No. 09-17490

**IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

Native Village of Kivalina; City of Kivalina,

Plaintiffs-Appellants,

v.

ExxonMobil 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 P.L.C.; Shell Oil Company; Peabody Energy Corporation; The AES Corporation; American Electric Power Company, Inc.; American Electric Power Services Corporation; Duke Energy Corporation; DTE Energy Company; Edison International; MidAmerican Energy Holdings Company; Pinnacle West Capital Corporation; The Southern Company; Dynegy Holdings, Inc.; Reliant Energy, Inc.; Xcel Energy Inc.

Defendants-Appellees.

On Appeal from the United States District Court
for the Northern District of California
The Honorable Saundra Brown Armstrong
District Court Case No. 08-cv-01138 SBA

**RESPONSE BRIEF OF DEFENDANT-APPELLEE
PEABODY ENERGY CORPORATION**

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CORPORATE DISCLOSURE STATEMENT REQUIRED BY FED. R. APP. P. 26.1

Defendant Peabody Energy Corporation is a Delaware Corporation with headquarters in St. Louis, Missouri. There is no parent corporation or publicly held entity that owns 10% of more of Peabody Energy Corporation's stock.

Dated: June 30, 2010

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JURISDICTIONAL STATEMENT

Although the district court had statutory subject matter jurisdiction over this action pursuant to 28 U.S.C. §§ 1331 and 1367, whether the district court had subject matter jurisdiction over this action under Article III is in dispute. The Court of Appeals has jurisdiction pursuant to 28 U.S.C. § 1291 to review the district court's September 30, 2009 order dismissing plaintiffs' claims.

ISSUES PRESENTED FOR REVIEW

1. Whether the district court properly dismissed plaintiffs' federal common law claim for public nuisance because it raises nonjusticiable political questions reserved for the political branches of government.

2. Whether the district court properly dismissed plaintiffs' federal common law claim for public nuisance because plaintiffs lack standing.

3. Whether alternative grounds exist under Rule 12(b)(6) of the Federal Rules of Civil Procedure for affirming the district court's dismissal of plaintiffs' complaint.

Pursuant to L.R. 28-2.7, a statutory addendum is submitted with this brief.

STATEMENT OF THE CASE

Plaintiffs' complaint attempts to hold two dozen oil, energy and utility companies responsible for coastal erosion in Alaska which plaintiffs say is caused by purported global warming. Even though their claims "seek[] to impose liability and damages on a scale unlike any prior environmental pollution case," *Native Vill.*

of Kivalina v. ExxonMobil Corp., 663 F. Supp. 2d 863, 876 (N.D. Cal. 2009), plaintiffs insist this is a "classic public nuisance case." *See* Plaintiffs-Appellants' Opening Brief ("Pls. Br.") at 23.

Recognizing that plaintiffs' global warming claims raise significant political questions that should be resolved by the political branches, the district court properly concluded that it lacked subject matter jurisdiction and dismissed with prejudice plaintiffs' federal common law claim for nuisance. *Kivalina*, 663 F. Supp. 2d at 868. The district court also found that plaintiffs lack Article III standing because they failed to meet their burden to allege sufficient facts to show that their alleged injuries are "fairly traceable" to defendants' conduct. *Id.* at 877-82.

The district court's ruling accords with the decisions of other district courts faced with adjudicating similar global warming claims. *See California v. General Motors Corp.*, No. C06-05755, 2007 WL 2726871, at *10 (N.D. Cal. Sept. 17, 2007) ("*GMC*"); *Comer v. Murphy Oil USA*, No. 05-436 (S.D. Miss. Aug. 30, 2007), *rev'd,* 585 F.3d 855 (5th Cir. Oct. 16, 2009), *vacated, reh'g en banc granted*, 2010 U.S. App. LEXIS 4253 (5th Cir. Feb. 26, 2010), *appeal dismissed* (5th Cir. May 28, 2010); *Conn. v. Am. Elec. Power Co.*, 406 F. Supp. 2d 265, 272 (S.D.N.Y. 2005) ("*AEP I*"), *rev'd*, 582 F.3d 309 (2d Cir. 2009) ("*AEP II*").

I. Plaintiffs' Complaint

On February 26, 2008, the Native Village of Kivalina (a self-governing Inupiat Eskimo Tribe of approximately 400 people) and the City of Kivalina filed their complaint against two dozen oil, energy, and utility companies. (Plaintiffs' Excerpts of Record ("ER") at 43, ¶¶ 13-15). Plaintiffs' theory is that alleged global warming is a "public nuisance" (ER at 41, ¶ 6) that defendants have "contribute[d] to" (ER at 40, ¶ 3) through their emissions of greenhouse gases "for many years" (*id.*), which has caused the "melting of Arctic sea ice" (ER at 40, ¶ 4) that protects Kivalina, which has increased Kivalina's vulnerability to coastal storm waves and surges (ER at 43-44, ¶ 16), which in turn has caused a "massive erosion problem" that is threatening to destroy property (ER at 41, ¶ 4), thereby requiring the City's relocation (ER at 40, ¶ 4; ER at 84-85, ¶¶ 185, 187).

Plaintiffs' complaint further alleges that:

- Carbon dioxide and other greenhouse gases have been increasing "since the dawn of the industrial revolution" in the 18th century. (ER at 70, ¶ 125).
- Some fraction of greenhouse gases remains in the atmosphere for "several centuries" and have a "lasting effect on climate." (ER at 70, ¶ 125).

- Greenhouse gas concentrations increase in the atmosphere year after year, as "each year's emissions are added to those that came before." (ER at 70, ¶ 125).
- Greenhouse gas emissions "rapidly mix in the atmosphere and cause an increase in the atmospheric concentration of carbon dioxide and other greenhouse gas emissions worldwide." (ER at 102, ¶ 254).
- Greenhouse gas emissions from any particular source "inevitably merge[] with the accumulation of emissions in California and the rest of the world." (ER at 42, ¶ 10).

As to Peabody, the complaint alleges that greenhouse gases are emitted through its coal mining operations and through the combustion of coal by others. (ER at 82, ¶¶ 177, 178).

Plaintiffs assert that all defendants are jointly and severally liable for their alleged contribution to greenhouse gases and purported global warming. (ER at 40, ¶¶ 1, 3; ER at 102, ¶ 253, ER at 103, ¶ 261).

The complaint alleges the following claims: (1) public nuisance under the federal common law; (2) private and public nuisance under "the applicable state

statutory and/or common law";[1] (3) civil conspiracy with respect to certain defendants, including Peabody; and (4) concert of action. (ER at 40, ¶ 2). Plaintiffs seek damages for the cost of relocating the inhabitants of Kivalina, which they allege the federal government estimates at between $95 and $400 million. (ER at 40, ¶ 1; ER at 44, ¶ 17).

Peabody and other defendants filed motions to dismiss pursuant to Rules 12(b)(1) and 12(b)(6), arguing that the district court lacks subject matter jurisdiction because (1) the case presents nonjusticiable political questions; (2) plaintiffs lack Article III standing; and (3) plaintiffs have failed to state a claim for relief under any of their causes of action.

By memorandum and order on September 30, 2009, the district court granted Peabody's and the other defendants' motions to dismiss the federal common law nuisance claim on political question and standing grounds.[2]

Political Question. Applying the six independent tests laid out by the Supreme Court in *Baker v. Carr*, 369 U.S. 186, 210 (1962), the district court found

[1] Plaintiffs' state law claims for private and public nuisance are stated in the alternative to their federal common law public nuisance claim "if federal common law were not to apply." (ER at 103, ¶ 263).

[2] The district court declined to exercise supplemental jurisdiction over plaintiffs' state law claims and dismissed them without prejudice. *Kivalina*, 663 F. Supp. 2d at 882-83.

that at least the second and third *Baker* tests require dismissal. Together, these two tests ask whether the case "demand[s] that a court move beyond areas of judicial expertise." *Kivalina*, 663 F. Supp. 2d at 873 (citation omitted).

Under the second *Baker* test, the court concluded that plaintiffs had "fail[ed] to articulate any particular judicially discoverable and manageable standards that would guide a factfinder in rendering a decision that is principled, rational, and based upon reasoned distinctions." *Id.* at 875 (citation omitted). It rejected plaintiffs' plea to evaluate their purported nuisance claim by focusing only on the reasonableness of the alleged harm. *Id*. The court instead found that nuisance analysis balances the social utility of the activity in question against the gravity of the harm alleged. *Id.* (citations omitted). In this purported global warming case, the court explained, a factfinder would have to weigh and consider at least:

> the energy producing alternatives that were available in the past and . . . their respective impact on far ranging issues such as their reliability as an energy source, safety considerations and the impact of the different alternatives on consumers and business at every level.

Id. at 874 (citations omitted).

Even this would not end the inquiry, as "[t]he factfinder would then have to weigh the benefits derived from those choices against the risk that increasing greenhouse gases would in turn increase the risk of causing flooding along the coast of a remote Alaskan locale." *Id.* at 874-75. The court determined that it

could not properly apply standards developed to adjudicate traditional air and water pollution cases to this case, since those cases involve "discrete" and "geographically definable" environmental effects and injuries "far different" from those alleged in this case, as well as an entirely different, more straightforward sequence of events leading to the claimed injury. *Id.* at 875-76.

The district court further concluded that under the third *Baker* test, it was barred from adjudicating plaintiffs' nuisance claim because it could not do so without making an initial policy determination ill-suited for judicial discretion. *Id.* at 876. It found that plaintiffs' nuisance claim would require a retroactive determination of an acceptable limit on defendants' greenhouse gas emissions, as well as who should bear the costs of global warming, issues that should be decided by the Executive or Legislative Branch in the first instance. *Id*. at 876-77.

Article III Standing. The district court focused on the second prong of the standing inquiry – whether plaintiffs' alleged injury can be fairly traced to the defendants' alleged conduct, *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 559-60 (1992); *Kivalina*, 663 F. Supp. 2d at 877 – noting that the Constitution requires proof of a "substantial likelihood" that the defendants' conduct caused plaintiffs' injury in fact. 663 F. Supp. 2d at 878 (quoting *Habecker v. Town of Estes Park*, 518 F.3d 1217, 1225 (10th Cir. 2008)).

The district court rejected plaintiffs' theory that it was sufficient to allege that defendants merely "contributed" to their injuries for traceability. *Id.* at 878-79. The court found that "contribution" theory, derived from statutory cases that predominantly arise under the Clean Water Act ("CWA"), 33 U.S.C. §§ 1251 *et seq*. (1972), is inapplicable here. *Id.* It noted a "critical distinction" between statutory water pollution claims, where a defendant's discharge in excess of federal limits is *presumed* to satisfy the "substantial likelihood" of harm requirement for standing (even if other parties have made similar discharges), and the common law nuisance claims here, where no such presumption exists. *Id*. at 879-80.

Even under plaintiffs' faulty contribution theory, the court found that plaintiffs would lack standing because plaintiffs had not alleged that the "seed" of their injury can be traced to any of the defendants. *Id*. at 880. Plaintiffs' complaint acknowledges that "the genesis of the global warming phenomenon dates back centuries and is a result of the emission of greenhouse gases by a multitude of sources *other than* the Defendants." *Id*. (emphasis in original). Thus, the court explained "there is no realistic possibility of tracing any particular alleged effect of global warming to any particular emission by any specific person, entity, [or] group at any particular point in time." *Id*. (citation omitted).

The court also found that CWA cases analyzing Article III standing were inapplicable because plaintiffs had not established that they were within the "zone

of discharge" of defendants' alleged greenhouse gas emissions, given that it is "*impossible* to trace the pathway of any particular . . . emission" to the effects alleged in the complaint. *Id*. at 881 (citation and internal quotation marks omitted) (emphasis in original). The court concluded that the "links in the chain of causation between the challenged . . . conduct and the asserted injury are far too weak for the chain as a whole to sustain [plaintiffs'] standing." *Id*. (citing *Allen v. Wright*, 468 U.S. 737, 759 (1984)) (internal quotation marks omitted). This is particularly true where plaintiffs' nuisance claim relies "on a series of events far removed both in space and time from the Defendants' alleged discharge of greenhouse gases." *Id.* (citation omitted).

II. Political Branch Activity

For over three decades, the Executive and Legislative Branches have addressed climate change policy. Below are examples of significant actions the political branches have taken in recent years.[3]

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[3] The courts may take notice of laws, conventions, rules and other matters of public record. *See, e.g., Coupe v. Fed. Express Corp.*, 121 F.3d 1022, 1026 n.3 (6th Cir. 1997); *AEP I*, 406 F. Supp. 2d at 268-70. Courts may also take judicial notice of the content of hearings and testimony before congressional committees and subcommittees. *See, e.g., Adarand Constructors, Inc. v. Slater*, 228 F.3d 1147, 1168 n.12 (10th Cir. 2000).

A. Domestic Policy

On June 26, 2009, the U.S. House of Representatives passed the American Clean Energy and Security Act of 2009, comprehensive energy and climate change legislation that contains specific targets for rates of reduction of economy-wide greenhouse gases. H.R. 2454, 111th Cong. (2009). This legislation impacts the entire national economy and represents a negotiated compromise on which sectors should take action to reduce greenhouse gas emissions and when. The legislation also contains provisions for addressing greenhouse gas reductions with international parties.

On November 5, 2009, the Senate Environment and Public Works Committee passed legislation that, like the House legislation, would create a cap-and-trade regime with greenhouse gas reduction targets. Clean Energy Jobs and American Power Act of 2009, S. 1733, 111th Cong. (2009). On December 7, 2009, the EPA finalized its Endangerment Finding for greenhouse gases, pursuant to section 202 of the Clean Air Act ("CAA"), 42 U.S.C. §§ 7401 *et seq*. (1970), and the Supreme Court's decision in *Massachusetts v. EPA*, 549 U.S. 497 (2007). "Endangerment and Cause or Contribute Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act; Final Rule," 74 Fed. Reg. 66,496 (Dec. 15, 2009) ("Endangerment Finding"). The Endangerment Finding paves the way for the EPA to regulate sources of greenhouse gases under the CAA.

On March 26, 2010, the EPA published final renewable fuel standards, which are projected to significantly decrease greenhouse gas emissions associated with the use of fossil fuels. 75 Fed. Reg. 14,670 (March 26, 2010). In May 2010, the EPA, as an outgrowth of the Endangerment Finding, finalized actual regulations governing greenhouse gas emissions from light duty vehicles. 75 Fed. Reg. 25,323 (May 7, 2010). Those emission stationary for light-duty vehicles will, according to the EPA, require certain statutory sources to begin to comply with certain provisions of the CAA with regard to their greenhouse gas emissions beginning on January 2, 2011. 75 Fed. Reg. 17,004, 17,019-20 (Apr. 2, 2010). The EPA published a final rule governing application of the CAA's permitting program for new major stationary sources and major modifications at existing major stationary sources of greenhouse gases. 75 Fed. Reg. 31,514 (June 3, 2010). The rule clarifies which stationary sources will need to begin to comply with certain CAA permitting programs to address their greenhouse gas emissions and when.

B. International Policy

In December 2009, President Obama joined leaders from around the world at the UNFCCC's Fifteenth Conference of the Parties in Copenhagen, Denmark (the "Copenhagen Conference") for negotiations on an international climate treaty. *See* Remarks by the President (Dec. 18, 2009), available at

http://www.whitehouse.gov/the-press-office/remarks-president-during-press-availability-copenhagen. The Copenhagen Conference, which resulted in an Accord, marked the first time that developing countries agreed to make pledges for national greenhouse gas reductions, while developed countries like the United States pledged considerable resources to assist developing countries. Attendees committed to continue negotiating in December 2010.

SUMMARY OF ARGUMENT

The district court recognized this lawsuit as an improper effort to address through the courts complex national and international policy issues presented by alleged global warming. Acknowledging the limiting principles embodied in the separation of powers doctrine and Article III constraints on judicial power, the district court correctly dismissed plaintiffs' federal common law public nuisance claim on political question and standing grounds.

In finding plaintiffs' nuisance claim to be nonjusticiable under the political question doctrine, the district court rejected plaintiffs' characterization of it as a simple nuisance or interstate pollution claim routinely adjudicated by courts. The district court concluded that traditional tort principles provide no basis for adjudicating plaintiffs' novel global warming nuisance claim, where plaintiffs admit that that the erosion of Kivalina's coastline cannot be tied to any alleged greenhouse gas emissions by Peabody, but instead was allegedly caused by global

warming resulting from the greenhouse gas emissions of billions of emitters around the globe since at least the dawn of the Industrial Revolution.

The district court further found that adjudicating whether Peabody's energy-producing activities were an "unreasonable interference" under the rubric of nuisance law would require the court to weigh the risks and benefits of energy-producing alternatives, a task more appropriate for the political branches. *Kivalina*, 663 F. Supp. 2d at 877. Likewise, the district court found that it could not adjudicate plaintiffs' nuisance claim without making a first-of-its-kind decision about what constitutes a "reasonable" amount of greenhouse gas emissions for Peabody and other defendants, and therefore who should bear the cost of alleged global warming, which is a policy judgment for the political branches.

The district court's holding that plaintiffs lack standing also should be affirmed. The attenuated and speculative causal chain that plaintiffs allege between the erosion of Kivalina's coastline and Peabody's coal-mining activities cannot, as a matter of law, meet the "fairly traceable" prong of Article III standing inquiry. Plaintiffs do not allege that Kivalina's coastline would not have eroded in the absence of Peabody's mining activities. Instead, they allege that carbon dioxide and other greenhouse gases have been emitted since the dawn of the Industrial Revolution two hundred years ago and that these emissions have had an enduring effect on the global climate. Having pled these facts, plaintiffs cannot

plausibly claim that Peabody's allegedly emissions caused the erosion of the Kivalina coastline, as standing law requires.

Plaintiffs' reliance on "multiple tortfeasor" cases to establish standing is misplaced. Peabody cannot be held jointly and severally liable for plaintiffs' alleged injuries. Peabody itself does not burn coal, and its purported emissions are a tiny fraction of worldwide greenhouse gas emissions. The same goes for plaintiffs' reliance on statutory pollution cases. Those cases rest on a presumption of a substantial likelihood that a defendant's alleged conduct (a discharge in violation of a statutory scheme that affects a finite number of parties) caused a plaintiff's injury. Such a presumption is inapt here, where Peabody's mining activities and purported emissions are authorized by federal statute, the population of emitters is infinite, and the emissions allegedly affect the entire world.

The district court also properly rejected plaintiffs' request for special solicitude in the standing analysis. This case is not like *Massachusetts*, where the Supreme Court acknowledged special solicitude owed to the Commonwealth of Massachusetts, because neither Kivalina plaintiff is a sovereign state pursuing its special interest in ensuring that the federal government enforces federal law.

Finally, alternative grounds support dismissal of plaintiffs' complaint. The CAA displaces plaintiffs' claim for public nuisance under the federal common law, as reinforced by recently promulgated regulations for greenhouse gas emissions

under the CAA. Plaintiffs' alternative claims under state law for public and private nuisance are also preempted by the CAA. Finally, all of plaintiffs' claims fail as a matter of law because plaintiffs have failed to plead facts to support them.

ARGUMENT

I. Legal Standards

This Court reviews *de novo* a district court's decision that a case presents a nonjusticiable political question. *Corrie v. Caterpillar, Inc.*, 503 F.3d 974, 979 (9th Cir. 2007). Likewise, the Court reviews *de novo* a district court's decision on standing. *Arakaki v. Lingle*, 477 F.3d 1048, 1056 (9th Cir. 2007); *Tyler v. Cuomo*, 236 F.3d 1124, 1131 (9th Cir. 2000). A court is presumed to lack jurisdiction unless the contrary appears affirmatively from the record. *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 342 n.3 (2006). As this Court has explained:

> When subject matter jurisdiction is challenged under Federal Rule of Procedure 12(b)(1), the plaintiff has the burden of proving jurisdiction in order to survive the motion. A plaintiff suing in federal court must show in his pleading, affirmatively and distinctly, the existence of whatever is essential to federal jurisdiction, and, if he does not do so, the court, on having the defect called to its attention or on discovering the same, must dismiss the case, unless the defect be corrected by amendment.

Tosco Corp. v. Communities for a Better Env't, 236 F.3d 495, 499 (9th Cir. 2001) (citations and internal quotations omitted); *see also Kokkonen v. Guardian Life Ins. Co.*, 511 U.S. 375, 377 (1994).

When ruling on a motion to dismiss, a district court accepts factual allegations in the complaint as true and draws reasonable inferences in favor of plaintiff. *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974), *overruled on other grounds by Davis v. Scherer,* 468 U.S. 183 (1984). Factual allegations, however, must be sufficient "to raise a right to relief above the speculative level." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (citation omitted). A complaint must contain sufficient factual matter to state a claim to relief that is plausible on its face. *Id.* at 570.

In *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1950 (2009), the Supreme Court explained that *Twombly* sets forth a "two-pronged approach" to determining whether a complaint states plausible claims for relief. First, the court identifies those allegations that, "because they are no more than conclusions, are not entitled to the assumption of truth." *Id.* at 1950. The court then determines whether the well-pleaded factual allegations "plausibly give rise to an entitlement to relief." *Id.* "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* at 1949 (citation omitted); *see also Moss v. U.S. Secret Serv.*, 572 F.3d 962, 969 (9th Cir. 2009) ("[F]or a complaint to survive a motion to dismiss, the non-conclusory factual content, and reasonable inferences from that content, must be plausibly suggestive of a claim entitling the plaintiff to relief.")

(citing *Ashcroft*, 129 S. Ct. at 1949 (internal quotation marks omitted)). In undertaking this plausibility analysis, the Court can "draw on its judicial experience and common sense." *Ashcroft*, 129 S.Ct. at 1950.

II. The District Court Correctly Held That Plaintiffs' Nuisance Claim Presents A Nonjusticiable Political Question.

The political question doctrine is "primarily a function of the separation of powers." *Baker*, 369 U.S. at 210. The doctrine reflects the principle that "certain political questions are by their nature committed to the political branches to the exclusion of the judiciary." *Antalok v. United States*, 873 F.2d 369, 379 (D.C. Cir. 1989). It also recognizes that "courts are fundamentally underequipped to formulate national policies or develop standards that are not legal in nature." *Japan Whaling Ass'n v. Am. Cetacean Soc'y*, 478 U.S. 221, 230 (1986). Thus, where, as with alleged global warming, political and policy choices are front and center, "[t]he responsibilities for assessing the wisdom of such policy choices and resolving the struggle between competing views of the public interest are not judicial ones." *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 866 (1984).

In *Baker*, the Supreme Court set forth "six independent tests" for determining whether courts should defer to the political branches on an issue:

> (1) a textually demonstrable constitutional commitment of the issue to a coordinate political department; or (2) a lack of judicially discoverable and manageable standards for resolving

> it; or (3) the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or (4) the impossibility of a court's undertaking independent resolution without expressing lack of respect due coordinate branches of government; or (5) an unusual need for unquestioning adherence to a political decision already made; or (6) the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

Vieth v. Jubelirer, 541 U.S. 267, 277-78 (2004) (plurality opinion) (quoting *Baker*, 369 U.S. at 217). This Court has long held that "[i]mplicating any one of these factors renders a question 'political' and thus nonjusticiable." *United States v. Mandel*, 914 F.2d 1215, 1222 (9th Cir. 1990). Because the political question doctrine is jurisdictional in nature, plaintiffs bear the burden of showing that none of the *Baker* tests apply. *See Corrie*, 503 F.3d at 982; *Tosco Corp.*, 236 F.3d at 499.

Plaintiffs argue that "interstate pollution" cases are always justiciable because courts have adjudicated them before. Pls. Br. at 42-44. That argument is irreconcilable with *Baker*, which holds that the doctrine turns on a "case-by-case inquiry," requiring a "discriminating analysis of the particular question posed" and in particular the "possible consequences of judicial action." *Baker*, 369 U.S. at 211-12. The Supreme Court, the Ninth Circuit and other courts have made clear that the labels plaintiffs affix to their claims, whether "nuisance," "negligence," or "trespass," are irrelevant because the "discriminating analysis" demanded by the Constitution cannot be satisfied by mere "semantic cataloguing." *Baker*, 369 U.S.

at 211, 217; *see also Corrie*, 503 F.3d at 980 (upholding dismissal of public nuisance and other tort claims under political question doctrine). Indeed, if plaintiffs could avoid *Baker* by simply attaching familiar common law labels to their claims,

> [T]here would hardly be a political question doctrine left . . . [because] it is difficult to conceive of a case reaching court that did not have some foundation in legal questions . . . . It is the political nature of the . . . [issues raised], not the tort nature of the individual claims, that bars our review and in which the Judiciary has no expertise.

Antolok, 873 F.2d at 383-84 (opinion of Sentelle, J.); *see also In re African-American Slave Descendants Litig.*, 471 F.3d 754, 758 (7th Cir. 2006) (stating that the "earliest and still the best example" of the political question doctrine is the Supreme Court decision in *Luther v. Borden*, 48 U.S. 1 (1849), a trespass case); *Schneider v. Kissinger*, 412 F.3d 190, 197 (D.C. Cir. 2005) ("[R]ecasting foreign policy . . . in tort terms does not provide standards for making or reviewing foreign policy judgments.").

Putting aside plaintiffs' mischaracterization of this case as an "interstate pollution" dispute, neither of the two cases plaintiffs rely upon – *Illinois v. City of Milwaukee*, 406 U.S. 91 (1972) ("*Milwaukee I*"), nor *Ohio v. Wyandotte Chemicals Corp.*, 401 U.S. 493 (1971), *overruled on other grounds by Int'l Paper Co. v. Ouellette*, 479 U.S. 481 (1989) – created an exception to the political question doctrine for such disputes, or any other particular category of dispute.

Indeed, plaintiffs concede that *Milwaukee I* did not address the political question doctrine at all. Pls. Br. at 43. As for *Wynadotte*, the Court devoted a single sentence in dicta to the political question doctrine. *Wyandotte*, 401 U.S. at 496. Neither case is instructive because, unlike this case, each involved a dispute within well-defined geographic borders arising from specific discharges that were traceable to a limited set of defendants. *Milwaukee I*, 406 U.S. at 93 (cities discharged sewage into Lake Michigan); *Wyandotte*, 401 U.S. at 493 (companies discharged mercury into tributaries of Lake Erie). This case, by contrast, involves emissions made by billions of individuals, companies and other entities across the globe, which allegedly resulted in injuries that plaintiffs concede cannot be traced to Peabody or any other defendant.

In short, the district court properly concluded that the political question doctrine bars plaintiffs' nuisance claim. Indeed, the far-reaching issues of national and international policy implicated by this case are beyond dispute, given plaintiffs' assertion that alleged climate change is global and driven by the independent activities of billions of people "since the dawn of the industrial revolution." (ER at 70, ¶ 125). Application of the *Baker* tests establishes that the case turns on precisely the sort of policy judgment that neither this nor any court may resolve.

A. The District Court Correctly Found That The Second *Baker* Test Requires Dismissal.

As the Supreme Court explained in *Vieth* when it affirmed dismissal under the second *Baker* test, "[o]ne of the most obvious limitations imposed" on the judiciary is that "judicial action must be governed by *standard*, by *rule*." *Vieth*, 541 U.S. at 278 (emphasis in original). While laws promulgated by the political branches may be inconsistent and ad hoc, "law pronounced by the courts must be principled, rational, and based upon reasoned distinctions." *Id.*

The district court's search for standards properly looked beyond the common law nomenclature of plaintiffs' nuisance claim, focusing instead on whether the claim is susceptible to adjudication. It expressly held that it was *not* concerned with the legal complexities or political controversy surrounding alleged global warming, but instead on the inability of traditional nuisance standards to address global warming claims. *Kivalina*, 663 F. Supp. 2d at 873-74. Citing the "admitted and significant distinctions" between this case and the traditional nuisance cases on which plaintiffs rely, the district court concluded:

> Plaintiffs' global warming nuisance claim seeks to impose liability and damages on a scale unlike any prior environmental pollution case cited by Plaintiffs. Those cases do not provide guidance that would enable the Court to reach a resolution of this case in any "reasoned" manner.

Id. at 876.

At bottom, reliance on traditional tort principles fails to provide "principled, rational and reasoned" standards in two crucial respects. First, plaintiffs assert that the "central question" in a nuisance action is one of allocation of liability. Pls. Br. at 49. Yet, they fail to identify any basis to distinguish one defendant from all other actors around the world whose lawful activities result in greenhouse gas emissions. By definition, the global warming posited by plaintiffs is global, implicating "humanity at large." *See Massachusetts v. EPA*, 549 U.S. 497, 541 (2007) (Roberts, J., dissenting) (internal quotation omitted). The result is a theory of liability under which *every* person, company, government or other entity is a potential joint tortfeasor. *See* 68 Fed. Reg. 59,922, 52,928 (Sept. 8, 2003) ("virtually every sector of the U.S. economy" is a source of greenhouse gas emissions). The comparative quantity of alleged emissions from Peabody's lawful mining activities furnishes no workable standard because plaintiffs repeatedly emphasize that, under their theory, a defendant is liable *regardless* of the quantity of its lawful emissions. *See* Pls. Br. at 29-32, 61-62 (explaining a party may be liable even though its acts alone might not have caused an injury, and that it is "sufficient for a plaintiff to prove that a defendant contributes to a public nuisance"); *see also id.* at 66.

Like the district court below, other district courts in global warming tort cases have found that such claims are fundamentally different from traditional tort

claims because they seek to impose liability on an "unprecedented scale" and leave the court no way to discern one emitter from another. *GMC*, 2007 WL 2726871, at *15; *see also AEP I*, 406 F.Supp. 2d at 272 ("[N]one of the pollution-as-public nuisance cases cited by Plaintiffs has touched on so many areas of national and international policy. The scope and magnitude of the relief Plaintiffs seek reveals the transcendently legislative nature of this litigation.").[4]

Second, plaintiffs concede that their nuisance claim requires them to prove that defendants' actions were "unreasonable." *See* Pls. Br. at 23-24, 50. Yet the generic concept of "reasonableness" provides no guidance for resolving the far-reaching economic, environmental, foreign policy, and national security policy issues raised by plaintiffs' nuisance claim. *See Vieth*, 541 U.S. at 291 ("'Fairness' does not seem to us a judicially manageable standard."). Common law tort principles do not guide a court "in determining what is an unreasonable

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[4] The district court properly declined to follow the Second Circuit's decision in *AEP II*, which erroneously held that the fact that courts have adjudicated traditional common law public nuisance claims in the past was sufficient to avoid dismissal of a global warming case under the second and third *Baker* tests. *AEP II*, 582 F.3d at 326-31. That decision, like plaintiffs' arguments here, defies *Baker* by *assuming* that tort law furnishes manageable standards, without saying *how*, as a practical matter, courts can apply those standards to determine which greenhouse gas emissions are wrongful. *See* Laurence H. Tribe, *et al.*, "Too Hot for Courts to Handle: Fuel Temperatures, Global Warming, and the Political Question Doctrine," Washington Legal Foundation Working Paper No. 169 (Jan. 2010) at 13-20 (criticizing *AEP II* and explaining why traditional tort principles are inadequate to address global warming tort claims).

contribution to the sum of carbon dioxide in the Earth's atmosphere, or in determining who should bear the costs associated with the global climate change that admittedly result from multiple sources around the globe." *GMC*, 2007 WL 2726871, at *15.

Plaintiffs conspicuously fail to state what standards, if any, a court might use to resolve these two fundamental problems. Instead, they assert that the district court below erred by: (1) concluding that plaintiffs' nuisance claim would impermissibly require it to consider wide-ranging policy issues; and (2) distinguishing traditional nuisance cases from this case. *See* Pls. Br. at 49-60. Both of these arguments lack merit and provide no basis to reverse the decision below.

1. The Restatement Provides No Standards For Adjudicating The National And International Policy Issues Implicated By Plaintiffs' Claims.

Plaintiffs contend that the district court erred when it held that plaintiffs' federal common law public nuisance claim raises political questions because it requires the court, in determining whether defendants contributed to an unreasonable interference with public rights, to weigh the risks and benefits of energy-producing alternatives. Pls. Br. at 49. Although the district court's analysis did not expressly cite § 826 of the Restatement (Second) of Torts, the balancing test referenced by the court echoes the balancing test set forth in

§ 826(a) for determining whether an invasion is "unreasonable."[5] *See Kivalina*, 663 F. Supp. 2d. at 874.

In plaintiffs' view, §§ 821B, 826(b) and 829A of the Restatement offer "alternative" tests that courts "may" use to analyze a nuisance claim and that require no such balancing. Pls. Br. 49-55.[6] Plaintiffs do not argue that the district court was *required* to apply § 826(b)'s test in lieu of § 826(a)'s balancing test. *Id.* at 50 ("The Restatement . . . provides several ways in which . . . reasonableness can be conducted"). Nor could they, given that numerous authorities hold that § 826(a)'s balancing test provides the "primary test" that should be applied "in every case." *Florida East Coast Prop., Inc. v. Metropolitan Dade County*, 572 F.2d 1108, 1111 (5th Cir. 1978); *see also San Diego Gas & Elec. Co. Super. Ct.*,

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[5] Restatement (Second) of Torts § 826 provides that an invasion is "unreasonable" if "(a) the gravity of harm outweighs the utility of the actor's conduct, *or* (b) the harm caused by the conduct is serious and the financial burden of compensating for this and similar harm to others would not make the continuation of the conduct not feasible." Restatement (Second) of Torts § 826 (emphasis added).

[6] Section 821B provides that in determining whether an interference is unreasonable, a court "may" also consider the significance of the interference, whether the conduct is proscribed by statute or other law, or whether the defendant knows or has reason to know his conduct has a significant effect on a public right. *Id.* at § 821B. Section 829A is an "application of the general rule stated in § 826," and provides that "an intentional invasion of another's interest in the use and enjoyment of land is unreasonable if the harm resulting from the invasion is severe and greater than the other should be required to bear without compensation." *Id.* at § 829A cmt. b.

13 Cal. 4th 893, 938 (Cal. 1996) (balancing harm and utility is the "primary test" for determining reasonableness in a nuisance claim); *accord Robie v. Lillis*, 299 A.2d 155, 159 (N.H. 1972).

Even if the district court had applied § 826(b) or § 829A, it would have been required to make profound decisions affecting national energy policy. Section 826(b) applies *only* where "the financial burden of compensating for this and similar harm to others would not make the continuation of the conduct not feasible." Restatement (Second) of Torts § 826(b). "Consideration is given not only to the cost of compensating for the harm in the suit before the court but also to the potential liability for compensating *all other persons who may have been injured by the activity*." *Id.* at cmt. f (emphasis added). Here, plaintiffs allege that greenhouse emissions harm everyone. (ER at 70-78, ¶¶ 123-62; ER at 83-84, ¶¶ 181-84). Application of § 826(b) therefore necessarily requires a determination by the court that energy companies such as Peabody both can and should pay for an injury that plaintiffs allege affects everyone around the globe.

This holds equally true for § 829A, which requires balancing where "it is doubtful whether the facts of a case bring it within [§ 829A]." Restatement (Second) of Torts § 829A cmt. b. That is the case here, given that all of the examples set forth in the Restatement, as well as every case cited by plaintiffs that applies §§ 826(b) or 829A, involve conduct by a single defendant who was the

direct and sole cause of harm to adjoining or nearby property.[7] Plaintiffs cite no authority suggesting that either § 826(b) or § 829A has any application to cases like this one, where the alleged conduct is not confined to a specific geographic area and purportedly affects virtually every living being in the entire world.

The comments to § 821B reiterate that the question of unreasonableness turns on the impermissible balancing test the district court found that plaintiffs' nuisance claims requires. Restatement (Second) of Torts § 821B cmt. e (determining unreasonableness "involve[s] the weighing of the gravity of the harm against the utility of the conduct"). Section 821B further recognizes that "conduct that is fully authorized by statute, ordinance or administrative regulation does not subject the actor to tort liability." Restatement (Second) of Torts § 821B cmt. f; *accord N. Transp. Co. v. Chicago*, 99 U.S. 635, 640 (1879), *overruled on other grounds by Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922) (holding conduct authorized by statute is not a nuisance, even if harmful); Cal. Civ. Code §

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[7] Restatement § 829A Illustrations (factories and smelters affected adjoining or nearby properties); *Hall v. Phillips*, 436 N.W. 2d 139 (Neb. 1989) (pesticides damaged adjacent crops); *Crest Chevrolet-Oldsmobile-Cadillac, Inc. v. Willemsen*, 384 N.W. 2d 692 (Wis. 1986) (construction caused flooding of adjoining property); *Pendergrast v. Aiken*, 293 N.C. 201 (N.C. 1977) (same); *Hughes v. Emerald Mines Corp.*, 450 A.2d 1 (Pa. Super. Ct. 1982) (mining activities polluted water-well on adjoining property); *Jost v. Dairyland Power Coop.*, 172 N.W. 2d 647 (Wis. 1969) (sulfur fumes damaged nearby crops); *Furrer v. Talent Irrigation Dist.*, 258 Or. 494 (Or. 1970) (canal flooded nearby property).

3482 ("nothing which is done or maintained under the express authority of a statute can be deemed a nuisance"). That is precisely the case with Peabody. Pursuant to the Federal Mine Safety and Health Act, 30 U.S.C. §§ 801 *et seq.*, and federal regulation, Peabody is not only authorized to ventilate underground coal mines to rid them of the natural build-up of gases, including methane, it is *required* to do so. 30 U.S.C. § 863; 30 C.F.R. § 75.323(b). Finally, plaintiffs cannot argue that the district court erred in failing to apply the alternative factors enumerated in § 821B, because the Restatement states, and plaintiffs concede, that those factors are neither "exclusive" nor controlling of the reasonableness determination. Restatement (Second) of Torts § 821B cmt. e; Pls. Br. at 27.

Equally unavailing is plaintiffs' contention that even if their nuisance claim requires the court to balance the risks and benefits of energy producing alternatives, prior cases alleging harm from industrial facilities support engaging in such a balancing here. Pls. Br. at 54. Neither of the district court cases on which plaintiffs rely supports imposing liability on entire sectors of the economy, or provides any standard for doing so. *See N.C. ex rel. Cooper v. Tenn. Valley Auth.*, 593 F. Supp. 2d 812, 831 (W.D.N.C. 2009); *Cook v. Rockwell Int'l Corp.*, No. 09-cv-00181, 2006 U.S. Dist. LEXIS 89544, at *40-43 (D. Colo. Dec. 7, 2006). Absent any such standards, the district court would be forced to engage in its own ad hoc policy determinations, thereby running afoul of the third *Baker* test.

2. The District Court Properly Distinguished Traditional Nuisance Cases.

In distinguishing the traditional nuisance cases on which plaintiffs rely, the district court explained, "Plaintiffs themselves concede that considerations involved in the emission of greenhouse gases and the resulting effects of global warming are 'entirely different' than those germane to water or air pollution cases." *Kivalina*, 663 F. Supp. 2d at 875 (citation omitted). Even now, plaintiffs do not dispute the district court's finding that their nuisance claim seeks to impose liability and damages on a scale unlike any traditional environmental pollution case.[8] *See* Pls. Br. at 55-57. Their only response is that traditional nuisance cases provide standards that permit plaintiffs to single out a handful of U.S companies for their lawful emissions. Pls. Br. at 56. Yet that is no answer to the problem, because, as plaintiffs also emphasize, the billions of potential co-defendants whom they chose not to sue are subject to contribution claims. *Id.* at 33 n.8, 60.

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[8] Moreover, plaintiffs virtually concede the lack of manageable standards here when they rely on dicta in *Los Angeles County Bar Ass'n v. Eu*, 979 F.3d 697, 702 (9th Cir. 1992), for the proposition that "so long as the nature of the inquiry is familiar to the courts, the fact that standards have not yet been developed does not render a question non-justiciable." Pls. Br. at 48. *Eu* is distinguishable because there the court concluded that the dispute presented only a garden-variety constitutional challenge to state legislation, and there were no unique circumstances that would have prevented existing due process and equal protection standards from adequately resolving the case. *See Eu*, 979 F.3d at 702-03.

Plaintiffs' assertion that, under *Alperin v. Vatican Bank*, 410 F.3d 532 (9th Cir. 2005), the political question doctrine does not turn on the size of the dispute (Pls. Br. at 55) misconstrues the crux of the problem – the lack of standards for determining the proper size of the dispute in the first place. *Alperin* is not a pollution case and it identified no standards for singling out a small subset of defendants for the collective, lawful actions of billions of parties not before the Court. *See Alperin*, 410 F.3d at 552-55.[9]

Plaintiffs also cite *Koohi v. United States*, 976 F.2d 1328 (9th Cir. 1992), for the proposition that "damages actions are particularly judicially manageable." Pls. Br. at 47. This Court has never held that the nature of the relief sought is sufficient to resolve the political question doctrine. On the contrary, in *Corrie*, it upheld dismissal of a public nuisance claim for damages on political question grounds, demonstrating that *Baker*'s demand for a "discriminating case-by-case analysis" applies regardless of the relief sought. *Corrie*, 503 F.3d at 979; *see also GMC*, 2007 WL 2726871, at *8 ("regardless of the relief sought, the Court is left to make

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[9] Plaintiffs' argument that the chain of events alleged here "is neither lengthy nor unusual for a public nuisance case" (Pls. Br. at 57) fails for the same reason, because the real problem is that the alleged chain of events is one that connects to a virtually unlimited number of parties. Nor does *Massachusetts* support plaintiffs' position, because that case did not address tort liability and did not identify any standard for determining whether a private party "caused" alleged global warming. The sole issue was the EPA's interpretation of its obligations under a federal statute. *Massachusetts*, 549 U.S. at 504.

an initial decision as to what is unreasonable in the context of carbon dioxide emissions"). Further, longstanding authority from the Supreme Court and this Court recognizes that an award of damages can have the same regulatory effect as injunctive relief. *See*, *e.g.*, *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 521 (1992) ("The obligation to pay compensation can be, indeed, is designed to be, a potent method of governing conduct and controlling policy") (internal quotation marks and citation omitted); *Harris By and Through Harris v. Ford Motor Co.*, 110 F.3d 1410, 1413 (9th Cir. 1997) (quoting and following *Cipollone*).

B. The District Court Correctly Found That The Third *Baker* Test Requires Dismissal.

The third *Baker* test asks whether a court can adjudicate the claims before it "without an initial policy determination of a kind clearly for nonjudicial discretion." *Baker*, 369 U.S. at 217. Its purpose is to prevent a court from "removing an important policy determination from the Legislature." *In re Methyl Tertiary Butyl Ether Prods. Liab. Litig.*, 438 F. Supp. 2d 291, 297 (S.D.N.Y. 2006) ("*MTBE*"). This test is satisfied here, because plaintiffs' nuisance claim requires a first-of-its-kind decision on both the "reasonable" amount of greenhouse gas emissions and who should bear the costs of purported global warming. Any judicial decision to penalize lawful greenhouse gas emissions requires a balancing of benefits and risks to make policy judgments that are fundamentally legislative in nature. *See O'Melveny & Myers v. FDIC*, 512 U.S. 79, 89 (1994) (weighing policy

considerations is a task "for those who write the laws, rather than for those who interpret them") (internal quotation marks and citation omitted); *Chevron*, 467 U.S. at 866 ("The responsibilities for assessing the wisdom of . . . policy choices and resolving the struggle between competing views of the public interest are not judicial ones."). Indeed, the Supreme Court has stated that courts "have neither the expertise nor the authority to evaluate . . . policy judgments" concerning emissions regulation and alleged climate change. *Massachusetts*, 549 U.S. at 533.

The inherently political nature of the issues raised by plaintiffs' nuisance claim is underscored by recent Legislative and Executive Branch activity addressing greenhouse gas emissions in both the domestic and international contexts. Plaintiffs' claims would improperly "remov[e] an important policy determination" from the political branches that are currently addressing issues of alleged global warming. *MTBE*, 438 F. Supp. 2d at 297.

There is no merit to plaintiffs' assertion that courts need not make any initial policy decisions because the political branches have concluded that greenhouse gas emissions should be reduced. Pls. Br. at 58-59. The ongoing efforts of the political branches show that difficult questions remain as to *how* best to reduce emissions, how *much* to reduce them, *when* to reduce them, and *who* should bear the costs associated with such reductions – none of which the courts have the "expertise or authority" to answer. *See Massachusetts*, 549 U.S. at 533; *see also*

Tribe at 20 (explaining that permitting judicial determination of whether and how high to set penalties would embroil courts in "one of the most fundamental and important choices facing climate policymakers."). No case holds that the mere articulation of a "generalized" policy objective, such as the gradual reduction of greenhouse gas emissions, defeats the third *Baker* test.[10]

C. Dismissal Is Also Required Under The First *Baker* Test.

The district court wrongly held, and plaintiffs wrongly argue here, that no express provision of the Constitution supports an inference that the power to resolve issues arising out of alleged global warming rests with the political branches. Pls. Br. at 46. On the contrary, that provision is found in the Executive Branch's textually committed power over foreign policy. U.S. Const. art. II, §§ 2, 3; *GMC*, 2007 WL 2726871, at *13-14 (holding climate change litigation

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[10] Plaintiffs also argue that no initial policy determination is required here because they only sued the allegedly largest greenhouse gas emitters in the U.S., and because determining liability is a "quintessentially judicial function." Pls. Br. at 59. Apart from the fact that a crucial initial policy decision is whether *anyone* should be held liable for currently lawful emissions, this argument is simply a variation of plaintiffs' flawed argument that nuisance cases are immune from scrutiny under the political question doctrine because courts have addressed them before.

implicated the political branches' powers over foreign policy); *but see AEP II*, 582 F.3d at 325.[11]

The Supreme Court repeatedly has prohibited conduct that impairs or interferes with the President's ongoing negotiations with foreign entities. In *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 377 (2000), for example, the Court held that a state statute affecting firms doing business in Burma reduced the "bargaining chip[s]" that the President had to offer in dealing with Burma. The Court found the statute was at odds with the President's "authority to speak for the United States among the world's nations in developing a 'comprehensive, multilateral strategy to . . . improve human rights . . . in Burma. *Id.* at 380; *see also Am. Ins. Ass'n v. Garamendi*, 539 U.S. 396, 424 (2003) (striking state law on the ground that it had the effect of giving "the President . . . less to offer and less economic and diplomatic leverage" over ongoing negotiations with European governments) (internal quotation marks and citation omitted). As with the claims

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[11] Though plaintiffs fail to raise them in their brief, the remaining *Baker* tests furnish additional grounds for dismissal. Judge-made policy in the present setting would carry a high risk of pronouncements that conflict with those of the political branches (the sixth *Baker* test) and would express disrespect (the fourth *Baker* test) for the political branches' determination that U.S. greenhouse gas emissions should be legally limited only in the context of multilateral limits among both developed and developing nations and in a way that minimizes harm to this nation's economy, energy policy, and national security. Finally, in light of the critical national interests at stake, unquestioning adherence to the political branches' decisions in this area is necessary (the fifth *Baker* test).

in *Crosby* and *Garamendi,* plaintiffs' claims here should not be permitted to interfere with the President's foreign policy negotiations on global warming.[12]

III. The District Court Properly Concluded That Plaintiffs Lack Standing.

A. Article III Standing Is A Fundamental Constitutional Limit On The Courts' Authority.

Article III dictates that federal courts cannot consider the merits of a case unless it presents an actual "case or controversy." *Steffel v. Thompson*, 415 U.S. 452, 458 (1974). Standing doctrine fleshes out Article III's "case or controversy" requirement as a "fundamental limit[] on federal judicial power." *Allen v. Wright*, 468 U.S. 737, 750 (1984). "If a dispute is not a proper case or controversy, the courts have no business deciding it, or expounding the law in the course of doing so." *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 341 (2006).

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[12] Plaintiffs cite two district court cases holding that state regulation of vehicle emissions standards did not interfere with the Executive Branch's efforts to negotiate a multilateral solution to alleged global warming, *Central Valley Chrysler-Jeep, Inc. v. Goldstene* 529 F. Supp. 2d 1151 (E.D. Cal. 2007), and *Green Mountain Chrysler Plymouth Dodge Jeep v. Crombie*, 508 F. Supp. 2d 295 (D. Vt. 2007). Pls. Br. at 46 n.12 Both cases are distinguishable because they turned on interpretation of the Energy Policy and Conservation Act, a statutory enactment that was itself a product of action by the political branches. Moreover, unlike the ad hoc tort liability at issue here, there was never any threat that the state regulations at issue in *Goldstene* and *Crombie* would extend beyond a single segment of the economy – manufacturers and dealers of passenger vehicles and light duty trucks. *See Goldstene*, 529 F. Supp. 2d at 1156; *Crombie*, 508 F. Supp. 2d at 304-05.

To establish Article III standing, a litigant must establish: (1) "injury in fact," meaning a "concrete and particularized" injury that is not "conjectural" or "hypothetical;" (2) that the injury is "fairly . . . trace[able] to the challenged action of the defendant;" and (3) that it is "likely" that the injury will be "redressed by a favorable decision." *Lujan*, 504 U.S. at 560-61 (internal quotation marks and citations omitted).

Plaintiffs bear the burden of establishing standing under Article III. *Id.* at 561. "'The party seeking to invoke the jurisdiction of the federal Courts' . . . [must] allege at the pleading stage 'specific facts sufficient to satisfy' all the elements of standing for each claim he seeks to press."[13] *Coalition for a Sustainable Delta v. FEMA*, No. 09-cv-2024, 2010 WL 1904824, at *4 (E.D. Cal. May 10, 2010) (citing *Schmier v. United States Court of Appeals*, 279 F.3d 817, 821 (9th Cir. 2002)). *Twombly's* and *Iqbal's* pleading standards apply to plaintiffs' standing allegations. *See, e.g., White v. United States*, No. 09-3158, 2010 WL 1404377, at *4 (6th Cir. April 9, 2010); *Zanders v. Swanson*, 573 F.3d 591, 594 (8th Cir. 2009). Thus, a plaintiff's "naked assertions devoid of further factual

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[13] Plaintiffs wrongly assert that they are entitled to an "evidentiary opportunity" before their case may be dismissed for lack of standing. Pls. Br. at 64 n.17. At the pleadings stage, standing determinations are based on the plaintiff's general factual allegations; thus, a district court may properly resolve standing issues on a motion to dismiss and without an evidentiary hearing. *Lujan*, 504 U.S. at 561.

enhancement" will not suffice to establish standing. *White*, 2010 WL 1404377, at *4 (quoting *Iqbal*, 129 S.Ct. at 1949) (internal quotation marks omitted).

B. Plaintiffs Have Not Alleged An Injury That Is Fairly Traceable To Peabody's Alleged Conduct.

To demonstrate that their alleged injury is fairly traceable to Peabody's alleged conduct, plaintiffs must plead nonconclusory factual allegations from which the Court can infer that Peabody's conduct caused their injury in fact, and thus there is a "substantial likelihood" that the relief sought would redress the injury. *See Mayfield v. United States*, 599 F.3d 964, 971 (9th Cir. 2010) (citation omitted). A causal chain that is too attenuated and requires speculative inferences to move from one link to the next will not support Article III standing. *Allen,* 468 U.S. at 752 ("[S]tanding inquiry requires careful judicial examination of a complaint's allegations to ascertain whether . . . the line of causation . . . [is] too attenuated."); *Johnson v. Weinberger*, 851 F.2d 233, 235 (9th Cir. 1988) ("When speculative inferences are necessary . . . to establish either injury or the connection between the alleged injury and the act challenged, standing will not be found.") (citing *Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26, 45 (1976)) (internal quotation marks omitted); *Salmon Spawning & Recovery Alliance v. Gutierrez*, 545 F.3d 1220, 1228 (9th Cir. 2008) (a "causal connection" that relies on an "attenuated chain of conjecture" is insufficient to support standing) (internal quotation marks and citation omitted); *see also Tyler*, 236 F.3d at 1136-37

(connections between plaintiffs and defendants in litigation involving private parties were "simply [] too attenuated to grant standing") (citation omitted); *Habecker*, 518 F.3d at 1225 (causal chain between alleged injury and defendant's conduct broken by "speculative inference"); *In re African-American Slave Descendants Litig.*, 471 F.3d at 759 (casual chain between alleged conduct and injury had "too many weak links for a court to be able to find that the defendants' conduct harmed the plaintiffs . . . in an amount that could be estimated without the wildest speculation").

The district court found that plaintiffs' complaint does not allege facts sufficient to infer that Peabody's alleged conduct is the likely cause of plaintiffs' purported injuries. Instead, plaintiffs allege an attenuated and speculative connection between Peabody's coal mining activities and the erosion of Kivalina's coastline. As the district court observed, plaintiffs' nuisance claim hinges on establishing the following chain of events:

> emitted greenhouse gases combine with other gases in the atmosphere which *in turn* results in the planet retaining heat, which *in turn* causes the ice caps to melt and the oceans to rise, which *in turn* causes the Arctic sea ice to melt, which in turn allegedly renders Kivalina vulnerable to erosion and deterioration resulting from winter storms.

Kivalina, 663 F. Supp. 2d at 876 (citations omitted) (emphasis in original). Under plaintiffs' theory of liability, any alleged harm they have suffered from purported

global warming "involves a series of events *disconnected* from the discharge itself." *Id*. (emphasis added).

Plaintiffs' causal theory is constitutionally deficient in material respects. First, plaintiffs do not allege that Kivalina's coastal erosion would not have occurred absent an increased concentration of greenhouse gases in the atmosphere. Rather, they allege that coastal erosion was worsened "in part" by higher than usual air temperatures. (*See* ER at 85, ¶ 187.) Under these circumstances, any inference that plaintiffs' purported injuries were caused by alleged global warming, caused in turn by Peabody's lawful mining activities, is too speculative to satisfy the fairly traceable requirement. *See Twombly*, 550 U.S. at 570 (to survive motion to dismiss, allegations must cross line from "conceivable to plausible"); *see also Nelsen v. King County*, 895 F.2d 1248, 1253 (9th Cir. 1990) ("The Supreme Court and our court have repeatedly recognized that claims predicated upon . . . 'speculative contingencies afford no basis for finding the existence of a continuing controversy as required by article III.'") (citations omitted).

Second, plaintiffs' allegations fail to establish a plausible link between Peabody's conduct and the alleged effects of global warming. Plaintiffs claim that carbon dioxide and other greenhouse gases have been increasing since the "dawn of the industrial revolution" in the 18th century. (ER at 70, ¶ 125). They further allege that these emissions "rapidly mix in the atmosphere and cause the increase

in the atmospheric concentration of carbon dioxide levels and other greenhouse gases worldwide." (ER at 102, ¶ 254). These gases, according to plaintiffs, remain in the atmosphere for centuries and have a "lasting effect" on the climate. (ER at 70, ¶ 124). Plaintiffs do not allege at what point in time in the two hundred years since the dawn of the Industrial Revolution greenhouse gases reached concentrations sufficient to affect the Earth's climate generally and Kivalina's coastline specifically. Absent such allegations, it is plausible that the alleged increase in air temperature that plaintiffs claim has increased Kivalina's vulnerability to coastal storm waves and surges was caused by emissions that occurred long before Peabody began operations. *See DSE Group, LLC v. Richardson*, No. 08-15111, 2010 WL 2232193, at *1 (9th Cir. June 4, 2010) (standing lacking where plaintiffs' injury appeared to be the result of the independent action of some party not before the court) (citations omitted); *Town of Southold v. Town of E. Hampton*, 406 F. Supp. 2d 227, 235 (E.D.N.Y. 2005) (town lacked standing to challenge law because "their alleged injuries appear to have been created years before the implementation of the [challenged law]"), *vacated on other grounds*, 477 F.3d 38 (2d Cir. 2007)).

Third, while plaintiffs allege that Peabody's lawful activities "contribute[d] to" global warming (Pls. Br. at 61), they do not attempt to tie Peabody's mining activities to any specific increase in either atmospheric concentrations of

greenhouse gases or global temperatures. Indeed, plaintiffs do not allege that the absence of emissions from Peabody's mining activities would have had *any* discernable effect on the rate or level of alleged global warming. By limiting their allegations to Peabody's unspecified "contribution" to global warming, plaintiffs wind up connecting no defendant, and no emission, to the alleged harm. Under constitutional standing precedent, alleging an "injury that results from the independent action of some third party not before the court" does not satisfy Article III standing requirements. *Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26, 41-42 (1976); *see also Warth v. Seldin*, 422 U.S. 490, 509 (1975); *Levine v. Vilsack*, 587 F.3d 986, 992-93 (9th Cir. 2009) (standing lacking where judicial redress relied upon the actions of third parties not before the court).[14]

C. Plaintiffs Cannot Rely On "Multiple Tortfeasor" Cases To Relax The Fairly Traceable Requirement.

Plaintiffs acknowledge that tying emissions resulting from Peabody's lawful mining activities to plaintiffs' alleged injuries in any direct way is impossible. (*See* Peabody's Supplemental Excerpt of Record ("SER") at 2) ("[i]t would be

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[14] Plaintiffs wrongly claim that defendants conceded redressability in the district court. Pls. Br. at 61. To the contrary, Peabody argued in its motion to dismiss in the district court that plaintiffs' claim is not redressable because, for the court to provide plaintiffs with their requested remedy, it would first have to establish its own national policy on climate change and global warming in order to provide the factfinder with guidance for assessing the reasonableness of defendants' activities. (SER at 4-5).

impossible to trace the pathway of any particular greenhouse gas emission, as each combines in the atmosphere with other emissions.”). Rather, they essentially argue that the traceability requirement should be relaxed because emissions from Peabody’s mining activities are indivisible from the emissions of the billions of emitters around the world and throughout time. *See* Pls. Br. at 31, 66. Under their theory, Peabody should be held jointly and severally liable with the billions of greenhouse gas emitters on the planet for their alleged global warming injuries. *See id.* at 33 n.8.

Plaintiffs offer no legal support for this argument. It is hornbook law that a defendant alleged to have contributed to an injury *cannot* be held jointly and severally liable for that injury unless that defendant’s conduct constitutes a “substantial factor” in bringing that injury about. Restatement (Second) of Torts § 432; *Med. Lab. Mgmt. Consultants v. ABC*, 306 F.3d 806, 820 (9th Cir. 2002) (“Tortious conduct is a legal cause of harm to another if the conduct is a substantial factor in bringing about the harm.”) (internal quotation marks and citation omitted); *Ileto v. Glock, Inc.*, 349 F.3d 1191, 1212 (9th Cir. 2003) (tort liability requires that the act or omission of the defendant be a “substantial factor” to the harm suffered) (citation omitted); *Vickers v. United States*, 228 F.3d 944, 953-54 (9th Cir. 2000) (“California applies the ‘substantial factor’ test of legal causation”) (internal quotation marks and citation omitted). Section 432 provides that an

actor's negligent conduct is "not a substantial factor in bringing about harm to another if the *harm would have been sustained even if the actor had not been negligent*." (emphasis added). Similarly, comment d. to Restatement (Second) of Torts § 834, which addresses nuisance, provides:

> When a person is only one of several persons participating in carrying on an activity, his participation must be substantial before he can be held liable for the harm resulting from it. This is true because to be a legal cause of harm a person's conduct must be a substantial factor in bringing it about.

Because plaintiffs have not alleged facts sufficient to show that Peabody's mining activities constitute a "substantial factor" in causing alleged global warming, and in turn, plaintiffs' alleged injuries, they cannot establish causation sufficient to satisfy the fairly traceable requirement of Article III standing.

D. Statutory Pollution Cases Are Inapposite.

Plaintiffs analogize their global warming tort claim to a statutory-based pollution claim. *See* Pls. Br. at 62-74. The district court correctly rejected the analogy. *Kivalina*, 663 F. Supp. 2d at 879. Cases that involve (a) discharges in violation of a statutory scheme (b) by a finite number of polluters affecting (c) a finite number of parties provide no guidance here, where (d) Peabody's mining activities violate no statutory prescription, (e) the number of emitters is infinite, and (f) the emissions in question affect "humanity at large." *Massachusetts v. EPA,* 415 F.3d 50, 60 (D.C. Cir.), *rev'd*, 549 U.S. 497 (2007) (Sentelle, J.,

dissenting in part and concurring in the judgment); *see also Massachusetts*, 549 U.S. at 541 (Roberts, J., dissenting) (citation omitted).

Statutory cases rest on a presumption that "there is a 'substantial likelihood' that a defendant's conduct caused the plaintiff's harm," even if other parties have also made similar discharges. *Kivalina,* 663 F. Supp. 2d at 879 (quoting *Pub. Interest Research Group v. Powell Duffryn Terminals, Inc.*, 913 F.2d 64, 72-73 (3d Cir. 1990)). In contrast, plaintiffs' alleged injuries are supposedly traceable to undifferentiated greenhouse gas emissions in the atmosphere, produced by innumerable emitters all over the world. (ER at 102, ¶ 254.); Pls. Br. at 66. Furthermore, unlike in statutory pollution cases, plaintiffs do not allege that Peabody's lawful mining activities violate any statute.[15] Thus, plaintiffs' claims bear no resemblance to the CWA cases upon which they rely. For these reasons, the district court rightly rejected the Second Circuit's conclusion in *AEP II* that the first part of the standing test under the CWA is inapplicable to global warming claims. *Kivalina*, 663 F. Supp. 2d at 880 n.7.

[15] For this reason, plaintiffs' reliance on *Northwest Envtl. Def. Ctr. v. Owens Corning Corp.*, 434 F. Supp. 2d 957 (D. Or. 2006), in which plaintiffs sued alleging a failure to obtain a necessary construction permit, is also misplaced.

E. The Native Village of Kivalina Is Not Entitled To Special Solicitude In The Standing Analysis.

As a fall-back standing argument, plaintiffs argue that the Native Village of Kivalina, as a federally recognized Tribe, is entitled to the same special solicitude that states are often accorded. Pls. Br. at 75-77. They claim that the Native Village of Kivalina is a sovereign, and that "[a] sovereign has *parens patriae* standing to protect quasi-sovereign interests, i.e., interests 'that the State has in the well-being of its populace.'" *Id.* at 75-76 (citation omitted). This argument fails.

Plaintiffs are not entitled to a relaxed standing analysis based on the "special solicitude" afforded to the Commonwealth of Massachusetts in *Massachusetts*, because plaintiffs do not stand in the same position as the Commonwealth of Massachusetts did in that case, nor are they asserting the same types of claims. There, Massachusetts sought to compel the EPA to consider a petition for rulemaking requesting that the EPA regulate carbon dioxide emissions from new motor vehicles. *Massachusetts*, 549 U.S. at 510-12. The Court held that Massachusetts had standing because, as a state, it was "not [a] normal litigant[]" and had a cognizable interest in ensuring that the federal government and its agencies enforced federal laws. *Id.* at 519-20. When the United States was formed, the Court reasoned, states accepted limitations on their sovereign power in exchange for protections provided by the federal government. *Id.* As result of this exchange, states have a special sovereign interest in the enforcement of federal

law. *Id*. That special sovereign interest permitted Massachusetts standing to sue to force the EPA to comply with federal enabling statutes, even where a private litigant would lack standing to do so. *Id.*

The Native Village of Kivalina is not entitled to any such "special solicitude" because its status as a federally recognized Tribe is not derived from the exchange of sovereign powers that occurred when the United States was formed. Instead, plaintiffs assert that their quasi-sovereign status is the product of the Indian Reorganization Act of 1934, as amended in 1936. (ER at 43, ¶ 13). Thus, plaintiffs do not share the sovereign interest in the enforcement of federal law that the states possess. Moreover, unlike the Commonwealth of Massachusetts, plaintiffs' nuisance claim is not directed at forcing the federal government to take action mandated by federal law. Rather, plaintiffs are suing a handful of private companies to recover money damages, and their claims do not fall within the realm of interests that sovereigns are empowered to protect. *See Massachusetts*, 549 U.S. at 520. Thus, the district court properly concluded that the Native Village of Kivalina was entitled to no special solicitude.[16]

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[16] Moreover, *parens patriae* standing is not available for the Native Village of Kivalina. *Parens patriae* standing traditionally provides a sovereign or quasi-sovereign entity the ability to assert claims for injunctive or declaratory relief to protect its sovereign interests in its territory and the well being of its citizens. *See California v. United States*, 180 F.2d 596, 600-01 (9th Cir. 1950); *see also*

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IV. Alternative Grounds Support Affirming The District Court's Dismissal.

Several alternative grounds provide a basis to affirm the district court's dismissal of plaintiffs' complaint.[17]

A. Plaintiffs' Claim For Public Nuisance Under Federal Common Law Has Been Displaced By Federal Statutory Law.

Plaintiffs derive their federal common law claim from decades-old case law holding that courts must apply federal common law to resolve interstate water and air pollution disputes. *See* Pls. Br. at 18-19 & n.2 (citing *Illinois v. City of Milwaukee*, 406 U.S. 91 (1972) ("*Milwaukee I*"); *Georgia v. Tennessee Copper Co.*, 237 U.S. 474 (1915)). The Supreme Court has since ruled that the CWA displaced the federal common law for interstate water pollution disputes. *City of Milwaukee v. Illinois*, 451 U.S. 304, 331 (1981) ("*Milwaukee II*"); *see also Arkansas v. Oklahoma*, 503 U.S. 91, 99 (1992) ("[The CWA] pre-empted Illinois'

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Badgley v. City of New York, 606 F.2d 358, 365 (2d Cir. 1979). It does not grant a tribe the right to assert claims to recover money damages for individual members, as plaintiffs seek to do here. *See United States v. Santee Sioux Tribe*, 254 F.3d 728, 734 (8th Cir. 2001) (tribe lacked standing to recover unlawful garnishments suffered by individual members); *N.Y. ex rel. Abrams v. Seneci*, 817 F.2d 1015, 1017 (2d Cir. 1987) ("The state cannot merely litigate as a volunteer the personal claims of its competent citizens.").

[17] *See Atel Fin. Corp. v. Quaker Coal Co.*, 321 F.3d 924, 926 (9th Cir. 2003) (court may affirm on any ground that has support in the record, whether or not the district court decision relied on same grounds).

federal common law remedy."). Relying on *Milwaukee II*, the Ninth Circuit has found that the CAA has similarly displaced the federal common law for interstate air pollution disputes. *Nat'l Audubon Soc'y v. Dept. of Water*, 869 F.2d 1196, 1200-01 (9th Cir. 1989) ("[T]he [CAA] empowers the EPA, not the federal courts, to identify pollutants and concentration levels that endanger or are likely to endanger the health and welfare of the public.").

The CAA, which is commonly regarded as among the most comprehensive environmental statutes ever enacted, also displaces plaintiffs' federal common law public nuisance claim. *See Bunker Hill Co. Lead & Zinc Smelter v. EPA*, 658 F.2d 1280, 1284 (9th Cir. 1981) (noting that the CAA "was intended comprehensively to regulate, through guidelines and controls, the complexities of restraining and curtailing modern day air pollution."). As the Supreme Court observed, the CAA's 1977 amendments "are a lengthy, detailed, technical, complex, and comprehensive response to a major social issue." *Chevron*, 467 U.S. at 848.

Given the comprehensive nature of the CAA and wide reach of the greenhouse gas emission regulations the EPA recently promulgated under it, it is clear that the CAA displaces plaintiffs' federal common law nuisance claim.[18] *See*

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[18] Plaintiffs' argument that the CAA cannot displace their purported federal common law claim because "[t]he CAA is silent on the availability of damages for injuries caused by air pollution" is unavailing. *See* Pls. Br. at 78. Congress can

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Reeger v. Mill Service, Inc., 593 F. Supp. 360, 363 (W.D. Pa. 1984) (holding that the CAA displaces plaintiffs' federal common law nuisance claim); *United States v. Kin-Buc, Inc.*, 532 F. Supp. 699, 702 (D.N.J. 1982) (same).

Plaintiffs attempt to get around displacement by distinguishing their nuisance claim, which seeks to impose liability for emissions that *do not* violate any federally set limits, from the "typical" interstate pollution claims that *Milwaukee II* and *Nat'l Audubon* recognized as displaced, which are based on allegations that a defendant's emissions exceeded federally set emissions limits. *See* Pls. Br. at 21. But it is precisely because plaintiffs' nuisance claim arises out of purported global warming and is distinguishable from the "typical" interstate pollution claim recognized in *Milwaukee I* and *Georgia* that those cases are inapplicable here.

In *Georgia*, the State of Georgia sought to enjoin a mining company from discharging noxious gas from its Tennessee mining operations into Georgia's territory. *Georgia*, 237 U.S. at 475. Similarly, in *Milwaukee I,* Illinois sought to enjoin the City of Milwaukee from discharging raw sewage into the interstate

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displace federal common law with a federal statutory scheme regardless of whether that scheme provides a private cause of action for damages. *See Middlesex Cty. Sewage Auth. v. National Sea Clammers Ass'n*, 453 U.S. 1, 21-22 (1981) (CWA displaces federal common law even though CWA lacks damages remedy).

waters of Lake Michigan. *Milwaukee I*, 406 U.S. at 93-94. As the Supreme Court explained in *Milwaukee I*, the application of federal common law was necessary to fill gaps in substantive law that arose when the United States was formed. 406 U.S. at 104. When the states first joined the union, the Court reasoned, they "made the forcible abatement of outside nuisances impossible to each." *Id.* In other words, a state court has no authority to abate a nuisance emanating from outside of the state's borders. On the other hand, the Court noted, states did not "renounce the possibility" of seeking to abate such a nuisance in federal court. *Id.* Thus, the application of federal public nuisance law was necessary to adjudicate disputes related to and arising from interstate air and water pollution. *Id.*

Here, plaintiffs do not seek to abate a nuisance emanating from a neighboring state. Rather, they are seeking damages for injuries allegedly caused by a purported nuisance that emanates from every single state and foreign nation in the world. (ER at 102, ¶ 254) ("Emissions of carbon dioxide and other greenhouse gases . . . rapidly mix in the atmosphere and cause an increase in the atmospheric concretion of carbon dioxide and other greenhouse gases worldwide."). Unlike in *Milwaukee I* and *Georgia*, the purported "nuisance" is the accumulation of greenhouse gases in the atmosphere, which cannot be tied to emissions from any particular polluter (let alone defendant), any particular geographic source or any period of time. (ER at 70, ¶ 125) ("Carbon dioxide levels in the atmosphere have

increased 35 percent since the dawn of the industrial revolution in the 18th century."). These differences render plaintiffs' reliance on *Georgia* and *Milwaukee I* as a basis to apply federal common law to its global warming claims misplaced. *See Sharff v. Raytheon Co. Short Term Disability Plan,* 581 F.3d 899, 907-908 (9th Cir. 2009) (court refused to use "ERISA federal common law" to impose on plan provider a new, unprecedented duty to disclose); *see also United States v. City of Las Cruces*, 289 F.3d 1170, (10th Cir. 2002) (court declined to expand federal common law recognized in interstate equitable apportionment cases to case with similar but distinguishable facts).

Furthermore, the federal interests and policies at stake in addressing alleged global warming go so far beyond the type of interests recognized in *Georgia* and *Milwaukee I* that judge-made federal common law cannot serve as a gap-filler. While localized, interstate pollution disputes of the type at issue in *Georgia* and *Milwaukee I* can be resolved by resorting to common law principles, the novel and unbounded nature of plaintiffs' global warming-related nuisance claim renders it not amenable to resolution under public nuisance law.

Finally, plaintiffs' argument that displacement turns on whether Congress has already provided for damages of the kind that plaintiffs seek fails. Pls. Br. at 78-79. "The question is whether the field has been occupied, not whether it has been occupied in a particular manner." *See, e.g., Milwaukee II*, 451 U.S. at 324

("Demanding specific regulations of general applicability before concluding that Congress has addressed the problem to the exclusion of federal common law asks the wrong question."). A federal statute can displace federal common law even if that displacement leaves plaintiffs with no remedy. *Illinois v. Outboard Marine Corp.*, 680 F.2d 473, 478 & n.8 (7th Cir. 1982) (rejecting argument that "Congress has not 'addressed the question' because it has not enacted a remedy against polluters . . . . The lesson of Milwaukee II is that once Congress has addressed a national concern, our fundamental commitment to the separation of powers precludes the courts from scrutinizing the sufficiency of the congressional solution."); *Mattoon v. City of Pittsfield*, 980 F.2d 1, 7 (1st Cir. 1992) (Federal Safe Drinking Water Act preempted federal common law nuisance action even though EPA had not yet issued implementing regulations.).

B. Plaintiffs' Nuisance Claims Fail Because Plaintiffs Do Not And Cannot Plead Proximate Causation.

Plaintiffs' nuisance claims, whether based on federal or state common law, also fail because plaintiffs cannot plausibly allege an essential element – that Peabody's mining operations proximately caused plaintiffs' injury.[19] *See, e.g.,*

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[19] Questions of proximate causation are appropriately resolved as a matter of law at the motion to dismiss stage. *See Hemi Group, LLC v. City of New York*, 130 S.Ct. 983, 989 (2010) (affirming district court's dismissal of RICO claims on motion to dismiss because plaintiff could not demonstrate proximate causation

(continued…)

Martinez v. Pac. Bell, 225 Cal. App. 3d 1557, 1565 (Cal. Ct. App. 1990). The purpose of proximate cause is to "limit[] the defendant's liability to those foreseeable consequences that the defendant[] . . . was a substantial factor in producing." *Ileto,* 349 F.3d at 1206.

Here, plaintiffs cannot plausibly demonstrate proximate cause because Peabody could not have reasonably foreseen that its mining operations would result in the erosion of Kivalina's coastline. According to plaintiffs' theory of liability, Peabody would have had to anticipate: (1) that emissions from its mining operations, as well as emissions from utility companies that burn Peabody's coal, would mix with the emissions of billions of other emitters over at least the past two centuries and increase the atmospheric concentration of greenhouse gases by some unspecified amount; (2) that such an increase would increase sea temperatures in the northern seas; (3) that those increased sea temperatures would raise sea levels by some unspecified degree; (4) that the resulting increased tidal and storm activity would decrease the strength and size of the ice barrier that protects plaintiffs' shoreline; and (5) that, as a result, plaintiffs would suffer some unspecified amount of increased coastal erosion. (ER at 40-41, ¶¶ 3, 4; ER at 82-83, ¶ 179; ER at 84-

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(continued)

because causal theory was too attenuated). *Twombly* and *Iqbal* require plaintiffs to support their proximate cause allegations with facts that are plausible on their face. *Twombly*, 550 U.S. at 547; *Iqbal*, 129 S.Ct. at 1949.

85, ¶¶ 185, 187; ER at 99, ¶ 243). Plaintiffs' causation chain is simply too attenuated and remote to support their nuisance claims against Peabody. *See, e.g., Wamanesa Mut. Ins. Co. v. Matlock*, 60 Cal. App. 4th 583, 588 (Cal. Ct. App. 1997) (no proximate cause where liability based on a "Rube Goldbergesque system of fortuitous linkages").

C. Plaintiffs' Conspiracy And Concert Of Action Claims Are Neither Cognizable Against Peabody Nor Sufficiently Pled.

1. Plaintiffs' Civil Conspiracy Claim Fails Because Plaintiffs Have Not Alleged A Valid Nuisance Claim.

A civil conspiracy cause of action cannot stand alone; it must be accompanied by allegations that the defendants conspired to commit some recognized tort. *See, e.g., Chavers v. Gatke Corp.,* 107 Cal. App. 4th 606, 614 (Cal. Ct. App. 2003); *see also* 5 B. Witken, Summary of California Law, Torts § 44 (9th ed. 1988) ("Strictly speaking . . . there is no separate tort of civil conspiracy, and there is no civil action for conspiracy to commit a recognized tort unless the wrongful act itself is committed and damage results therefrom."); *Entm't Research Group, Inc. v. Genesis Creative Group, Inc.* 122 F.3d 1211, 1228 (9th Cir. 1997) (under California law, civil conspiracy is not a separate cause of action."). Because plaintiffs have failed to plead a viable nuisance claim, plaintiffs' civil conspiracy claim also fails.

2. Peabody's Alleged Actions Are Protected By The First Amendment.

Plaintiffs' civil conspiracy claim is also barred by the First Amendment. While plaintiffs do not precisely spell out the purpose of the alleged conspiracy, the gravamen of plaintiffs' conspiracy allegations appears to be that certain defendants, including Peabody, contributed to groups that expressed opinions that clashed with "growing scientific and public consensus regarding global warming." (ER at 91, ¶ 209). Peabody cannot be held liable for engaging in scientific debate regarding issues of public interest. *See Vess v. Ciba-Geigy Corp. USA*, 317 F.3d 1097, 1110 (9th Cir. 2003) (advocacy group's public campaign touting benefits of particular drug protected by First Amendment and could not provide basis for civil conspiracy to "spread misinformation"); *see also Universal City Studios, Inc. v. Corley*, 273 F.3d 429, 446-47 (2d Cir. 2001) (recognizing First Amendment protects "scientific expression and debate" as much as political or artistic expression) (citation omitted).

3. Plaintiffs' Civil Conspiracy Claim Fails Because It Is Not Pled With Sufficient Specificity.

Plaintiffs' civil conspiracy claim also fails because plaintiffs' allegations do not satisfy the heightened pleading standards of Rule 9(b). This Court has held that Rule 9(b) applies to *all* claims sounding in fraud, regardless of how a plaintiff presents those claims in its complaint. *Kearns v. Ford Motor Co.*, 567 F.3d 1120,

1124-25 (9th Cir. 2009). Plaintiffs' civil conspiracy allegations clearly sound in fraud because they are premised on an alleged conspiracy to "mislead the public with respect to global warming." (ER at 104, ¶ 269). Plaintiffs' complaint, however, offers no specifics about Peabody's allegedly "misleading" conduct. Instead, it refers vaguely to the activities of certain trade associations, some of which allegedly represent the "coal industry." (ER at 86, ¶ 190). The complaint does not allege what role Peabody purportedly played in any of these alleged activities, how Peabody's alleged conduct effectuated any attempt to mislead the public, or whom among the "public" Peabody allegedly misled. Thus, plaintiffs' allegations fail under Rule 9(b) because they do not put Peabody on notice as to the "particular misconduct" it must defend. *See Vess*, 317 F.3d at 1108.

4. Plaintiffs Fail To State A Claim For Concert Of Action.

"Concert of action" is not an independent tort but a theory for imposing secondary liability. *See, e.g., Halberstam v. Welch*, 705 F.2d 472, 477 (D.C. Cir. 1983). Plaintiffs' concert of action allegations against Peabody should be dismissed because they are insufficient to establish secondary liability. Plaintiffs' bald assertions that defendants gave "substantial assistance or encouragement to each other" in the "contribution to and/or maintenance of a public nuisance" do not allow a reasonable inference that Peabody engaged in any conduct that would subject it to secondary liability for other defendants' emissions. *Twombly*, 550

U.S. at 556-57 ("formulaic recitation" of legal conclusions insufficient to raise reasonable inference of wrongdoing). It is difficult to conceive of any set of facts that would support such an inference. Peabody had no plausible motive to "substantially assist" or "encourage" any other defendant to contribute to alleged global warming. *See Iqbal,* 129 S.Ct. at 1952 (rejecting allegations insufficient to "plausibly suggest petitioners' discriminatory state of mind"). Because any such conspiracy would provide Peabody no benefit, plaintiffs' concert of action claim lacks plausibility on its face. *Id.* ("[O]nly a complaint that states a plausible claim for relief survives a motion to dismiss.").

CONCLUSION

The district court's dismissal with prejudice of plaintiffs' public nuisance claim under federal common law should be affirmed.

Dated: June 30, 2010

Respectfully submitted,

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STATEMENT OF RELATED CASES

Peabody is not aware of any related cases pending in this Court.

June 30, 2010 /s/ Kevin P. O'Brien

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C) and Circuit Rule 32-1, the attached answering brief is proportionately spaced, has a typeface of 14 points or more and contains 13,709 words.

June 30, 2010 /s/ Kevin P. O'Brien

CERTIFICATE OF FILING AND SERVICE

I, Kevin P. O'Brien, a member of the Bar of this Court, hereby certify that on June 30, 2010, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

I further certify that some of the participants in the case are not registered CM/ECF users. I have dispatched the foregoing document to a third party commercial carrier for delivery within 3 calendar days to the following non-CM/ECF participants:

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