised by the pending motions would be a "waste of judicial resources." *Brady v. Brown*, 51 F.3d 810, 816 (9th Cir. 1995); *see also Schneider v. TRW, Inc.*, 938 F.2d 986, 994 (9th Cir. 1991).

C. Any Federal Common Law Of Nuisance That Would Govern Greenhouse Gas Emissions Has Been Displaced.

Assuming there is a federal common law nuisance claim, Plaintiffs next contend that the Clean Air Act does not "preempt" their federal nuisance claim, because there is no "conflict" between the two and because their lawsuit does not "frustrate the purpose of the [Clean Air Act]." Pls. Br. 72. But the existence of a conflict or frustration of purpose is irrelevant to displacement. "Contrary to the suggestions of [Plaintiffs], the appropriate analysis in determining if federal statutory law governs a question previously the subject of federal common law is not the same as that employed in deciding if federal law pre-empts state law." *Milwaukee II*, 451 U.S. at 316. Whereas a preemption analysis starts with a presumption against preemption, a displacement analysis "start[s] with the assumption that it is for Congress, not federal courts, to articulate the appropriate standards to be applied as a matter of federal law." *Id*. at 317 (internal quotations omitted). Thus, there is a presumption *in favor of* displacement. In addition, while the fact that federal and state laws address the same subject is insufficient to establish preemption, *see Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977),[15] that is precisely the test for displacement: "[t]he question [is] whether the legislative scheme 'spoke directly to a question' … not whether Congress ha[s] affirmatively proscribed the use of federal common law." *Milwaukee II*, 451 U.S. at 315; *see also Exxon Shipping Co. v. Baker*, 128 S. Ct. 2605, 2619 (2008) ("'In order to abrogate a common-law principle, the statute must speak directly to the question addressed by the common law.'") (quoting *United States v. Texas*, 507 U.S. 529, 534 (1993)).

Plaintiffs' entire "preemption" argument, including their claim that there must be "a

[15] The fact that Defendants cited *Sprietsma v. Mercury Marine*, 537 U.S. 51 (2002), which addresses federal preemption of state law, does not help Plaintiffs. If a federal statute preempts a state law – because either the federal and state law conflict, or the federal law occupies the field – then the federal statute likely also displaces federal common law that addresses the same question. *Milwaukee II*, 451 U.S. at 317 n.9 ("[T]he very concerns about displacing state law which counsel against finding pre-emption of *state* law in the absence of clear intent actually suggest a willingness to find congressional displacement of *federal* law."). But the converse is not true. If a federal law does *not* preempt a state law – because there is no conflict or no occupation of the field – that same federal law may still directly speak to the same question addressed by federal common law for purposes of displacement.

conflict between the pollution standard set by EPA and the federal common law standard," Pls. Br. 74, is thus irrelevant to the displacement question here. Indeed, Plaintiffs not only confuse the two inquiries but also suggest that the displacement test is "demanding" and that *Milwaukee II*'s "presumption in favor of preemption of federal common law applies only where Congress has provided a comprehensive remedial scheme." Pls. Br. 76-77. *Milwaukee II* says nothing of the sort. As the Oil Companies' opening brief explained, the presumption in favor of displacement may have less force when the statute would "'invade … long-established and familiar principles'" of common law, Oil Co. MTD 17 n.7 (quoting *Texas*, 507 U.S. at 534, and citing cases), but Plaintiffs' cause of action is hardly "long-established" or "familiar."

It is true that legislation on an issue that is merely related to an area long governed by federal common law does not in all cases displace the common law. Thus, in *County of Oneida New York v. Oneida Indian Nation of New York State*, 470 U.S. 226, 236-40 (1985), the Supreme Court held that a federal statute, which included among its provisions two affecting Indian land relations, did not include a framework for dealing directly with violations of Indian property rights, and therefore did not displace a federal common law action to enforce well-established aboriginal land rights. The Court held that nothing in the federal statute addresses "directly the problem of restoring unlawfully conveyed land to the Indians," which was the subject of the federal common law claims at issue. *Id*. at 239. Indeed, the Court noted that in the two centuries following enactment of the purportedly displacing statute, Congress had enacted other legislation addressing Indian property rights that provided for specific procedures to adjudicate aboriginal property disputes — thus assuming the availability of a federal common law claim. *Id*.

County of Oneida is hardly "dispositive" of this case. In contrast to the federal law there, the Clean Air Act now occupies the field, and nothing in that Act "suggests Congress intended to rely for enforcement of this Act upon a federal common law remedy." *Nat'l Audubon*, 869 F.2d at 1202. Critically, Plaintiffs cannot dispute that, under *Massachusetts v. EPA*, 549 U.S. 497 (2007), the Clean Air Act speaks directly to the emission of greenhouse gases, which is precisely the subject of Plaintiffs' claims. That should be the end of the analysis. It is irrelevant to displacement that the EPA is only now in the process of considering appropriate regulations to

implement Congress's direction. The displacement test does not ask whether an agency has directly addressed the problem; it asks whether Congress has addressed the problem. Where Congress has done so, the federal statute, not federal common law, is the source of federal law.

Plaintiffs repeatedly claim that this lawsuit is different, because it seeks a remedy – damages – that is not provided for in the Clean Air Act. But this is just an attempt to argue that the Clean Air Act does not comprehensively regulate the subject. And the Ninth Circuit has already described the Clean Air Act precisely otherwise. *See Bunker Hill Co. Lead & Zinc Smelter v. EPA*, 658 F.2d 1280, 1284 (9th Cir. 1981); *see also Chevron U.S.A. Inc. v. NRDC*, 467 U.S. 837, 848 (1984). Plaintiffs do not really dispute this; they argue instead that they are entitled to bring a federal common law claim that provides "a different remedy" from that provided in the Clean Air Act. Pls. Br. 73. But where a federal law addresses a problem, there is no basis for a federal court to impose a more stringent, or "different," solution to the problem. *Exxon Shipping*, 128 S. Ct. at 2619 n.7; *Milwaukee II*, 451 U.S. at 320.

III. CONCLUSION

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

Dated: November 18, 2008

Respectfully Submitted,

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DECLARATION PURSUANT TO GENERAL ORDER 45, SECTION X

I, Casey M. Nokes, declare and attest, pursuant to this Court's General Order 45, section X, subparagraph B, that I am an ECF User and the filer of this document and that concurrence in the filing of this document has been obtained from each of the other signatories (in addition to myself) shown on page 20 of this document. I further declare and attest, pursuant to that same subparagraph of General Order 45, that I will maintain records to support this concurrence for subsequent production for the Court if so ordered or for inspection upon request by a party until one year after final resolution of the action (including appeal, if any).

I declare, under penalty of perjury under the laws of the United States of America, that the foregoing is true and correct.

Dated November 18, 2008

/S/ Casey M. Nokes

Casey M. Nokes