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7
8 UNITED STATES DISTRICT COURT
9 EASTERN DISTRICT OF CALIFORNIA

10
11 THE UNITED STATES OF AMERICA,
12 Plaintiff,

13 v.

14 THE STATE OF CALIFORNIA; GAVIN
C. NEWSOM, in his official capacity as
15 Governor of the State of California; THE
CALIFORNIA AIR RESOURCES
16 BOARD; MARY D. NICHOLS, in her
official capacity as Chair of the California
17 Air Resources Board and as Vice Chair and
a board member of the Western Climate
18 Initiative, Inc.; WESTERN CLIMATE
INITIATIVE, INC.; JARED
19 BLUMENFELD, in his official capacity as
Secretary for Environmental Protection and
20 as a board member of the Western Climate
Initiative, Inc.; KIP LIPPER, in his official
21 capacity as a board member of the Western
Climate Initiative, Inc.; and RICHARD
22 BLOOM, in his official capacity as a board
member of the Western Climate Initiative,
23 Inc.,

24 Defendants.

CASE NO. 2:19-cv-02142-WBS-EFB

**WCI, INC. DEFENDANTS' REPLY TO
PLAINTIFF'S OPPOSITION TO
DEFENDANTS' CROSS-MOTIONS FOR
SUMMARY JUDGMENT**

Complaint Filed: October 23, 2019
Trial Date: Not Yet Scheduled

Date: March 9, 2020
Time: 1:30 PM
Courtroom: 5
Judge: William B. Shubb

25
26
27 ¹ The WCI, Inc. Defendants are Western Climate Initiative, Inc. ("WCI, Inc."); Mary D. Nichols, in her
28 official capacity as Vice Chair and a board member of WCI, Inc.; and Jared Blumenfeld, in his official capacity as a
board member of WCI, Inc.

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1 **I. INTRODUCTION**

2 Plaintiff makes no attempt to show how the administrative and technical services provided
 3 by WCI, Inc., or any other conduct by the WCI, Inc. Defendants, cause injury to Plaintiff.² Nor
 4 does Plaintiff show how an order for declaratory relief directed at the WCI, Inc. Defendants –
 5 undisputed non-parties to the “Agreement and Arrangements” without the ability to affect the
 6 linkage agreement between California and Quebec’s cap-and-trade programs – could redress the
 7 injury-in-fact allegedly suffered by Plaintiff (*i.e.*, the constitutional violations at issue). As a
 8 consequence, Plaintiff lacks standing to sue the WCI, Inc. Defendants. Similarly, Plaintiff’s
 9 constitutional claims against the WCI, Inc. Defendants additionally fail because only states – as
 10 opposed to state actors or instrumentalities of the state – are subject to the restrictions imposed by
 11 the Treaty and Compact Clauses. And, even if the Treaty and/or Compact Clause somehow applied
 12 to state actors or instrumentalities of the state, which they do not, the WCI, Inc. Defendants do not
 13 qualify as such.

14 **II. PLAINTIFF MISCHARACTERIZES THE EVIDENCE**
 15 **ATTRIBUTABLE TO THE WCI, INC. DEFENDANTS**

16 **A. WCI, Inc. Is Separate and Distinct from Western Climate Initiative**

17 Plaintiff consistently throughout its briefing misrepresents the relationship between WCI,
 18 Inc. and the Western Climate Initiative (“WCI”).³ However, both historically and as exists today,
 19 WCI, Inc. is a separate and distinct legal entity from the informal partnership known as WCI. (*See*
 20 ECF No. 78-1 at 89-90,⁴ WCI’s Fact Nos. 1-2, 7-8.) Thus, any representations with respect with
 21 WCI cannot be imputed to WCI, Inc. (*See, e.g.*, ECF No. 78 at 5:22-26, 16:15-19 (“By linking
 22

23 ² Plaintiff’s own arguments focus solely on the Agreement and Arrangements – not the services
 24 offered by WCI, Inc. Indeed, Plaintiff concludes that “California’s Agreement with Quebec”
 25 violates the Article I Treaty and Compact Clauses, and that “California’s Agreement with Quebec
 cannot be sustained.” Thus, Plaintiff concedes by omission that it is the Agreement, not the services
 of WCI, Inc., that constitute the alleged constitutional violations and, as a result, its injury.

26 ³ For example, in making the statement that “WCI represents to the world that it constitutes ‘the
 27 largest carbon market in North America, and the only one developed and managed by governments
 from two different countries’” (ECF No. 78 at 10:5-7), this statement refers only to the WCI
 partnership – as opposed to WCI, Inc. (ECF No. 50-4, Ex. 12 at 135.)

28 ⁴ All page references related to ECF document citations are to the ECF page numbers as opposed
 to the document page numbers, if any.

1 California’s Program to WCI Partner jurisdictions [as opposed to WCI, Inc. participating
2 jurisdictions], the combined Programs will result in more emissions reductions...and will increase
3 opportunities for GHG emissions reductions for covered sources more than could be realized
4 through a California-only program.”); and ECF No. 78 at 10:5-7 (“WCI represents to the world that
5 it constitutes ‘the largest carbon market in North America, and the only one developed and managed
6 by governments from two different countries’ (quoting documents discussing WCI – *not* WCI,
7 Inc.).)

8 WCI, Inc. is a private, non-profit corporation organized under the laws of Delaware to
9 provide administrative support and technical services to participating jurisdictions. (*See* ECF No.
10 78-1 at 89-90, WCI Fact Nos. 1-2, 7-8.) WCI, Inc. utilizes a software platform specifically designed
11 to track emissions and offsets in accordance with a participating jurisdiction’s cap-and-trade
12 program requirements. (*See* ECF No. 78-1 at 89-90, WCI Fact Nos. 1-2, 7-8; ECF No. 50-4, Ex.
13 12 at 132-139.) Specifically, it tracks compliance instruments and organizes and conducts
14 allowance auctions. (*Id.*) WCI, Inc. supports both individual jurisdiction and cross-jurisdictional
15 allowance auctions, as applicable. (*See* ECF No. 78-1 at 89-90, WCI Fact No. 7-8; ECF No. 50-4,
16 Ex. 12 at 132-139.) WCI, Inc.’s services may be utilized by any jurisdiction with a cap-and-trade
17 program. (*See* ECF No. 78-1 at 89-90, WCI Fact Nos. 1-2, 7-8; ECF No. 50-4, Ex. 12 at 132-139.)
18 As evidenced by Nova Scotia’s participation in WCI, Inc., linkage with California is not required
19 to participate in WCI, Inc. or to utilize the support and technical services it offers. (ECF No. 50-4,
20 Ex. 12 at 136 (“During 2018, work was completed to enable Nova Scotia to be able to utilize CITSS
21 and the services of the market monitor”).) Additional jurisdictions may contract to utilize WCI,
22 Inc.’s services and become a participating jurisdiction under its Bylaws without linking to
23 California as Quebec has done. (ECF No. 78-3, Ex. 41 at 2; ECF No. 46-2 at 17, Art. III.)

24 WCI, on the other hand, is a somewhat informal “collaboration of independent jurisdictions
25 working together to identify, evaluate, and implement emissions trading policies to tackle climate
26 change at a regional level” that began in 2007. (*See* ECF No. 46-1 at 7, fn.3.) It was designed to
27 create a dialogue regarding implementation of cap-and-trade programs in the respective
28 jurisdictions of its partner participants. (ECF No. 12, Ex. 19 at 702.) However, WCI itself is not,

1 and has never been, a legal entity with the power to take any valid action. (*Id.*) Additionally, WCI
 2 partners are not necessarily, nor are they required to be, participating jurisdictions in WCI, Inc.
 3 (ECF No. 12, Ex. 19 at 704-706 (evidencing states and territories involved in WCI); ECF No. 50-
 4 4, Ex. 12 at 132-139 (evidencing WCI, Inc.'s participating jurisdictions).) Again, Plaintiff proffers
 5 no evidence to establish that the statements or actions of WCI may be attributed to WCI, Inc. in
 6 any manner that has legal significance.

7 **WCI, Inc. Is a Service Provider Subject to Individual Contracts With Each**
 8 **Jurisdiction Electing to Use Its Services for Remuneration.**

9 Contrary to Plaintiff's unsupported assertions, WCI, Inc.'s participants are not limited to
 10 California and Quebec or to jurisdictions with linkage agreements to California.⁵ Indeed, WCI, Inc.
 11 has served multiple jurisdictions since its inception including Ontario, British Columbia, Quebec,
 12 Nova Scotia and California. (*See* ECF No. 78-1 at 89-90, WCI Fact No. 3; *see also* Sahota Decl.
 13 ¶¶ 62-64; ECF No. 50-4, Ex. 9 (establishing Ontario as a participating member); ECF No. 46-2,
 14 Ex. B at 5 (establishing British Columbia as a participating member).) Each jurisdiction contracts
 15 with WCI, Inc. for a variety of services depending on its individual needs. (*See* ECF No. 78-1 at
 16 89-90, WCI Fact Nos. 8-9; ECF No. 50-4, Ex. 12 at 132-139.) For example, Nova Scotia currently
 17 utilizes WCI, Inc.'s services for tracking its emissions allowances, implementing an auction system,
 18 and providing associated administrative services in order to maintain compliance with its own cap-
 19 and-trade program. (ECF No. 50-4, Ex. 12 at 136.) Its program only includes Nova Scotia
 20 greenhouse gas emission allowances and is not linked with other jurisdictions. (ECF No. 50-4, Ex.
 21 12 at 136; *see* <http://www.wci-inc.org/docs/FundingAgreement-NS-EN-20190514.pdf> (last visited
 22 Mar. 2, 2020).) Similarly, WCI, Inc. has separate contracts with California and Quebec,
 23 respectively, to provide services for tracking each jurisdiction's emissions and offsets in order to
 24 maintain compliance with its specific cap-and-trade program. (ECF No. 46-2 at 2:25-3:11.) In
 25 addition to these services, WCI, Inc. supports California and Quebec's inter-jurisdictional

26 _____
 27 ⁵ Plaintiff cites to WCI, Inc.'s Articles of Incorporation for the proposition that WCI, Inc. is the
 28 operational center of California's international and domestic extra-California aspirations while
 ignoring that WCI, Inc. provides, and has provided, services to other jurisdictions without linking
 such services to those of California.

1 emissions trading program as established in the 2017 Agreement. (*See* ECF No. 78-1 at 89-90, WCI
 2 Fact No. 7.) However, the WCI, Inc. Defendants are indisputably not parties to the Agreement.
 3 (ECF No. 78-1, at 89-90, WCI Fact Nos. 13-14.)

4 **C. California Does Not Control WCI, Inc.**

5 No participating jurisdiction, including California, controls WCI, Inc.’s Board of Directors
 6 (“Board”) or exercises more control over the Board than any other participating jurisdiction. (ECF
 7 No. 46-2, Ex. B at 6.) Each participating jurisdiction appoints two individuals to the Board. (*Id.*)
 8 As such, California representatives account for *only two of the six members* on the Board. (*Id.*;
 9 Health and Safety Code §12894(b) (2020).) Moreover, with respect to their service on the WCI,
 10 Inc. Board, each of the WCI, Inc. board members⁶ owe fiduciary duties and obligations to the
 11 corporation, and any decision made as a board member must be independent from their affiliation
 12 with the State of California. Del. Code tit. 8, § 141 (2020); *Skeen v. Jo-Ann Stores, Inc.*, 750 A.2d
 13 1170, 1172 (Del. 2000) (“Directors of Delaware corporations are fiduciaries who owe duties of due
 14 care, good faith and loyalty to the company and its stockholders.”); *Italo-Petroleum Corp. of Am.*
 15 *v. Hannigan*, 40 Del. 534, 549-50 (1940) (“Public policy demands of directors an undivided loyalty
 16 to the corporation to the end that there shall be no conflict between duty and self-interest.”); *Guth*
 17 *v. Loft, Inc.*, 5 A.2d 503, 510 (“Corporate officers and directors are not permitted to use their
 18 position of trust and confidence to further their private interests.”). Even if these board members
 19 reported back to California the activities of the WCI, Inc. Board, allowing any response by the state
 20 to influence their decision-making for the entity would constitute a breach of fiduciary duty. *Ibid.*
 21 And, notably, Plaintiff has established no such breach.

22 **III. LEGAL ARGUMENTS**

23 **A. Plaintiff Lacks Standing as to the WCI, Inc. Defendants.**

24 It is a long-settled principle that facts supporting Article III jurisdiction “must affirmatively
 25 appear in the record” by one named plaintiff *as to each defendant and each claim*. *Mansfield C.*

26 ⁶ While Ms. Nichols is referred to herein as a WCI, Inc. board member, she is sued in her capacity
 27 as Vice Chair of WCI, Inc., an officer position under WCI, Inc.’s Bylaws, as well as in her capacity
 28 as a board member. (ECF No. 78-1 at 90, WCI’s Fact No. 6.) As such, for purposes of this Reply,
 all references to the WCI, Inc. board members include Ms. Nichols in her capacity as Vice Chair
 and an officer of WCI, Inc.

1 & *L.M.R. Co. v. Swan*, 111 U.S. 379, 382 (1884); *King Bridge Co. v. Otoe County*, 120 U.S. 225,
2 226 (1887); *Golden Gate Transactional Indep. Serv., Inc. v. California*, 2019 WL 4222452, at *6
3 (C.D. Cal. May 1, 2019); *see also In re Carrier IQ, Inc.*, 78 F. Supp. 3d 1051, 1069 (N.D. Cal.
4 2015) (“to hold each defendant in the case, there must be at least one named plaintiff with standing
5 to sue said defendant”).

6 At a minimum, the party invoking federal jurisdiction bears the burden of establishing three
7 elements. *See FW/PBS, Inc. v. Dallas*, 493 U.S. 215, 231 (1990); *Warth v. Seldin*, 422 U.S. 490,
8 508 (1975). First, the plaintiff must have suffered an “injury in fact”—an invasion of a legally
9 protected interest which is (a) concrete and particularized, *see Allen v. Wright*, 468 U.S. 737, 756
10 (1984); *Warth*, 422 U.S. at 508; *Sierra Club v. Morton*, 405 U.S. 727, 740-41, n. 16 (1972); and (b)
11 “actual or imminent, not ‘conjectural’ or ‘hypothetical,’” *Whitmore v. Arkansas*, 495 U.S. 149, 155
12 (1990) (*quoting Los Angeles v. Lyons*, 461 U.S. 95, 102 (1983)). Second, there must be a causal
13 connection between the injury and the conduct complained of—the injury has to be “fairly ...
14 trace[able] to the challenged action of the defendant, and not ... th[e] result [of] the independent
15 action of some third party not before the court.” *Simon v. Eastern Ky. Welfare Rights Org.*, 426
16 U.S. 26, 41-42 (1976). Third, it must be “likely,” as opposed to merely “speculative,” that the injury
17 will be “redressed by a favorable decision.” *Id.* at 38.

18 Since they are not mere pleading requirements but rather an indispensable part of the
19 plaintiff’s case, each element must be supported in the same way as any other matter on which the
20 plaintiff bears the burden of proof, *i.e.*, with the manner and degree of evidence required at the
21 successive stages of the litigation. *See Lujan v. Nat’l Wildlife Fed’n*, 497 U.S. 871, 883-89 (1990);
22 *Gladstone v. Vill. of Bellwood*, 441 U.S. 91, 114-15, n.31 (1979); *Simon*, 426 U.S. at 45, n.25;
23 *Warth*, 422 U.S. at 527, n.6. In response to a summary judgment motion, ***the plaintiff*** cannot rest
24 on “mere allegations,” but ***must “set forth” by affidavit or other evidence “specific facts,”*** Fed. R.
25 Civ. P. 56(e) (emphasis added), which for purposes of the summary judgment motion will be taken
26 to be true. And at the final stage, those facts (if controverted) must be “supported adequately by the
27 evidence adduced at trial.” *Gladstone*, 441 U.S. at 115, n.31.

28 Plaintiff fails to meet its burden on summary judgment as to standing. Plaintiff’s brief is

1 filled with speculation and conjecture as to WCI, Inc.’s role with respect to the linkage between
2 California and Quebec – ignoring well-established facts to the contrary. Its argument that the WCI,
3 Inc. Defendants cause injury to Plaintiff that can be redressed by this Court lacks any support in
4 the record. Instead, Plaintiff relies heavily on the linkage between California and Quebec and turns
5 a blind eye to Quebec and Nova Scotia’s ability to likewise act in concert to control WCI, Inc.
6 without any participation from California. Finally, while Plaintiff initially asserts that the
7 “Agreement and Arrangements injure the United States” (ECF No. 78 at 15:12-13), it concludes by
8 stating that the WCI, Inc. Defendants only implement the Agreement and Arrangements such that
9 their actions fall outside the alleged unconstitutional “Agreement and Arrangements” themselves.

10 Therefore, because Plaintiff has failed to set forth any specific facts by way of affidavit or
11 other evidence to establish standing, Plaintiff has failed to meet its burden to defeat the WCI, Inc.
12 Defendants’ Cross-Motion for Summary Judgment.

13 **B. The First and Second Causes of Action for Violation of the Treaty and Compact**
14 **Clauses as to the WCI, Inc. Defendants Fail as a Matter of Law.**

15 Plaintiff’s position seeks to have this Court to take unprecedented action by creating new
16 liabilities for private persons out of whole cloth by extending the Treaty and Compact Clauses to
17 such entities and individuals through application of the state actor and instrumentality of the state
18 doctrines that courts have only ever applied in the context of the Fourteenth Amendment and 42
19 U.S.C. § 1983. Indeed, Plaintiff’s brief highlights this fact (ECF No. 78 at 18:7-18). *See Evans v.*
20 *Newton*, 382 U.S. 296, 298-99, 301-02 (1966) (addressing state actor analysis in context of
21 Fourteenth Amendment); *West v. Atkins*, 487 U.S. 42, 55-56 (1988) (addressing state actor analysis
22 in context of § 1983 claim). Nowhere does Plaintiff provide legal authority to establish that these
23 doctrines apply to claims under the Article I Treaty or Compact Clauses – much less provide any
24 rational basis for extending such doctrines to the circumstances at issue here. The WCI, Inc.
25 Defendants urge the Court not to extend the state actor or instrumentality of the state analysis
26 beyond their intended purpose and long-standing legal authority limiting their application to claims
27 under the Fourteenth Amendment and Section 1983.

1 1. Plaintiff’s Treaty and Compact Clause Claims Fail Because the WCI, Inc.
2 Defendants Are Not States.

3 Plaintiff fails to identify any legal authority to support a cause of action for violation of the
4 Treaty or Compact Clauses against a non-state. Both the Treaty and the Compact Clauses are
5 directed *against States* and agreements entered into *by States*, not private actors. *See* U.S. Const.,
6 art. I, § 10, cl. 1 (“No *State* shall enter into any Treaty, Alliance or Confederation...” (emphasis
7 added)); *id.*, art. I, § 10, cl. 3 (“No *State* shall, without the Consent of Congress...enter into any
8 Agreement or Compact...with a foreign Power...” (emphasis added)). Indeed, a treaty is defined
9 as a contract made between *two or more nations*. *See, e.g., Trans World Airlines, Inc. v. Franklin*
10 *Mint Corp.*, 466 U.S. 243, 253 (1984); *Head Money Cases*, 112 U.S. 580, 598 (1884) (“A treaty is,
11 of course, ‘primarily a compact between independent *nations*.’” (emphasis added)). The Compact
12 Clause was designed to regulate cooperation among the states, originally targeting state border
13 issues and later targeting interstate agreements. *See, e.g., Virginia v. Tennessee*, 148 U.S. 503, 519
14 (1893); *United States Steel Corp. v. Multistate Tax Comm’n*, 434 U.S. 452, 471 (1978). Ultimately,
15 no case analyzing the Treaty or the Compact Clause has expanded either to apply to state actors or
16 instrumentalities of a state, including a private, non-profit corporation or its board members.

17 Therefore, because they are not states, WCI, Inc. and its board members cannot be held
18 liable for a violation of the Article I Treaty or Compact Clauses as a matter of law – regardless of
19 Plaintiff’s attempt to make them state actors or instrumentalities of the State of California.

20 2. The WCI, Inc. Defendants Are Not State Actors or Instrumentalities of the State of
21 California Should the Court Employ Such Analysis.

22 As an initial matter, it is presumed that private conduct does not constitute governmental
23 action. *Sutton v. Providence St. Joseph Med. Ctr.*, 192 F.3d 826, 835 (9th Cir. 1999). Plaintiff
24 provides no legal authority or evidence to rebut this presumption. Instead, Plaintiff makes a blanket
25 statement that WCI, Inc. providing services as outlined above makes the WCI, Inc. Defendants an
26 “instrumentality of the state” – while also using this term interchangeably with the term “state
27 actor.” Aside from general conclusory statements, Plaintiff has failed to put forth any evidence that
28 supports its assertion that the WCI, Inc. Defendants are either instrumentalities of the state or state

1 actors. Indeed, none of the cases Plaintiff cites apply to the instant case. *See, e.g., Evans*, 382 U.S.
2 at 298-99, 301-02 (Fourteenth Amendment); *West*, 487 U.S. at 55-56 (§ 1983).

3 WCI, Inc.’s actions are not fairly attributable to California. *See Nat’l Collegiate Athletic*
4 *Ass’n v. Tarkanian*, 488 U.S. 179, 193 (1988) (rejecting state actor argument where “the source of
5 the [challenged action] was the collective membership, speaking through an organization that is
6 independent of any particular State.”).⁷ As the Supreme Court has indicated, where a private actor
7 is not a “surrogate for ... one State,” the “connection with [that State is] too insubstantial to ground
8 a state-action claim.” *Brentwood Acad. v. Tennessee Secondary Sch. Athletic Ass’n*, 531 U.S. 288,
9 297-98 (2001) (reiterating that state action may be found where private organization’s “membership
10 consisted *entirely* of institutions *located within the same State*” (emphasis added)). Indeed,
11 Plaintiff’s conspiracy theory that two jurisdictions can collaborate and thereby transform a private
12 actor into a state actor for both jurisdictions is unsupported by precedent. This is particularly true
13 where “[f]oreign governments, like the government of Japan, are not bound by the U.S. or
14 California Constitutions.” *Ohno v. Yasuma*, 723 F.3d 984, 993 (9th Cir. 2013). Thus, Plaintiff’s
15 arguments that somehow California and Quebec together holding a majority interest on the WCI,
16 Inc. Board, putting aside for now each board member’s fiduciary duties, does not transform the
17 entity and its California board members into state actors.

18 WCI, Inc. derives its budget from “payments for services rendered,” not by stepping into
19 California’s shoes; WCI, Inc.’s functions include operating an instrument tracking system and
20 auctions, not making rules and enforcing regulations; and WCI, Inc. and its contractors, not its
21 board members, perform those administrative and technical services. (*See* ECF No. 12-2, Ex. 26;
22 ECF No. 49-3, Ex. 12 at 132-39 (describing “administrative support provided ... through the use
23 of specialized contractors”); ECF No. 78-1 at 56, California’s Fact No. 42; ECF No. 78-1 at 89-90,

24 ⁷ In *Tarkanian*, the plaintiff attempted to sue a private actor *in addition to an actual state entity* for
25 claims under the Fourteenth Amendment and Section 1983. *Tarkanian*, 488 U.S. at 193, 194. The
26 Court assessed whether a state entity’s embrace of a private entity’s rule and recommendation could
27 transform such rule and recommendation into state action and ultimately held that it could not.
28 Here, there is not even a recommendation or rule from WCI, Inc. that California has embraced.
Thus, there is even less basis to find state action by a private actor here. And, no case supports
Plaintiff’s theory that everyone who helps the State implement the State’s decision/action is a state
actor subject to constitutional liability, *alongside the State to whom the challenged conduct is*
already indisputably attributed.

1 WCI's Fact Nos. 1, 8-9, 13-14). *See also* Cal. Code of Regs., tit. 17, §§ 95940, 95943(a). In
2 addition, of course, “[a]cts of ... private contractors do not become acts of the government by
3 reason of their significant or even total engagement in performing public contracts.” *Rendell-Baker*
4 *v. Kohn*, 457 U.S. 830, 841 (1982). Indeed, that is “a dubious proposition that would convert every
5 contractor into a state actor.” *Ochoa v. Serv. Employees Int'l Union Local 775*, No. 2:18-CV-0297-
6 TOR, 2019 WL 1601361, at *5 (E.D. Wash. Apr. 15, 2019).

7 As set forth in detail above, while WCI, Inc. provides a software platform that can be
8 utilized to effectuate the intent of the Agreement, it does not in fact administer the Agreement –
9 *i.e.*, the WCI, Inc. Defendants do not control the compliance instruments auctioned or tracked on
10 behalf of any participation jurisdiction(s). (*See* ECF No. 78-1 at 89-90, WCI's Fact Nos. 1, 7-10.)
11 Instead, the participating jurisdiction determines the scope of services WCI, Inc. will provide to it,
12 including the compliance instruments to be tracked or auctioned and whether the auction will be
13 cross-jurisdictional or internal to the jurisdiction. The WCI, Inc. Defendants have set forth
14 substantial evidence to show that WCI, Inc. is a service that is offered to California, among other
15 jurisdictions, and can be utilized by any cap-and-trade program. Further, WCI, Inc. was established
16 as an independent entity unrelated to the regulatory and statutory scheme of California. Although
17 California regulations may set forth guidelines and requirements, those same regulations do not
18 affect how WCI, Inc. operates or the services it offers to other jurisdictions.

19 The WCI, Inc. board members also have separate and distinct obligations to WCI, Inc. under
20 Delaware law that prohibit them from allowing extraneous pressures or incentives from affecting
21 their decisions with respect to WCI, Inc. In their capacities as board members, each owe distinct
22 fiduciary duties and obligations to WCI, Inc., and any decisions made in their capacity as WCI, Inc.
23 board members must be made without regard to their affiliation with the State of California. Del.
24 Code tit. 8, § 141 (2020); *Skeen*, 750 A.2d at 1172; *Italo-Petroleum Corp. of Am.*, 40 Del. At 549-
25 550; *Guth*, 5 A.2d at 510. The record is devoid of any facts regarding the role of the WCI, Inc.
26 board members in the linkage between the respective cap-and-trade programs of California and
27 Quebec. There is no evidence that these individuals participated in any of the challenged activities
28

1 or even had the ability to do so. WCI, Inc. is designed so that no participating jurisdiction, including
2 California, has more control over its actions than any other jurisdiction.

3 Plaintiff has failed to, and cannot, establish its constitutional claims against the WCI, Inc.
4 Defendants because they are not States, instrumentalities of the state or “state actors” as advanced
5 by Plaintiff.

6 **C. Nichols and Blumenfeld, in Their Official Capacities as a WCI, Inc. Board Members,**
7 **Did Not Enter into an Unconstitutional Treaty or Compact.**

8 The WCI, Inc. board members are entitled to summary judgment as to the first and second
9 causes of action because they did not enter into the alleged unconstitutional “Agreement and [now]
10 Arrangements.” Plaintiff has proffered no evidence to support its standing to bring claims against
11 the WCI, Inc. board members – much less to maintain a Treaty or Compact Clause claim against
12 them. *See Sacks v. Office of Foreign Assets Control*, 466 F.3d 764, 774 (9th Cir. 2006). Plaintiff
13 does not, and cannot, connect the WCI, Inc. board members in their capacities as such to any
14 allegedly wrongful acts. Indeed, as discussed above, corporate officers and directors are not
15 permitted to use their position of trust and confidence to further their private interests. *Guth*, 5 A.2d
16 at 510. In this regard, directors are not permitted to vote on matters in which they are interested.
17 Del. Code tit. 8, § 144; *Aronson v. Lewis*, 473 A.2d 805, 816 (Del. 1984). Because Plaintiff does
18 not proffer any evidence of misconduct on behalf of the WCI, Inc. board members, as described in
19 more detail above, they are entitled summary judgment.

20 **IV. CONCLUSION**

21 Plaintiff’s Motion for Summary Judgment should be denied, and judgment should be
22 entered for Defendants on Plaintiff’s Article I Treaty and Compact Clause claims—Plaintiff’s first
23 and second causes of action.

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