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NORTH CAROLINA
ORANGE COUNTY

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
24CV003385-670

THE TOWN OF CARRBORO, NORTH)
CAROLINA,)
)
Plaintiff,)
)
v.)
)
DUKE ENERGY CORPORATION,)
)
)
Defendant.)
_____)

**PLAINTIFF TOWN OF CARRBORO’S
BRIEF IN RESPONSE TO
DEFENDANT DUKE ENERGY
CORPORATION’S MOTION TO
DISMISS UNDER N.C. RULE 12(b)(1)**

INTRODUCTION

Defendant Duke Energy Corporation’s (“Duke”) Motion to Dismiss Under Rule 12(b)(1) (the “Motion”) requests that this Court dismiss claims that were never asserted in Plaintiff the Town of Carrboro’s (“Carrboro”) Complaint. Attempting to recast the allegations of the Complaint into a lawsuit that Carrboro has not actually pled, Duke urges the Court to dismiss this action as nonjusticiable. (ECF No. 17, Duke’s Brief in Support of Motion (“Motion”) at 8). But the Court could conclude that this case is nonjusticiable only by *ignoring* Carrboro’s actual Complaint and instead relying on Duke’s inaccurate characterizations of the case Carrboro *actually* filed.

Far from nonjusticiable, this Court is well versed with the adjudication of common law tort actions involving deceptive conduct and the damages arising therefrom. Indeed, this case involves garden-variety common law claims arising out of Duke’s widespread deception campaigns about its fossil-fuel products and climate change. Here, Carrboro seeks monetary damages (and *only* monetary damages) for the concrete economic losses flowing from Duke’s deception campaigns.

Contrary to Duke’s assertions otherwise, resolution of this action does not require that the Court regulate, or even address, Duke’s emissions. Carrboro does not seek an injunction to reduce

Duke’s emissions or fossil-fuel sales. In short, Carrboro’s Complaint is not regulatory in nature—to the contrary, it is premised upon well-established tort principles commonly adjudicated by this Court. Because “[t]he plaintiff is the master of its complaint,” *Ferguson Enters., LLC v. Wilkie*, 2024 NCBC LEXIS 24, *4, 2024 NCBC Order 15 (N.C. Super. Ct. Feb. 24, 2024)—and thus, in resolving Duke’s Motion, the Court must both “view the allegations [of the complaint] as true and the supporting record in the light most favorable to the non-moving party[.]” *Mangum v. Raleigh Bd. of Adjustment*, 362 N.C. 640, 644, 669 S.E.2d 279, 283 (2008)—Duke’s Motion must be denied.

Duke’s jurisdictional arguments are likewise flawed. For example, no appellate court has ever granted a motion to dismiss based upon the political question doctrine in a climate-change action; rather, the argument has been consistently rejected. *E.g.*, *Connecticut v. American Electric Power Co.*, 582 F.3d 309 (2d Cir. 2009). And while Duke claims the N.C. Constitution somehow delegates the issues here “only to the General Assembly,” Motion at 14, Duke cites only to generalized utility regulation and environmental principles, while ignoring the constitutional provision directly on point: “All courts shall be open; every person for an injury done him to his lands, goods, person, or reputation shall have remedy by due course of law.” N.C. Const. art. I, § 18.

Duke’s standing argument is even more fatally flawed. There is no “case-or-controversy requirement” in the N.C. Constitution, and therefore, a plaintiff asserting a claim at common law need only allege “the infringement of a legal right” to confer standing. *Comm. to Elect Dan Forest v. Emps. Pol. Action Comm.*, 376 N.C. 558, 599, 607-08, 853 S.E.2d 698, 728, 733 (2021). Carrboro’s Complaint, which asserts traditional common law causes of action and describes with

particularly Carrboro's concrete economic losses proximately caused by Duke's deceptions, clearly satisfies North Carolina's relaxed standing requirements at the pleadings stage.

Fundamentally, Duke's Motion should be denied because there is no legislative or regulatory body that has authorized deceptions or insulated a tortfeasor, such as Duke, from liability for its deceptive business practices. For decades, courts throughout the country have repeatedly declined to dismiss civil actions alleging deceptive conduct committed by businesses engaged in highly regulated activities, such as the sale and marketing of tobacco products, opioids, MTBE, and other products. Following suit, the majority of courts have denied motions to dismiss where plaintiffs, such as Carrboro, have asserted common law tort or state law claims based upon an energy company's deceptions concerning fossil fuels and climate change. *District of Columbia v. Exxon Mobil Corp.*, No. 2020-CA-002892 (Super. Ct. D.C. April 21, 2025) (Exhibit A hereto);¹ *Minnesota v. American Petroleum Institute*, No. 62-CV-20-3837 (Minn. Dist. Ct. Feb. 14, 2025) (Exhibit B hereto); *Vermont v. Exxon Mobil Corp.*, No. 21-CV-02778 (Vt. Super. Ct. Dec. 11, 2024) (Exhibit C hereto); *County of Boulder v. Suncor Energy (U.S.A.), Inc.*, No. 2018-CV-30349 (Colo. Dist. Ct. June 21, 2024) (Exhibit D hereto); *Delaware ex rel. Jennings v. BP America Inc.*, No. N20C-09-097, 2024 Del. Super. LEXIS 25 (Del. Super. Ct. Jan. 9, 2024); *City & Cnty. of Honolulu v. Sunoco LP*, 153 Haw. 326, 537 P.3d 1173 (2023); *Massachusetts v. Exxon Mobil Corp.*, No. 1984-CV-03333, 2021 Mass. Super. LEXIS 471 (Mass. Super. Ct. June 22, 2021); *Municipalities of Bayamón v. Exxon Mobil Corp.*, No. 22-1550, 2025 U.S. Dist. LEXIS 36750 (D.P.R. Feb. 20, 2025).

¹ Pursuant to N.C. Business Court Rule 7.5, Carrboro's present Brief attaches copies of decisions that are not included in sources such as LexisNexis.

Our Supreme Court has held that the judiciary has both “the power and *duty*” to adjudicate cases for which there is jurisdiction. *Comm. to Elect Forest*, 376 N.C. at 607, 853 S.E.2d at 733 (emphasis added). This Court should therefore reject Duke’s misguided argument that traditional common law tort claims are somehow nonjusticiable.

LEGAL STANDARD

As a “notice pleading state,” North Carolina only requires that a complaint “give sufficient notice of the events or transactions which produced the claim to enable the adverse party to understand its nature and basis . . .” *Cato Corp. v. Zurich Am. Ins. Co.*, 386 N.C. 667, 671-72, 909 S.E.2d 144, 148 (2024). As our Supreme Court emphasized recently, this “system of notice pleading affords a sufficiently liberal construction of complaints so that *few fail to survive a motion to dismiss.*” *Lannan v. Bd. of Governors*, 2025 N.C. LEXIS 161, *13 (Mar. 21, 2025) (emphasis added).

Accordingly, after viewing the facts alleged in the Complaint “in the light most favorable to” Carrboro, Duke’s Motion must be denied “unless it appears *to a certainty* that [Carrboro] is entitled to no relief under any state of facts.” *Est. of Graham v. Lambert*, 385 N.C. 644, 656, 898 S.E.2d 888, 899 (2024) (emphasis added). This standard applies regardless of whether the motion to dismiss is “for lack of subject matter jurisdiction pursuant to Rule 12(b)(1) or for failure to state a claim . . . pursuant to Rule 12(b)(6).” *Soc’y for Hist. Pres. of Twentysixth N. Carolina Troops v. City of Asheville*, 385 N.C. 744, 748, 898 S.E.2d 760, 763 (2024).

STATEMENT OF THE CASE

On December 4, 2024, Carrboro filed the above-captioned civil action against Duke. (ECF No. 2, Complaint (“Compl.”)). The Complaint asserts five claims based upon well-established

common law torts: public nuisance, private nuisance, trespass, negligence, and gross negligence. Compl. ¶¶ 206-72.

STATEMENT OF FACTS

I. Carrboro Is Particularly Susceptible to Climate Impacts.

Carrboro is a municipal corporation organized under Chapter 160A of the General Statutes. Compl. ¶ 12. Carrboro owns and operates substantial real property and is responsible for maintaining it. *Id.* ¶ 13; *id.* ¶¶ 14-17 (“Carrboro owns or maintains approximately 47 miles of roads, 41 miles of sidewalks, and 872 curb ramps,” “numerous buildings,” “parks and other public recreational amenities,” in addition to “substantial stormwater infrastructure that is necessary to manage” flooding). Carrboro alleged that these properties are susceptible to “damage[] by weather events such as hurricanes, substantial rain events, extreme temperature changes, and others.” *Id.* ¶ 18.

Carrboro is located within the Piedmont, which experiences particularly profound climate change impacts. For example, Carrboro alleged that the “overall warming trend in North Carolina . . . is expected to continue, and by the end of this century, annual average temperature increases relative to the recent climate (1996–2015) for the Piedmont,” including Carrboro, are projected to be as high as 6°–10°F. *Id.* ¶ 40.

II. For Decades, Duke Has Understood How Climate Change Harms Communities Like Carrboro.

Duke is one of the world’s largest energy companies. Compl. ¶ 21. While Duke owns several regulated utility companies, its involvement with fossil fuels expands far beyond the utility industry, *id.* ¶¶ 21-22, including drilling for and selling natural gas, *id.* ¶ 138. Carrboro’s Complaint repeatedly describes Duke as profiting from a “fossil fuel-based business model.” *E.g., id.* ¶¶ 61, 175, 266-67.

Duke has been fully aware of the dangers of fossil fuels since the 1960s. *Id.* ¶¶ 47-59. A prominent example involves a 1968 meeting attended by Duke’s then-CEO, W.B. McGuire, during which the then-chair of the Atomic Energy Commission touted the benefits of nuclear power because “‘nuclear power does not add’ carbon dioxide to the atmosphere, while ‘many scientists see its increase in the atmosphere as a long-term problem of major consequence.’” *Id.* ¶ 49. The Complaint details numerous similar instances where Duke was involved with projects that unambiguously confirmed the dangers of fossil-fuel products and the realities of climate change. *Id.* ¶¶ 52-53 (industry journal discussing “profound climate change” and resulting “global physical and economic dislocation”).

In the 1980s, Duke became aware that the *public’s* potential understanding of climate science “may prove to be a showstopper in terms of” fossil fuel use. *Id.* ¶ 55 (quoting an industry report stating that “environmental research on accumulation of CO₂ in the atmosphere . . . has the potential for substantially limiting expanded use of fossil fuels”). By 1987, Duke’s climate science expertise had grown to the point where it knew *to almost the month* precisely when greenhouse gas concentrations in the atmosphere would reach 400 parts per million more than twenty-five years later. *Id.* ¶¶ 56-59.

III. Rather Than Disclose the Truth, Duke Engaged in Calculated Deception Campaigns.

Rather than share this knowledge—which would have allowed communities like Carrboro to better prepare, while also leading to a more rapid and economically achievable transition away from the fossil-fuel emissions driving climate change—Duke launched a series of protracted deception campaigns. Compl. ¶¶ 67-136. Duke engaged in this deceptive conduct for purposes of preserving its status as one of the world’s largest and most profitable energy companies. *Id.* ¶¶ 21, 61, 111, 265.

The Complaint details many aspects of these deception campaigns, including: “[d]ownplaying the seriousness of fossil fuel emissions while knowing that the dangers of such emissions were far more serious than represented”; “[l]aunching coordinated public relations campaigns designed to convince the public that fossil fuel emissions did not pose serious risk”; “[u]sing industry-funded, fringe ‘scientists’ to create a veneer of credibility to the knowingly false claims about fossil fuel emissions touted by these scientists”; “[q]uestioning, undermining, downplaying, and disputing the reality of anthropogenic climate change and the dangers of fossil fuel emissions while knowing the true facts to be otherwise”; and many other acts of deception. *Id.* ¶ 68(a)-(l).

Carrboro’s Complaint provides specific examples for each category of deceptive conduct described above. *Id.* ¶¶ 67-136. In one example, Duke arranged for fringe climate “scientists” to release statements claiming that the greenhouse gas effect is a “natural and beneficial phenomenon” that would “lengthen the growing season” for crops and have other “benefits.” *Id.* ¶ 100. Duke relied on these bunk skeptics to form purportedly scientific groups, *id.* ¶ 101, which said things like, “it would be easier to believe in the flat earth theory than in the threat of a greenhouse catastrophe.” *Id.* ¶ 108. This approach of creating fake “scientific” organizations and relying on spurious scientists followed the same playbook used by cigarette companies who paid scientists to undermine the scientific connection between tobacco and diseases, *id.* ¶ 101—for which those companies were ultimately held liable. *See, e.g., United States v. Philip Morris, USA, Inc.*, 449 F. Supp. 2d 1 (D.D.C. 2006) (finding tobacco companies responsible for deceptions including their reliance on fake scientists).

The Complaint further alleges that Duke’s deceptions about its fossil fuel-based business model continue today. Compl. ¶¶ 159-76. According to Carrboro’s Complaint, “[t]hese

misrepresentations mislead customers into transacting business with Duke and thereby unknowingly supporting its fossil fuel business model.” *Id.* ¶ 175.

IV. Duke’s Deceptions Materially Exacerbated Climate Change.

Carrboro’s Complaint alleges that Duke’s deceptions played a material role in causing climate change in order to preserve its significant fossil fuel-based business model. Compl. ¶¶ 21, 61, 111, 265. Hence, Duke became a prominent leader of “a conspiracy of deception about the causes and consequences of climate change that has materially delayed the transition away from fossil energy sources and thereby significantly worsened the climate emergency.” *Id.* ¶ 5. “Had substantial efforts to reduce greenhouse gas emissions began decades ago—when Duke already understood the dangers of climate change—then these harms would have been avoided or at least materially mitigated.” *Id.* ¶ 147; *see also id.* ¶ 150.

The Complaint alleges that in May 2008, a lobbying and advertising group, of which Duke was a member and supporter, “launched a widespread public campaign in favor of coal-fired generation and against efforts to reduce reliance upon coal.” *Id.* ¶¶ 122-23, 126. A subsequent poll “revealed that 69% of those polled agreed that coal was ‘a fuel for America’s future,’ which was an increase from 45% just two years before.” *Id.* ¶ 128.

V. Carrboro Has Incurred Direct and Substantial Damages as a Result of the Worsening Climate Crisis.

Carrboro has incurred direct, substantial damages resulting from climate change. These damages are *not* derivative or part of Carrboro’s representative role on behalf of its residents. Instead, these direct damages are to Carrboro’s roadways, stormwater control measures, and buildings, which are being damaged by the “recurring invasions” caused by Duke’s deceptive conduct, *id.* ¶¶ 192-202, 205, amounting to “millions of dollars” in damages, *id.* ¶¶ 194, 198.

ARGUMENT

Duke’s Motion should be denied for at least three reasons. *First*, it is fundamental that “[t]he plaintiff is the master of its complaint and free to choose which causes of action it will bring,” *Ferguson Enters., LLC*, 2024 NCBC LEXIS at *4, and therefore, this Court should reject Duke’s attempt to recast Carrboro’s deception-based tort claims as regulatory in nature. *Second*, Duke’s political question defense has never been adopted by any appellate court in the country and instead has been thoroughly discredited. *And third*, Duke’s standing defense has likewise been repeatedly rejected and is in fact based upon an outdated statement of the law that has been recently disavowed—at least *twice*—by the N.C. Supreme Court.

I. The Court Must Reject Duke’s Efforts to Recast Carrboro’s Allegations as Regulatory in Nature.

All of Duke’s arguments are constructed upon a faulty foundation: namely, Duke asks this Court to construe Carrboro’s allegations as some far-reaching effort to regulate emissions. *E.g.*, Motion at 8 (claiming that Carrboro seeks “authority to regulate electric utilities’ rates, emissions, or energy generation portfolios”). Like so many other courts around the country, this Court should reject Duke’s efforts to recast Carrboro’s Complaint into something that it is not.

A. Carrboro’s Claims Are Based Upon Duke’s Deceptions.

In the Complaint, Carrboro explicitly disavowed the very recharacterization requested by Duke: “This civil action does not seek any limitations on Duke’s emissions or operations, but only seeks to hold the company responsible for the damages proximately caused by its tortious conduct.” Compl. ¶ 11. Similarly, Carrboro’s Complaint explicitly stated that the source of its damages is Duke’s deception campaigns. *Id.* ¶ 1 (“In this civil action, [Carrboro] seeks compensation for the damages that it has incurred . . . as the proximate result of [Duke’s] knowing deception campaign[.]”). These allegations, which must be accepted as true, are sufficient by

themselves to deny Duke’s Motion. *Fox v. Johnson*, 243 N.C. App. 274, 287, 777 S.E.2d 314, 323 (2015) (the allegations in the complaint must be “treated as true” and “liberally construed”).

In addition to the paragraphs of the Complaint quoted above, which accurately frame the issues in this action, any fair review of the overall factual allegations in the Complaint likewise establishes that Carrboro’s common law claims are based upon Duke’s deceptions, not its regulated conduct. Compl. pp 16-37, 43-48. As the master of its complaint, Carrboro is empowered to identify the claims it will or will not assert. *E.g.*, *Makah Indian Tribe v. Exxon Mobil Corp.*, No. 24-157, 2025 U.S. Dist. LEXIS 56448, *27 (W.D. Wash. Mar. 26, 2025) (describing plaintiffs “[a]s architects of their complaint”).

For these reasons, numerous other courts considering climate-deception actions have rejected energy companies’ efforts to recast a plaintiff’s claims as regulatory. *E.g.* *Honolulu*, 153 Haw. at 355, 537 P.3d at 1202 (“But the question before the court is not whether a potential damages award in this case could regulate air pollution. If that were true, then any case with a potentially large damage award must be dismissed . . .”); *id.* at 354 (“Numerous courts have rejected similar attempts by oil and gas companies to reframe complaints alleging those companies knew about the dangers of their products and failed to warn the public or misled the public about those dangers.”); *Vermont v. Exxon Mobil Corp.*, No. 21-CV-260, 2024 U.S. Dist. LEXIS 20497, *20 (D. Vt. Feb. 6, 2024) (“The requested relief relates to the dissemination of information, and compliance would require nothing of Defendants with respect to their continued energy production.”); *Mayor & City Council of Baltimore v. BP P.L.C.*, 31 F.4th 178, 233-34 (4th Cir. 2022); *Minnesota v. American Petroleum Institute*, No. 20-1636, 2021 U.S. Dist. LEXIS 62653, *36 (D. Minn. Mar. 31, 2021) (“[T]he State’s action here is far more modest than the caricature Defendants present.”); *Massachusetts v. Exxon Mobil Corp.*, 462 F. Supp. 3d 31, 44 (D. Mass.

2020); *Boulder*, No. 2018-CV-30349 at p 39 (“In addressing similar climate-change related litigation, courts from other jurisdictions have likewise concluded that the litigation is not aimed at controlling fossil fuel emissions or amending federal energy policy, but rather concern” the deception campaigns contributing to plaintiffs’ injuries).

While the Complaint occasionally references Duke’s substantial emissions or its regulated utilities’ fossil-fuel portfolios, Compl. ¶¶ 137-45, these allegations establish Duke’s motive to deceive the public about climate change and thereby preserve its business model. *Id.* ¶ 175 (“These misrepresentations mislead customers into transacting business with Duke and thereby unknowingly supporting its fossil fuel business model.”). Indeed, Duke’s portfolio and emissions were made possible only by virtue of Duke’s widespread deception campaigns. *Id.* ¶ 150. This does not mean that Carrboro’s action seeks to regulate emissions. *See, e.g., Minnesota*, No. 62-CV-20-3837 at p 24 (“[w]ithin the claims in the Complaint, there is no attempt to regulate transboundary pollution”); *Honolulu*, 153 Haw. at 355, 537 P.3d at 1202-03 (explaining that a “suit does not regulate a matter simply because it might have an impact on that matter”).

Rather, Carrboro seeks to hold Duke responsible for the inevitable consequences of its deceptions: a delayed transition to renewable energy with concomitant massive emissions, resulting in climate change and thereby causing Carrboro’s damages. Emissions by Duke and others are part of the causal chain, but Duke’s deceptions are the source of its liability. *See, e.g., Hairston v. Alexander Tank & Equipment Co.*, 310 N.C. 227, 233, 311 S.E.2d 559, 565 (1984) (defendant may be liable where plaintiff’s injuries would not have occurred but for a “natural and continuous sequence” stemming from defendant’s actions); *see also Municipalities of Bayamón*, 2025 U.S. Dist. LEXIS 36750 at *99 (“the culprit” for which energy company defendants may be held responsible “is Defendants’ words, not their emissions”).

B. An Overlapping Regulatory Scheme Does Not Immunize a Tortfeasor from Liability.

Duke’s discussions of the Clean Air Act, the N.C. Utilities Commission (“NCUC”), and other governmental agencies are simply a smokescreen designed to distract the Court from Duke’s actual conduct at issue here. Motion at 6-9. A defendant is not absolved from tortious, deceptive conduct simply because its business activities are subject to a statute or regulatory scheme. Courts have long imposed liability for deceptive marketing upon businesses involved in even highly regulated activities, such as tobacco, opioids, and MTBE. *See, e.g., Shaw v. Brown & Williamson Tobacco Corp.*, 973 F. Supp. 539 (D. Md. 1997) (tobacco); *In re Nat’l Prescription Opiate Litig.*, 440 F. Supp. 3d 773 (N.D. Ohio 2020) (opioids); *Maryland v. Exxon Mobil Corp.*, 406 F. Supp. 3d 420 (D. Md. 2019) (MTBE).

That is precisely why courts in climate-deception suits have *uniformly* rejected Duke’s justiciability argument that overlapping regulation immunizes an energy company from liability. *E.g., Minnesota*, No. 62-CV-20-3837 (Minn. Dist. Ct. Feb. 14, 2025); *Vermont*, No. 21-CV-02778 (Vt. Super. Ct. Dec. 11, 2024); *Delaware ex rel. Jennings*, 2024 Del. Super. LEXIS 25 (Del. Super. Ct. Jan. 9, 2024); *Municipalities of Bayamón*, 2025 U.S. Dist. LEXIS 36750; *Boulder*, No. 2018-CV-30349 (Colo. Dist. Ct. June 21, 2024); *City & Cnty. of Honolulu v. Sunoco LP*, No. 1CCV-20-0000380, at p 7 (Cir. Ct. Haw. Mar. 29, 2022) (Exhibit E hereto) (“This court concludes that Plaintiffs’ framing of their claims in this case is more accurate. . . Defendants’ liability in this case, if any, results from alleged tortious conduct, and not from lawful conduct in producing and selling fossil fuels.”).

Holding Duke liable for its deceptions, irrespective of its regulatorily permitted conduct, is also consistent with decisions in federal and state courts in this region. For example, the Fourth Circuit determined a landowner stated a valid claim arising from highly regulated and permitted

discharges, because the defendant “should be held liable if it knew, or in the exercise of reasonable care should have known,” that the discharges would injure plaintiff. *Springer v. Joseph Schlitz Brewing Co.*, 510 F.2d 468, 474 (4th Cir. 1975). Relatedly, numerous North Carolina cases recognize that even lawful enterprises can constitute a nuisance. *E.g.*, *Jones v. Queen City Speedways, Inc.*, 276 N.C. 231, 239, 172 S.E.2d 42, 47 (1970) (a “motor vehicle speedway is a lawful enterprise,” but its operation “could be a private nuisance”); *see also McKiver v. Murphy-Brown, LLC*, 980 F.3d 937, 967 (4th Cir. 2020) (“Lawful enterprises can constitute a nuisance in fact.”).

II. The Political Question Doctrine Is Inapplicable to Traditional Common Law Actions Seeking Monetary Relief.

A. The Political Question Doctrine Has Been Rejected Repeatedly in Climate-Deception Cases.

In climate-change litigation, the leading political question case is *Connecticut v. American Electric Power Co.* (“*AEP*”), 582 F.3d 309 (2d Cir. 2009).² Rejecting defendants’ argument that the issues in the case were “‘textually committed to Congress by the Commerce Clause’ as a matter of ‘high policy,’” because, they claimed, the case concerned limits and reductions in emissions, *id.* at 324, the Court explained that plaintiffs merely asserted a “common law nuisance case” that “has been ‘constitutionally committed’ [to] none other than our own—the Judiciary.” *Id.* at 325.

Similarly, the Second Circuit rejected the energy company defendants’ argument that there was a lack of judicially manageable standards, given that “[w]ell-settled principles of tort and

² The Second Circuit was reversed on appeal by the U.S. Supreme Court due to its preemption analysis, but the Supreme Court declined to disturb the Second Circuit’s rejection of the energy companies’ political question defense. *American Electric Power Co. v. Connecticut*, 564 U.S. 410, 420 (2011). The Supreme Court’s analysis on preemption is supportive of Carrboro’s state-based tort claims. Compl. ¶ 11 (“this civil action does not assert any claims based on federal law”). Preemption issues will be addressed in response to Duke’s forthcoming Rule 12(b)(6) motion. Motion at 9, n.1.

public nuisance law provide appropriate guidance to the district court in assessing Plaintiffs' claims." *Id.* at 329. Numerous other courts have reached the same conclusion. *See, e.g., Minnesota*, No. 62-CV-20-3837 at p 30; *Vermont*, No. 21-CV-02778 at p 19 ("The political question doctrine is not a basis to dismiss the Complaint."); *Boulder*, No. 2018-CV-30349 at pp 55-56; *Delaware ex rel. Jennings*, 2024 Del. Super. LEXIS 25 at *37.³

B. The Issues in This Action Are Textually Committed to the Judiciary.

North Carolina imposes a particularly high bar for a political question, requiring "a *textually demonstrable* commitment of the matter to another branch," *Harper v. Hall*, 384 N.C. 292, 325, 886 S.E.2d 393, 415-16 (2023) (emphasis added), and emphasizing the doctrine should be applied only "[i]n rare instances," *Common Cause v. Lewis*, No. 18-CVS-014001, 2019 N.C. Super. LEXIS 56, *385 (N.C. Super. Ct. Sept. 3, 2019). Here, Duke fails to identify any "textually demonstrable commitment" to any branch other than the judiciary. Generalities about municipal corporate power, environmental preservation, and utilities regulation neither suffice nor address

³ Duke wrongly suggests its Motion is supported by rulings "across the Nation." Motion at 9. To the contrary, only *one* of Duke's climate-change precedents involved a successful justiciability challenge, and the political question and standing analyses were originally reversed on appeal. *Comer v. Murphy Oil USA*, 585 F.3d 855, 860 (5th Cir. 2009) ("[W]e conclude that the plaintiffs have standing to assert their public and private nuisance, trespass, and negligence claims, and that none of these claims present nonjusticiable political questions[.]"). The Fifth Circuit eventually granted review *en banc*, lost its quorum due to recusals, and therefore vacated the original panel's decision. *See Comer v. Murphy Oil USA*, 839 F. Supp. 2d 849, 853 (S.D. Miss. 2012). The subsequent ruling Duke relies upon was predicated on irrelevant *res judicata* issues. *Id.* at 855-57. The remainder of Duke's citations involve preemption issues to be addressed later, and, in any event, Duke's citations are a distinct minority that have been roundly criticized by courts throughout the country. *See, e.g., Boulder*, No. 2018-CV-30349 at p 46 (explaining how "the vast majority of courts who have considered" *New York v. Chevron*, 993 F.3d 81 (2d Cir. 2021) have found the decision irrelevant to climate-deception lawsuits); *see also City of Oakland v. BP P.L.C.*, No. 17-06011, 2022 U.S. Dist. LEXIS 193512, *10 (N.D. Cal. Oct. 24, 2022) (explaining how the earlier *Oakland* decision on which Duke relies was vacated and should never have been issued).

what branch of government should preside over common law torts for deceptive conduct. Motion at 13-15.

While Duke quotes a provision of our Constitution stating that “only the General Assembly may give ‘powers and duties to counties, cities and towns,’” Motion at 13, Duke ignores that the General Assembly has authorized municipalities, like Carrboro, to file civil actions. In fact, Chapter 160A expressly provides that municipalities “shall be vested with all of the property and rights in property belonging to the corporation,” including the right to “sue and be sued.” N.C. Gen. Stat. § 160A-11. Indeed, Chapter 160A provides no limitation on this right, and the General Assembly also declared that Chapter 160A “shall be broadly construed and grants of power shall be construed to include any additional and supplementary powers that are reasonably necessary or expedient to carry them into execution and effect.” N.C. Gen. Stat. § 160A-4.

Duke also inexplicably fails to cite the most pertinent constitutional provision: “All courts shall be open; every person for an injury done him to his lands, goods, person, or reputation shall have remedy by due course of law.” N.C. Const. art. I, § 18. This provision is far more specific to the present action than Duke’s more general references and therefore should control. *McIntyre v. McIntyre*, 341 N.C. 629, 631, 461 S.E.2d 745, 747 (1995). Our Constitution commits this common law action to the judiciary.

C. North Carolina’s Common Law and Pattern Jury Instructions Provide Judicially Manageable Standards for Carrboro’s Common Law Claims and Do Not Require Policy Determinations.

Duke further errs in arguing the Court “lacks a judicially manageable standard” and that this action requires “policy determinations.” Motion at 15 & 18. Both arguments are entirely reliant upon Duke’s erroneous notion that this action seeks to reduce emissions or second-guess regulatory decision-making and is thus a political question. Duke’s argument was rebutted above,

supra at pp 9-13, including because the Complaint merely asserts basic common law tort claims for monetary damages premised upon Duke’s deceptive conduct. Compl. ¶¶ 1, 11, 68.

Like other courts confronted with climate-deception actions, this Court should deny Duke’s effort to recast Carrboro’s allegations as something they are not. *E.g.*, *Honolulu*, 153 Haw. at 334, 537 P.3d at 1181. In fact, the Fourth Circuit has already rejected Duke’s argument that deception-based claims are actually an effort at regulation or policymaking. *Baltimore*, 31 F.4th at 233-34 (“None of Baltimore’s claims concern emission standards, federal regulations about those standards, or pollution permits. Their Complaint is about Defendants’ fossil-fuel products and extravagant misinformation campaign that contributed to its injuries.”).

1. There Are Judicially Manageable Standards to Adjudicate Carrboro’s Claims.

Because Carrboro relies upon garden-variety common law tort claims, Duke’s argument that this Court lacks judicially manageable standards is simply misplaced. To resolve these claims, the Court can draw upon a rich reserve of common law setting forth the elements of each tort claim asserted by Carrboro. *E.g.*, *McManus v. Southern R. Co.*, 150 N.C. 655, 64 S.E. 766 (1909) (plaintiff can pursue nuisance claim for “nauseous and loathsome odors” from neighboring property); *Jordan v. Foust Oil Co.*, 116 N.C. App. 155, 447 S.E.2d 491 (1994) (contamination of plaintiff’s property from leaking storage tank satisfied elements of nuisance and trespass); *Whiteside Estates, Inc. v. Highlands Cove, L.L.C.*, 146 N.C. App. 449, 553 S.E.2d 431 (2001) (upstream property owner’s sediment pollution constituted nuisance and trespass); *Wilson v. McLeod Oil Co.*, 95 N.C. App. 479, 383 S.E.2d 392 (1989) (nuisance and trespass); *Banks v. Dunn*, 177 N.C. App. 252, 630 S.E.2d 1 (2006) (same).

Similarly, the Court can apply North Carolina’s Pattern Jury Instructions to instruct the jury on Carrboro’s common law claims. *E.g.*, N.C. Pattern Jury Inst. ¶¶ 102.11 (negligence),

805.00 (trespass), 805.20 (nuisance). Far from lacking judicially manageable standards, this Court has substantial experience with adjudicating basic common law torts. *E.g.* *AEP*, 582 F.3d at 326, 329 (“Well-settled principles of tort and public nuisance law provide appropriate guidance to the district court in assessing Plaintiffs’ claims . . .”).

To avoid application of these judicially manageable standards, Duke selectively excises small segments of the Complaint to suggest that Carrboro asks the Court to upend regulatory decisions or enact policy determinations. Duke’s partial quotations are inconsistent with the fact that Carrboro’s Complaint does not—*ever*—question the decisions of regulators. Rather, a fair reading of Carrboro’s allegations demonstrates that the gravamen of Carrboro’s Complaint centers upon Duke’s deceptions and not its regulated activities. *E.g.*, Compl. ¶ 101 (Duke created fake “scientific” organizations to deceive the public about its fossil-fuel products); *see also Philip Morris, USA, Inc.*, 449 F. Supp. 2d 1 (tobacco companies responsible for deceptions including their reliance on fake scientific organizations).

Moreover, Duke fails to recognize that environmental actions based upon common law tort claims almost always overlap with a regulatory scheme of some type, yet such actions remain cognizable. *Me. People’s Alliance & Natural Res. Def. Council v. Mallinckrodt, Inc.*, 471 F.3d 277, 286 (1st Cir. 2006) (“[N]uisance principles contribute heavily to the doctrinal template that underbraces [environmental] statutes . . . and the tasks involved in adjudicating environmental cases are well within the federal courts’ accustomed domain.”). Furthermore, the Fourth Circuit and North Carolina have recognized that tortfeasors are not immune from liability simply because

their conduct received regulatory approval. *Springer*, 510 F.2d at 474; *Biddix v. Henredon Furniture Industries, Inc.*, 76 N.C. App. 30, 331 S.E.2d 717 (1985).⁴

Just like Duke, energy companies in climate-deception actions throughout the nation have argued that their activities were permitted, received regulatory approval, or grew out of legislative policymaking. Repeatedly, courts have rejected these arguments because the source of the alleged harm is not the defendant's regulated activities but instead its *deceptions*. *E.g.*, *Boulder*, No. 2018-CV-30349 at pp 71-74. While Duke attempts to recharacterize Carrboro's claims as complex or as involving regulated activity, courts "have long been up to the task of assessing complex scientific evidence in cases where the cause of action was based" upon common law or statute. *AEP*, 582 F.3d at 329; *id.* at 325 (rejecting defendants' effort to "magnify to the outer limits the discrete domestic nuisance issues actually presented" and thereby "misstate the issues Plaintiffs seek to litigate").

2. Carrboro's Claims Do Not Require Policy Determinations.

Finally, Carrboro's claims do not require that the Court render any policy determinations. Instead, the Court need only apply the classic principles of negligence, nuisance, and trespass. Compl. ¶¶ 206-72.

In point of fact, Duke's entire argument about "policy determinations" should be rejected because courts have long recognized that reliance upon common law claims with judicially manageable standards "obviates any need to make initial policy decisions of the kind normally

⁴ Duke cites *N. Carolina ex rel. Cooper v. TVA*, 615 F.3d 291 (4th Cir. 2010) for the proposition that tort law cannot "supplant federal and state law that establishes" a regulatory framework. Motion at 16. To the contrary, the *Cooper* court expressly stated that "the savings clause of the Clean Air Act may allow for some common law nuisance suits." *Id.* at 302-03. In any event, *Cooper* is materially distinguishable because it did not involve allegations of deceptive conduct, and unlike Carrboro, the plaintiff in *Cooper* sought an injunction over defendants' emissions.

reserved for nonjudicial discretion” and “further undermines the claim that such suits relate to matters that are constitutionally committed to another branch.” *Kadic v. Karadzic*, 70 F.3d 232, 249 (2d Cir. 1995); *AEP*, 582 F.3d at 329 (“[w]ell-settled principles of tort and public nuisance law provide appropriate guidance,” and therefore, such actions do not require policymaking).

III. Carrboro Clearly Has Standing to Assert Common Law Tort Claims for Monetary Damages.

Duke’s standing defense has been repeatedly rejected, including by every appellate court to consider the issue. *E.g.*, *AEP*, 582 F.3d at 345 (energy companies’ standing defense “unavailing”); *see also Massachusetts v. U.S. Environmental Protection Agency*, 549 U.S. 497 (2007) (upholding Massachusetts’ standing due to harms caused by climate change). Duke’s standing defense should meet the same fate.

A. Duke Misstates the Law of Standing in North Carolina.

In North Carolina, “[w]hen a person alleges the infringement of a legal right arising under a cause of action at common law, a statute, or the North Carolina Constitution . . . *the legal injury itself gives rise to standing.*” *Comm. to Elect Forest*, 376 N.C. at 558-59, 853 S.E.2d at 714 (emphasis added). Thus, Carrboro has standing simply because it alleges concrete monetary damages arising from common law claims.

Duke’s Brief inexplicably failed to recognize this relatively new rule of standing and instead argued that Carrboro must make a three-pronged showing of injury, traceability and redressability. Motion at 21. Duke’s position is inconsistent with *Comm. to Elect Forest*, and it is furthermore based solely upon a single Court of Appeals opinion that was reversed on appeal to the Supreme Court on the standing issue. *Soc’y for Hist. Pres.*, 385 N.C. at 749, 898 S.E.2d at 764 (reversing the single opinion relied upon by Duke, Motion at 21).

B. Carrboro Has Standing Because It Alleged an Infringement of Legal Rights.

Carrboro’s Complaint alleges all that is necessary under *Comm. to Elect Forest* to establish standing: namely, Carrboro alleged the infringement of its legal rights. The Complaint details Carrboro’s damages caused by Duke’s deceptions. For instance, the Complaint alleged that “Carrboro’s damages are the result of recurring invasions and interferences” with Carrboro’s real property, such as the incursion of “riverine and urban flooding.” Compl. ¶¶ 203-05. Carrboro also alleged that Duke’s conduct caused damages to Carrboro’s roadways and stormwater control measures. *Id.* ¶¶ 192-98. As a result of these “invasions and interferences,” *id.* ¶ 203, Carrboro has incurred “millions of dollars” in damages, *id.* ¶¶ 194, 198, 202.⁵

The Supreme Court, in *Comm. to Elect Forest*, expressly discussed that these types of damages affirmatively confer standing. 376 N.C. at 596, 853 S.E.2d at 725-26 (quoting trespass, nuisance and negligence cases). Indeed, the Supreme Court noted that considerably *less than* Carrboro’s alleged damages will nonetheless confer standing: “We have long held that a plaintiff can maintain an action for infringement of a common law interest irrespective of any ‘actual’ injury that may occur to her.” *Id.* at 596, 853 S.E.2d at 725 (“For instance, we have not dismissed trespass actions where there is no allegation of harm beyond the infringement of the legal right.”); *see also Town of Midland v. Harrell*, 385 N.C. 365, 892 S.E.2d 845 (2023) (municipality had standing to recover for roadway damages).

⁵ Carrboro’s damages are to the property that it owns as a municipal corporation—*e.g.*, roadways that Carrboro owns. Compl. ¶¶ 14-18, 192-205. Hence, Carrboro’s claims are for direct damages and are not on behalf or derivative of its residents’ damages. Therefore, Duke’s passing reference to the *parens patriae* doctrine, Motion at 17 n.7, is entirely misplaced. *State ex rel. Stein v. EIDP, Inc.*, 2023 NCBC LEXIS 32, *3, 2023 NCBC 18 (N.C. Super. Ct. Mar. 2, 2023) (contrasting the government’s role as *parens patriae* to “protect the health, safety, security, and well-being of its residents and natural resources,” versus its right to “bring[] suit in its capacity as an owner of real property”).

C. Carrboro Has Alleged Claims Grounded in Common Law, Statute and the N.C. Constitution.

Duke makes the strained argument that Carrboro's claims are not grounded in common law, statute, or our Constitution. Motion at 21-25. Even if Duke's argument was not abrogated by the new standing rule of *Comm. to Elect Forest*, Carrboro's claims are well-grounded in common law, statute, and our Constitution.

The General Assembly has authorized municipal civil actions. *Supra* at p 15. In fact, municipalities are regularly required to file common law actions for redress of damages to their property. *E.g.*, Complaint, *Town of Hope Mills v. Crowder Const. Co.*, No. 12-CVS-9002 (N.C. Super. Ct. Oct. 16, 2012) (town tort suit) (Exhibit F hereto); Crossclaim, *Haren Construction Co. v. City of Roxboro*, No. 21-CVS-60 (N.C. Super. Ct. April 30, 2021) (town negligence claim) (Exhibit G hereto). Given the vast property holdings of municipalities, Duke's argument that such actions are not authorized by statute is absurd.

Further, North Carolina's Constitution guarantees Carrboro's right to access the judiciary "for an injury done him to his lands, goods, person, or reputation [and] shall have remedy by due course of law." N.C. Const. art. I, § 18. Finally, as to common law, our judiciary has long recognized the right of litigants, like Carrboro, to seek redress for damages to land based on common law torts. *E.g.*, *Whiteside Estates, Inc.*, 146 N.C. App. 449, 553 S.E.2d 431. Indeed, the Supreme Court has specifically described common law tort claims for invasions to land as conferring standing upon a plaintiff. *Comm. to Elect Forest*, 376 N.C. at 596, 853 S.E.2d at 725; *see also* Compl. ¶¶ 203-05 (discussing Duke's invasions onto Carrboro's land and resulting damages).

The Court should similarly reject Duke's attacks on whether Carrboro's individual claims are cognizable. Duke argues there is no "common law duty running from a utility holding company

. . . to a municipality” unless there is a “special relationship,” Motion at 24. Even if such a special relationship were required, Carrboro alleges just such a relationship. Compl. ¶ 251 (“For the above stated reasons, Defendant had a special relationship with Plaintiff . . .”). Similarly, while Duke argues climate-deception actions cannot support a trespass claim, Duke ignores the contrary precedents nationwide. *Delaware ex rel. Jennings*, 2024 Del. Super. LEXIS 25 at *40 (rejecting dismissal of trespass claim, stating the claim’s viability is “an issue to be addressed at a later stage of the case”); *Boulder*, No. 2018-CV-30349 (finding trespass claims predicated on fossil-fuel sales and climate deceptions are justiciable).

Finally, Duke’s questioning of the specific elements of Carrboro’s claims is inappropriate for a standing defense. *Comm. to Elect Forest*, 376 N.C. at 596, 853 S.E.2d at 726 (arguments about the elements of common law claims are “not dismissal for lack of standing, but dismissal for failure to state a claim”).

D. Carrboro Has Adequately Alleged Traceability and Redressability.

Although the Court need not consider any other issue to reject Duke’s standing defense, *Soc’y for Hist. Pres.*, 385 N.C. at 751, 898 S.E.2d at 765, Duke’s traceability and redressability arguments are nonetheless meritless.

Traceability is “a question of fact for the jury.” *Estate of Long v. Fowler*, 378 N.C. 138, 150, 861 S.E.2d 686, 696 (2021). Here, the Complaint details how Duke’s deceptions—for example, “coordinated public relations campaigns designed to convince the public that fossil fuel emissions did not pose a serious risk,” Compl. ¶ 68(b)—caused both Carrboro and the larger public to delay the transition to renewable energy. *Id.* ¶¶ 153 & 177. The Complaint similarly explains how Duke’s deceptions played a material role in delaying the overall transition away from fossil fuels. *Id.* ¶¶ 146-152. By downplaying the dangers of fossil-fuel emissions, relying on fringe

scientists, and telling the public that decarbonizing was unnecessary while knowing otherwise, *id.* ¶ 149, Duke succeeded in preserving an overall domestic energy system that makes massive emissions, *id.* ¶ 156-57. As a result of these deceptions, “the public has continued its reliance upon fossil fuels and the transition toward renewable energy has been unreasonably and unnecessarily delayed by decades, thereby materially exacerbating the climate crisis.” *Id.* ¶ 153.

At the pleading stage, the “fairly traceable” standard is not equivalent to a requirement of tort causation. *Natural Res. Def. Council, Inc. v. Watkins*, 954 F.2d 974, 980 n.7 (4th Cir. 1992) (the “fairly traceable” standard “does not mean that plaintiffs must show [causation] to a scientific certainty” and “is not equivalent to a requirement of tort causation”). Here, Carrboro’s allegations that Duke, given its internal knowledge, should have “reasonably foreseen” that its deceptions would result in Carrboro’s harms are more than sufficient. Compl. ¶ 271; *see Westbrook v. Cobb*, 105 N.C. App. 64, 67, 411 S.E.2d 651, 653 (1992) (“foreseeability as an element of proximate cause does not require that defendant should have been able to foresee the injury in the precise form in which it occurred”); *see also Libertarian Party of Va. v. Judd*, 718 F.3d 308, 316 (4th Cir. 2013) (“plaintiffs need not establish that the challenged action is the ‘proximate cause’ of the injury and instead need only show that it is ‘in part responsible for’ the asserted injury.”).⁶

The mere fact that Duke is not the *only* emitter of greenhouse gases, Motion at 26-27, is also irrelevant, as the Second Circuit explained in rejecting this precise argument. *AEP*, 582 F.3d at 346 (“nuisance liability at common law [arises from] actions which ‘contribute’ to the creation

⁶ None of Duke’s cases suggest otherwise, for in those cases plaintiffs alleged no facts supporting traceability. *N.C. Coal. v. City of Durham*, No. 19-CV-309, 2019 U.S. Dist. LEXIS 236836, *15 (M.D.N.C. Oct. 18, 2019) (finding plaintiff asserted “only speculation”); *Orr v. EPA*, 641 F. Supp. 3d 258 (W.D.N.C. 2022) (finding no alleged connection between defendant and alleged harm); *N.C. Fisheries Ass’n v. Pritzker*, No. 14-CV-138, 2015 U.S. Dist. LEXIS 95425, *23 (E.D.N.C. July 22, 2015) (finding “nothing suggests” a connection between injury and defendant).

of the nuisance,” regardless of whether others also contributed); *Hairston*, 310 N.C. at 234, 311 S.E.2d at 565 (“There may be more than one proximate cause of an injury.”); Restatement (Second) of Torts § 840E (“[T]he fact that other persons contribute to a nuisance is not a bar to the defendant’s liability for his own contribution.”). It is thus unsurprising that Duke’s standing argument has been uniformly rejected in climate-deception lawsuits. *E.g.*, *Honolulu*, 153 Haw. at 334, 537 P.3d at 1181; *Boulder*, No. 2018-CV-30349 at pp 65-69; *see also In re Nat’l Prescription Opiate Litig.*, No. 17-204, 2019 U.S. Dist. LEXIS 150565, *64-65 (N.D. Ohio Sept. 4, 2019) (causation established at pleading stage even though manufacturer was responsible for “less than one percent” of the opioid market).

Duke’s redressability argument also fails, since the Complaint does not seek to abate or even address climate change. Compl. ¶ 11. While Duke cursorily suggests Carrboro is not permitted to seek damages, Motion at 29 (*citing* N.C. Gen. Stat. § 19-2.1), *nothing* in the statute Duke cites suggests such a limitation. *See, e.g., Cooper v. Berger*, 371 N.C. 799, 810, 822 S.E.2d 286, 296 (2018) (“when a statute lists the situations to which it applies, it implies the exclusion of situations not contained in the list”). Rather, a damages action such as this one is well within Carrboro’s broad authority to “sue and be sued.” N.C. Gen. Stat. § 160A-11.

IV. Carrboro’s Relationship with NC WARN Is Both Constitutionally Protected and Irrelevant.

Finally, Duke impugns Carrboro’s First Amendment rights by raising irrelevant issues concerning an environmental nonprofit named NC WARN. Motion at 10 & 23. In *NAACP v. Buttons*, 371 U.S. 415 (1963), the NAACP recruited and represented litigants without charging fees. *Id.* at 422-23. Rejecting as unconstitutional a law prohibiting these activities, the Supreme Court explained that proscribing such litigation collaboration violates “protected freedoms of expression and association.” *Id.* at 437. Carrboro has a constitutional right to work with others to

pursue this litigation, and its relationship with NC WARN is irrelevant. *See Treants Enterprises, Inc. v. Onslow County*, 94 N.C. App. 453, 459, 380 S.E.2d 602, 605 (1989) (“freedom to engage in association for the advancement of beliefs and ideas” is protected by the federal Constitution).

CONCLUSION

For the foregoing reasons, Duke’s Motion to Dismiss Under Rule 12(b)(1) should be denied.

This, the 1st day of May, 2025.

LEWIS & ROBERTS, PLLC

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CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that this brief complies with Rule 7.8 of the North Carolina Business Court Rules in that it (excluding the caption, any index, table of contents, table of authorities, signature blocks, and required certifications) contains no more than 7,500 words, as determined by the word count feature of Microsoft Word.

This the 1st day of May, 2025.

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CERTIFICATE OF SERVICE

I, the undersigned attorney, do hereby certify that the foregoing document was served electronically via both email and the North Carolina Business Court's e-filing system on all counsel of record, including the following:

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