

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO**

THE MUNICIPALITIES OF BAYAMÓN,
CAGUAS, LOÍZA, LARES,
BARRANQUITAS, COMERÍO, CAYEY,
LAS MARÍAS, TRUJILLO ALTO, VEGA
BAJA, AÑASCO, CIDRA, AGUADILLA,
AIBONITO, MOROVIS, MOCA,
BARCELONETA, CAMUY, CATAÑO,
SALINAS, ADJUNTAS, ARROYO,
CULEBRA,
DORADO, GUAYNABO, HORMIGUEROS,
JUNCOS, LAJAS, MANATÍ, NAGUABO,
NARANJITO, UTUADO, VILLALBA,
COAMO, OROCOVIS, VIEQUES, and
YABUCOA on behalf of themselves and
others similarly situated, known as the
MUNICIPALITIES OF PUERTO RICO,

Plaintiffs,

v.

EXXON MOBIL CORP., SHELL PLC F.K.A.
ROYAL DUTCH SHELL PLC, CHEVRON
CORP, BP PLC, CONOCOPHILLIPS,
MOTIVA ENTERPRISES, LLC,
OCCIDENTAL PETROLEUM F.K.A.
ANADARKO PETROLEUM CORP, BHP,
RIO TINTO PLC, AMERICAN
PETROLEUM INSTITUTE, XYZ
CORPORATIONS 1-100,
and JOHN AND JANE DOES 1-100,

Defendants.

CIVIL NO. 22-1550 (SCC)(HRV)

RE:
CONSUMER FRAUD; DECEPTIVE
BUSINESS PRACTICES; RACKETEER
AND CORRUPT ORGANIZATIONS
ACT, 18 U.S.C. § 1962; CLAYTON ACT, 15
U.S.C. § 15 ET SEQ.; PUBLIC NUISANCE;
STRICT LIABILITY – FAILURE TO
WARN; STRICT LIABILITY – DESIGN
DEFECT; NEGLIGENT DESIGN
DEFECT; PRIVATE NUISANCE; UNJUST
ENRICHMENT

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2 **MAGISTRATE JUDGE’S OMNIBUS REPORT AND RECOMMENDATION**

3 **I. INTRODUCTION**

4 Plaintiffs, the municipalities of Bayamón, Caguas, Loíza, Lares, Barranquitas,
5 Comerío, Cayey, Las Marías, Trujillo Alto, Vega Baja, Añasco, Cidra, Aguadilla, Aibonito,
6 Morovis, Moca, Barceloneta, Camuy, Cataño, Salinas, Adjuntas, Arroyo, Culebra, Dorado,
7 Guaynabo, Hormigueros, Juncos, Lajas, Manatí, Naguabo, Naranjito, Utuado, Villalba,
8 Coamo, Orocovis, Vieques, and Yabucoa (together, “Plaintiffs”), initiated this lawsuit on
9 November 22, 2022 in their own right and on behalf of the proposed class, the 78
10 Municipalities of Puerto Rico. Defendants are Exxon Mobile Corporation (“Exxon”),
11 Shell PLC (“Shell”), Chevron Corporation (“Chevron”), BP PLC (“BP”), Motiva
12 Enterprises LLC (“Motiva”), Occidental Petroleum Corporation (“Occidental”), BHP
13 Group Limited (“BHP”), Rio Tinto PLC (“Rio Tinto”), ConocoPhillips Company
14 (“Conoco”), and American Petroleum Institute (“API”). Defendants are ten of the largest
15 fossil fuel companies in the world. Plaintiffs claim that Defendants engaged in a decades-
16 long campaign to misrepresent the dangers of carbon-based and fossil fuel products
17 which they marketed and sold. It is alleged that Defendants conduct ultimately led to the
18 catastrophic destruction brought about by the 2017 storms.

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22 After Plaintiffs amended the complaint (Docket No. 205), Defendants moved for
23 dismissal, both jointly and individually. The presiding District Judge referred the
24 motions to dismiss as well as related motions to take judicial notice to the undersigned
25 for report and recommendation.
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1 **II. FACTUAL AND PROCEDURAL BACKGROUND**

2 The following facts are taken from the parties' pleadings. Plaintiffs initiated this
3 lawsuit claiming that defendant's exploitation of fossil fuel products have caused
4 extensive losses, fatalities, and property damage during the storms of September 2017
5 and their subsequent effects. (Docket No. 205, ¶ 1). The action seeks redress for the
6 economic damages and detrimental effects on Puerto Rico's climate directly attributable
7 to Defendants' activities. (Id., ¶ 9)

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9 This is a summary of Plaintiffs' main allegations:

- 10 1. For decades, the Defendants were aware of scientific information
11 establishing that the products they marketed and sold in Puerto Rico
12 accelerated climate change and could likely lead to dangerous storms.
13 (Id., ¶ 1).
- 14 2. Defendants had a duty of disclosure under Puerto Rico and United
15 States consumer protection laws but failed to disclose: (a) that their
16 own scientists confirmed climate change was an actual threat, (b) that
17 their products were a direct cause of that climate change, (c) the
18 anticipated effects upon Puerto Rico. (Id., ¶ 7(b)).
- 19 3. Rather than disclosing the information and warning the public,
20 Defendants colluded with other fossil fuel-dependent companies to
21 form the Global Climate Coalition ("GCC") and the American Petroleum
22 Institute ("API") through which they funded climate change denial
23 marketing campaigns. (Id., ¶ 2).
- 24 4. In masking the true source of their marketing, Defendants violated
25 consumer protection laws in both Puerto Rico and the United States.
26 (Id., ¶ 7(c)).
- 27 5. Defendants' scheme sought to maintain energy production monopoly,
28 lower prices, and block the development of alternative energy sources.
(Id., ¶ 7(d)).
6. The Plaintiffs relied on this misleading information to continue
purchasing and using carbon-based products and endanger the lives of
their residents and communities. (Id., ¶ 3).

- 1 7. Defendants were required by their own Best Business Practices
2 (adopted in the 1980s) to disclose what they internally knew about
3 upcoming super storms in the North Atlantic. (Id., ¶ 7(f)).
- 4 8. Defendants Best Business Practices also prevented them from colluding
5 to deceive the Plaintiffs. (Id., ¶ 7(e)).
- 6 9. As publicly-traded companies, Defendants were required by their
7 adopted Best Business Practices and corporate law to disclose to their
8 investors that their products were contributing to the magnitude and
9 acceleration of climate change and that these corporate acts would not
10 only increase the ferocity of storms that hit Puerto Rico's shores but
11 would inevitably result in a catastrophic loss of lives and property such
12 as occurred in 2017 and since. (Id., ¶ 7(i)).
- 13 10. The Defendants have intentionally interfered with the citizens of the
14 Municipalities of Puerto Rico's rights to life, liberty, and the enjoyment
15 of property as guaranteed by Article II, Section 7 of the Constitution of
16 Puerto Rico. (Id., ¶9).
- 17 11. Defendants have also interfered with Puerto Rico and its consumers'
18 human rights as recognized in Section 20, Article II of the Puerto Rico
19 Constitution guaranteeing citizens the right to education, to obtain
20 employment, an adequate standard of living, social protection, and
21 family assistance. (Id.).

22 Based on these allegations, the Amended Complaint asserts fourteen causes of
23 action: common law consumer fraud (First Cause of Action), conspiracy to commit
24 common law consumer fraud and deceptive businesses practices (Second Cause of
25 Action), misleading practices and advertisement under Rule 7 of the Puerto Rico Rules
26 (Third Cause of Action), violations to the Racketeer Influenced and Corrupt
27 Organizations Act, 18 U.S.C. §1961(3) ("RICO") (Fourth, Fifth, Sixth and Seventh Causes
28 of Action), antitrust violations pursuant to 15 U.S.C. §1 et seq. (Eighth Cause of Action),
public nuisance pursuant to 32 L.P.R.A. §2761 (Ninth Cause of Action), strict liability –
failure to warn (Tenth Cause of Action), strict liability-design defect (Eleventh Cause of

1 Action), negligent design defect (Twelfth Cause of Action), private nuisance pursuant to
2 32 L.P.R.A. §2761 (Thirteenth Cause of Action), restitution-unjust enrichment
3 (Fourteenth Cause of Action).

4 The Defendants moved to dismiss, both jointly and on independent grounds. The
5 Presiding Judge referred to me Defendant's Joint Motion to Dismiss for lack of personal
6 jurisdiction (Docket No.234) and Motion to Dismiss for failure to state a claim (Docket
7 No. 235). The Judge also referred to the undersigned Defendant's individual motions to
8 dismiss at Docket Nos. 232 (Occidental)¹; 236 (BP PLC's); 237 (Conoco Philips); 239
9 (Chevron's); 240 (Motiva); 242 (Exxon); 243 and 245 (BHP); 244 (Shell); 246 and 247
10 (Rio Tinto); 254 (API).

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13 Plaintiffs opposed the Joint Motions to Dismiss, (Docket Nos. 281 and 280,
14 respectively). ² Defendants replied jointly (Docket No. 296, 297 and 305) and
15 individually, Docket Nos. 290 (API); 292 (Shell); 293 (Occidental); 294 (BP P.L.C.); 295
16 (Conoco); 299 (Chevron); 301 (Exxon); 302 (Motiva); 303 and 304 (BHP); 306 and 307
17 (Rio Tinto).

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19 Also before the Court are two motions for judicial notice at Docket Nos. 238 and
20 241, as well as Plaintiffs' opposition thereto, (Docket No. 282), Defendants' reply (Docket
21 No. 298 (joint reply) and Chevron's reply (Docket No. 300).

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26 ¹ Occidental later filed a notice of supplemental authority. (Docket No. 314).

27 ² Subsequently, Plaintiffs supplemented their Opposition at Docket No. 280 to include two additional
28 cases. (Docket No. 313).

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2 **III. APPLICABLE LAW AND DISCUSSION**

3 **A. Legal Standards**

4 Defendants claim that dismissal is warranted under Federal Rules of Civil
5 Procedure 12(b)(2) and 12(b)(6).
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7 **1. Fed. R. Civ. P. 12(b)(2)**

8 A party may move to dismiss for lack of personal jurisdiction pursuant to Fed. R.
9 Civ. P. 12(b)(2). When examining a motion to dismiss for lack of personal jurisdiction, a
10 district court may choose from among several methods to determine whether plaintiff
11 has met its burden to show that jurisdiction has attached. *Naicom Corp. v. DISH*
12 *Network Corp.*, No. 3:21-CV-01405-JAW, 2024 WL 1363755, at *13 (D.P.R. Mar. 29,
13 2024)(citing *Boit v. Gar-Tec Prods., Inc.*, 967 F.2d 671, 674 (1st Cir. 1992)). For cases in
14 the early stages of litigation, the court employs the prima facie standard. *Rodriguez v.*
15 *Dixie S. Indus., Inc.*, 113 F. Supp. 2d 242, 249 (D.P.R. 2000)(citing *Rodriguez v.*
16 *Fullerton Tires Corp.*, 115 F.3d 81, 83-84 (1st Cir. 1997)). The prima facie approach is
17 also the standard when a court rules on a motion to dismiss without holding an
18 evidentiary hearing. *United States v. Swiss Am. Bank, Ltd.*, 274 F.3d 610, 618 (1st Cir.
19 2001).
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22 Under the prima facie approach, the Court examines whether the plaintiff “has
23 proffered evidence which, if credited, is sufficient to support findings of all facts essential
24 to personal jurisdiction.” *Phillips v. Prairie Eye Ctr.*, 530 F.3d 22, 26 (1st Cir. 2008);
25 *Boit v. Gar-Tec Prods., Inc.*, 967 F.2d 671, 675 (1st Cir. 1992). In conducting the inquiry,
26 the district court acts “as a data collector” rather than as a “factfinder.” *Rodriguez-Rivera*
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1 *v. Allscripts Healthcare Sols., Inc.*, 43 F.4th 150, 160 (1st Cir. 2022)(internal citations
2 omitted)). All allegations must be construed “in the light most favorable to the plaintiff.”
3 *Santiago-González v. Motion Powerboats, Inc.*, 334 F. Supp. 2d 98, 101 (D.P.R. 2004).

4 A plaintiff bears the burden of demonstrating personal jurisdiction over each
5 defendant. *LP Solutions LLC v. Duchossois*, 907 F.3d 95, 102 (1st Cir. 2018). Establishing
6 personal jurisdiction under the Fourteenth Amendment may take the form of specific, or
7 general jurisdiction. *Astro-Med, Inc. v. Nihon Kohden Am., Inc.*, 591 F.3d 1, 9 (1st Cir.
8 2009). Plaintiffs rely on specific jurisdiction which requires that their claims relate to the
9 defendant’s contacts. *Id.* (citing *Harlow v. Children’s Hosp.*, 432 F.3d 50, 57 (1st
10 Cir.2005)).³

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13 “The proper exercise of specific in personam jurisdiction hinges on satisfaction of
14 two requirements: first, that the forum in which the federal district court sits has a long-
15 arm statute that purports to grant jurisdiction over the defendant; and second, that the
16 exercise of jurisdiction pursuant to that statute comports with the strictures of the
17 Constitution. *See Pritzker v. Yari*, 42 F.3d 53, 60 (1st Cir. 1994)(citing *Ticketmaster–*
18 *New York, Inc. v. Alioto*, 26 F.3d 201, 204 (1st Cir.1994); *United Elec. Workers v. 163*
19 *Pleasant St. Corp.*, 960 F.2d 1080, 1086 (1st Cir.1992); and *Hahn v. Vermont Law Sch.*,
20 698 F.2d 48, 51 (1st Cir.1983)). To establish specific jurisdiction, a plaintiff must show:
21 (1) relatedness, (2) purposeful availment, and (3) reasonableness. *See Phillips Exeter*
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26 ³ General jurisdiction, in contrast, requires plaintiff to show “continuous and systematic general business
27 contacts” between defendant and the forum. *United States v. Swiss Am. Bank, Ltd.*, 274 F.3d 610, 619
28 (1st Cir. 2001)(quoting *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 416, 104 S.Ct.
1868, 80 L.Ed.2d 404 (1984)).

1 *Acad. v. Howard Phillips Fund, Inc.*, 196 F.3d 284, 288 (1st Cir.1999)(The exercise of
2 specific personal jurisdiction requires that: “(1) the claim underlying the litigation must
3 directly relate to or arise out of Defendant's contacts with the forum; (2) those contacts
4 must constitute purposeful availment of the benefits and protections afforded by the
5 forum’s laws; and (3) jurisdiction must be reasonable in light of a number of factor’s
6 touching upon fundamental fairness.”) “Questions of specific jurisdiction are always tied
7 to the particular claims asserted.” *Astro-Med, Inc.*, 591 F.3d at 9 (citing *Phillips Exeter*
8 *Acad.*, 196 F.3d at 289).

10 Notwithstanding a plaintiff’s required proffer of evidence, the First Circuit has
11 “long held that a diligent plaintiff who sues an out-of-state corporation and who makes
12 out a colorable case for the existence of in personam jurisdiction may well be entitled to
13 a modicum of jurisdictional discovery if the corporation interposes a jurisdictional
14 defense.” *Grp. of Former Emps. of Sprague Caribe v. Am. Annuity Grp., Inc.*, 388 F.
15 Supp. 2d 3, 5 (D.P.R. 2005)(citing *Sunview Condominium Ass'n v. Flexel Int'l, Ltd.*, 116
16 F.3d 962, 964 (1st Cir.1997)). Also, “wide latitude must be accorded to the plaintiff to
17 establish the minimum contacts with Puerto Rico and that defendant.” *Id.* (citing *Puerto*
18 *Rico v. SS Zoe Colocotroni*, 61 F.R.D. 653, 657 (D.P.R.1974)(citing *Com. Oil Refining Co.*
19 *v. Houdry Process Corp.*, 22 F.R.D. 306, 308 (D.P.R.1958)); *see also Mullaly v. Sunrise*
20 *Senior Living Mgmt., Inc.*, 224 F. Supp. 3d 117, 123 (D. Mass. 2016)(citing *Swiss Am.*
21 *Bank*, 274 F.3d at 625 (internal quotation marks, citations and emphasis omitted)).
22 Whether to permit such jurisdictional discovery is within the broad discretion of the
23 district court. *Swiss Am. Bank*, 274 F.3d at 626.
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2 Plaintiffs also assert jurisdiction under Section 1965(b) of RICO, which provides:

3 In any action under section 1964 of this chapter in any district
4 court of the United States in which it is shown that *the ends of*
5 *justice require* that other parties residing in any other district
6 be brought before the court, the court may cause such parties
7 to be summoned, and process for that purpose may be served
8 in any judicial district of the United States by the marshal
9 thereof.

10 18 U.S. C. § 1965(b). Section 1965 permits a court overseeing a valid RICO claim to
11 exercise “personal jurisdiction over an out-of-state defendant [based on nationwide
12 contacts] so long as the Court has jurisdiction established by the minimum contacts of at
13 least one defendant [with the forum State].” *Marrero-Rolón v. Autoridad de Energía*
14 *Eléctrica de P.R.*, 2015 WL 5719801, at *3 (D.P.R. Sept. 29, 2015), report and
15 recommendation adopted, (D.P.R. Mar. 31, 2016); *see also Casio Computer Co. Ltd. v.*
16 *Savo*, 2000 WL 1877516, at *26 (S.D.N.Y. Oct. 13, 2000).

17 **2. Fed. R. Civ. P. 12(b)(6)**

18 To determine if a complaint’s allegations survive the 12(b)(6) stage, the Court
19 must examine whether, taking the complaint’s well-pled (non-conclusory, non-
20 speculative) facts as true and drawing all reasonable inferences in the pleader’s favor, the
21 amended complaint’s allegations state a plausible claim for relief. *Schatz v. Republican*
22 *State Leadership Comm.*, 669 F.3d 50, 55 (1st Cir. 2012); *Cay-Montanez v. AXA*
23 *Equitable Life Ins. Co.*, No. CV 19-1124 (SCC), 2021 WL 4251338, at *2 (D.P.R. Sept. 17,
24 2021). While a complaint need not give detailed factual allegations, “[t]hreadbare recitals
25 of the elements of a cause of action, supported by mere conclusory statements, do not
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1 suffice.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S. Ct. 1937, 1949, 173 L. Ed. 2d 868
2 (2009).

3 **3. Judicial Notice**

4 A district court is generally limited to considering only facts and documents that
5 are part of the complaint, but may also consider “matters susceptible to judicial notice.”
6 *Newton Covenant Church v. Great Am. Ins. Co.*, 956 F.3d 32, 35 (1st Cir. 2020)(internal
7 citations omitted). Pursuant to Fed. R. Evid. 201(b), the court may take judicial notice of
8 “a fact that is not subject to reasonable dispute because if: 1) is generally known within
9 the territorial jurisdiction of the trial court or (2) capable of accurate and ready
10 determination by resort to sources whose accuracy cannot reasonably be questioned.”
11 *Pietrantonio v. Corcept Therapeutics Inc.*, 640 F. Supp. 3d 197, 204–05 (D. Mass. 2022).

12 **B. Jurisdiction**

13 Plaintiffs claim that they have established jurisdiction over Defendants on several
14 basis. First, in accordance with 28 U.S.C. §1332(a), because the Municipalities of Puerto
15 Rico and the named Defendants are citizens of different states, and the amount in
16 controversy exceeds \$75,000, exclusive of interest and costs.

17 Second, Plaintiffs assert there is special jurisdiction over defendants because they
18 conduct business in Puerto Rico and the United States through marketing, transporting,
19 trading, distributing, refining, manufacturing, selling, and/or consuming of oil and coal.
20 Plaintiffs describe Defendants’ purposeful activities toward Puerto Rico and the United
21 through a campaign of deception and misinformation.

22 Lastly, plaintiffs aver that the Court also has personal jurisdiction over all the
23 Defendants under 18 U.S.C. §1965(b). They argue that the Court may exercise nationwide
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1 jurisdiction over the named Defendants where the “ends of justice” require national
2 service and Plaintiffs demonstrate national contacts in the United States generally. Here,
3 the ends of justice require, Plaintiffs say, that the Municipalities of Puerto Rico be
4 permitted to bring the Defendants before the Court in a single trial.
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6 For background, this is not the first time that an action of this nature reaches our
7 Circuit. In *Rhode Island v. Shell Oil Prods. Co.*, 35 F.4th 44, 50 (1st Cir. 2022), the First
8 Circuit examined whether removal to federal court was proper and ultimately affirmed
9 the district court’s order remanding the case to Rhode Island state court. This ruling
10 follows other similar actions brought in state courts throughout the United States. *See*,
11 e.g., *County of San Mateo v. Chevron Corp.*, 294 F. Supp. 3d 934 (N.D. Cal. 2018), and
12 *Mayor & City Council of Baltimore v. BP P.L.C.*, 388 F. Supp. 3d 538 (D. Md. 2019).
13 Judicial discourse to date has centered not around whether the companies can be held
14 liable, but rather, whether federal or state courts should decide.
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16 Unlike those cases, this action was filed first in federal court under both diversity
17 and federal question jurisdiction. According to Plaintiffs, there is personal jurisdiction
18 over each Defendant. In addition, they posit that Section 1965 of RICO only requires that
19 they have jurisdiction over one defendant for the matter to move forward.
20

21 Because Section 1965 jurisdiction requires that the Court have jurisdiction over at
22 least one of the RICO defendants, I will first analyze whether there is *in personam*
23 jurisdiction over Defendants.
24

25 **1. In Personam Jurisdiction**

26 “When a district court’s subject matter jurisdiction is founded upon a federal
27 question, the constitutional limits of the court’s personal jurisdiction are fixed, in the
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1 first instance, not by the Fourteenth Amendment but by the Due Process Clause of the
2 Fifth Amendment.” *United Elec., Radio & Mach. Workers of Am. v. 163 Pleasant St.*
3 *Corp.*, 960 F.2d 1080, 1085 (1st Cir. 1992) (citing *Lorelei Corp. v. County of Guadalupe*,
4 940 F.2d 717, 719 (1st Cir.1991) (per curiam); *Whistler Corp. v. Solar Elecs., Inc.*, 684 F.
5 Supp. 1126, 1128 (D.Mass.1988)). “In such circumstances, the Constitution requires only
6 that the defendant have the requisite ‘minimum contacts’ with the United States, rather
7 than with the particular forum state (as would be required in a diversity case).” *Id.* (citing
8 *Lorelei*, 940 F.2d at 719; *Trans-Asiatic Oil Ltd. v. Apex Oil Co.*, 743 F.2d 956, 959 (1st
9 Cir.1984)).
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12 A federal court sitting in diversity may exercise personal jurisdiction over an out-
13 of-state defendant only after engaging in a two-step analysis. First, the court must
14 determine whether the state long-arm statute authorizes jurisdiction over the
15 nonresident defendant. Second, the court must consider whether the exercise of personal
16 jurisdiction would not deny defendant his constitutional right to due process of law. *See*
17 *Omni Capital Int’l v. Rudolf Wolff & Co., Ltd.*, 484 U.S. 97, 104, 108 S. Ct. 404, 98
18 L.Ed.2d 415 (1987).
19

20 Although it is undisputed that the Defendants are nonresidents of Puerto Rico,
21 Plaintiffs argue that all three elements of the specific jurisdiction test are met. First, all
22 Defendants purposefully availed themselves of the privilege of conducting business
23 activities in Puerto Rico because each of them sold, marketed and promoted fossil fuels
24 on the island. Second, Plaintiff’s claims arise out of or relate to Defendant’s production,
25 marketing, and sale of those products in Puerto Rico. Lastly, Defendants did not meet
26 the burden to show that personal jurisdiction would be unreasonable.
27

1 I will examine each requirement in turn.

2
3 **a. Purposeful Availment**

4 As per the Amended Complaint, Defendants purposefully availed themselves of
5 the privilege of doing business in Puerto Rico by “marketing, transporting, trading,
6 distributing, refining, manufacturing, selling, and/or consuming of oil and coal.” (Docket
7 No. 205, ¶13). In addition, the citizens of the Municipalities purchased Defendants’
8 products and invested in the publicly traded corporate Defendants. (Id., at ¶¶15-16).
9 Furthermore, some Defendants allegedly availed themselves of the benefits and
10 protections of Puerto Rican law by registering an agent for service of process. (Id.). Lastly,
11 the target of Defendants’ actions included citizens and consumers in Puerto Rico. (Id., at
12 ¶14).

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15 “The function of the purposeful availment requirement is to assure that personal
16 jurisdiction is not premised solely upon a defendant's ‘random, isolated, or fortuitous’”
17 contacts with the forum state. *See Sawtelle v. Farrell*, 70 F.3d 1381, 1391 (1st Cir.
18 1995)(citing *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 774, 104 S.Ct. 1473, 1478,
19 79 L.Ed.2d 790 (1984)). The cornerstones of the analysis are “voluntariness and
20 foreseeability.” *Adelson*, 510 F.3d at 50. The contact with the forum “must be voluntary
21 and not based on the unilateral actions of another party.” *Id.* (citing *Burger King Corp.*
22 *v. Rudzewicz*, 471 U.S. 462, 475, 105 S.Ct. 2174, 85 L.Ed.2d 528 (1985)). As to
23 foreseeability, the defendant’s contacts in the forum state must give him notice such that
24 he could “reasonably anticipate being haled into court there.” *World-Wide Volkswagen*
25 *Corp. v. Woodson*, 444 U.S. 286, 297, 100 S Ct. 559, 62 L.Ed.2d 490 (1980).

1 The Amended Complaint alleges that Puerto Rico is mostly dependent on oil and
2 coal imports for its electricity. For the fiscal year ending in June 2017, petroleum
3 supplied just under half of the island's electricity and coal continued to supply about one-
4 sixth of electricity. (Docket No. 205, ¶174). Defendants, however, dispute jointly and
5 individually, that they conduct activities on the island.
6

7 Courts have found that even if a defendant does not conduct business activities in
8 a forum, the transportation and sale to a forum's consumers through agents and
9 subsidiaries amounts to purposeful direction of activities on the forum. *See City of*
10 *Oakland v. BP p.l.c.*, No. C 17-06011 WHA, 2018 WL 3609055, at *3 (N.D. Cal. July 27,
11 2018); *City of Long Beach v. Total Gas & Power N. Am., Inc.*, 465 F. Supp. 3d 416, 438
12 (S.D.N.Y. 2020), *aff'd*, No. 20-2020-CV, 2021 WL 5754295 (2d Cir. Dec. 3, 2021) (“It is
13 well established that a defendant can ‘purposefully avail itself of a forum by directing its
14 agents or distributors to take action there.’”).
15

16 In *Asahi Metal Indus. Co. v. Superior Ct. of California, Solano Cnty.*, 480 U.S.
17 102, 111, 107 S. Ct. 1026, 1032, 94 L. Ed. 2d 92 (1987) the Supreme Court adopted the
18 view that the Due Process Clause requires something more than merely placing a product
19 into the stream of commerce to exert jurisdiction over a foreign defendant. For context,
20 the plaintiff did no business in the United States; had no office, affiliate, subsidiary, or
21 agent in the United States; manufactured its component parts outside the United States
22 and delivered them to Toyota Motor Company in Japan. *Id.* at 111. In concluding that
23 purposeful action towards the forum State was needed, the Court expressed:
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26 Additional conduct of the defendant may indicate an intent or
27 purpose to serve the market in the forum State, for example,
28 designing the product for the market in the forum State,

1 **advertising in the forum State**, establishing channels for
2 providing regular advice to customers in the forum State, **or**
3 **marketing the product through a distributor** who has
 agreed to serve as the sales agent in the forum State.

4 *Id.* at 112 (emphasis supplied). The First Circuit has followed in line with *Asahi*.

5 In *Knox v. MetalForming, Inc.*, 914 F.3d 685, 691–92 (1st Cir. 2019), our
6 appellate court concluded that “specific targeting of a forum” is not “the only means” of
7 showing purposeful avilment. Considering the facts, a defendant’s “regular flow or
8 regular course of sale’ in the [forum]” could make the exercise of jurisdiction foreseeable
9 to the defendant. *Id.* (citing *Plixer Int’l, Inc. v. Scrutinizer GmbH*, 905 F.3d 1, 10 (1st Cir.
10 2018)). Likewise, advertising and marketing activities may constitute purposeful
11 activities for jurisdictional purposes. *See, e.g., AARP v. Am. Fam. Prepaid Legal Corp.*,
12 604 F. Supp. 2d 785, 803 (M.D.N.C. 2009)(Approving the creation and purposeful
13 direction of lead cards containing AARP references to North Carolina found to be
14 purposeful activity directed at the forum); *Lindora, LLC v. Isagenix Int’l, LLC*, 198 F.
15 Supp. 3d 1127, 1139 (S.D. Cal. 2016)(in finding purposeful avilment in a trademark
16 infringement action in California, Court considered that Plaintiff provided its California
17 Associates with infringing marketing materials, held training workshops and
18 promotional events in California using the marks in dispute, and operated a website
19 where the infringing marks were used.); *Ponzio v. Mercedes-Benz USA, LLC*, 447 F.
20 Supp. 3d 194, 216–17 (D.N.J. 2020)(Finding that Plaintiffs had established with
21 reasonable particularity sufficient contacts between the defendants and the forum state
22 after considering, among other factors, Defendants’ marketing activities within the
23 forum, and Plaintiff’s allegations that they viewed the marketing material prior to
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1 purchasing the product and that “each relied on the alleged misrepresentations made
2 through Mercedes' marketing and advertisements when they purchased their Mars Red
3 vehicles.”).

4 Here, Plaintiffs make the following specific allegations against Defendants:

- 5
- 6 (i) Defendants refining “upstream” operations utilize Buckeye
7 Partners, LP to provide their oil-based products in Puerto
8 Rico. (Docket No. 205, at ¶85).
- 9 (ii) Esso Oil PR, a subsidiary of Exxon, had extensive presence in
10 Puerto Rico until 2008, when it sold its 145 service stations
11 and access to terminals and airports in Puerto Rico and St.
12 Thomas to Total Petroleum Puerto Rico Corp. (Id., at ¶96-
13 99.).
- 14 (iii) Exxon’s downstream operation (consisting of marketing,
15 refining and retail operations), includes sale of its petroleum-
16 based consumer products in Puerto Rico. (Id., at ¶97). Exxon
17 advertises, markets, and sells its products in Puerto Rico.
18 Plaintiffs are customers of Exxon and have invested in Exxon
19 as a publicly traded company.
- 20 (iv) Chevron sold its fuel distribution and storage business in PR
21 and the USVIs in 2012 but continues to market and sell its
22 products in Puerto Rico. (Id., at ¶¶126 and 128).
- 23 (v) BP had an aviation business at the Luis Munoz Marin
24 International Airport in San Juan servicing over 4 million
25 passengers per year, which it sold to Puma Energy in 2015.
26 BP continues to market and sell its products in Puerto Rico,
27 including the Castrol brand for industrial and automotive
28 lubricants. (Id., at ¶¶137-140).
- (vi) Shell branded gasoline was sold in Puerto Rico through the
Sol Group (“Sol”) and Sol Puerto Rico Limited (“Sol P.R.”),
the exclusive distributor of Shell Fuels in Puerto Rico. Shell’s
website reflects 121 Shell gas stations in Puerto Rico as of
November 14, 2022. (Id., at ¶111).
- (vii) In July 2012 Chevron sold its fuel distribution and storage
businesses in Puerto Rico and the United States Virgin
Islands to Puma Energy, including 192 Texaco service

1 stations, an aviation fuel supply and storage tanks with a
2 combined capacity of 430,000 barrels. Chevron continues to
3 sell the “Delo,” “Ursa,” “Havoline,” “IsoClean” and “Techron”
4 heavy duty diesel engine oils, coolants/antifreeze,
5 transmission fluids, gear oils, greases and hydraulic oils in
6 and Puerto Rico. (Id., at ¶123, 126).

7 (viii) Conoco markets and sells its products in Puerto Rico,
8 including its Phillips 66 lubricants. (Id., at ¶150). Plaintiffs
9 have been, and remain, customers of Conoco and have
10 invested in Conoco as a publicly traded company. (Id., at
11 ¶153).

12 (ix) Motiva markets and sells its products in Puerto Rico through
13 its joint ventures with codefendants. At all relevant times,
14 The Municipalities of Puerto Rico and/or their citizens have
15 been customers of Motiva. (Id., at ¶163).

16 (x) Occidental markets and sells consumer products worldwide,
17 including in Puerto Rico. Plaintiffs have been, and remain,
18 customers of either Occidental or Anadarko and have
19 invested in Occidental and previously Anadarko as a publicly
20 traded company. (Id., at ¶169).⁴

21 (xi) Defendant BHP is 1/3 owner of the Cerrejón coal mine, which
22 imports about 1.6 million short tons of coal annually to
23 supply Puerto Rico’s coal-fired electricity generating plant at
24 Guayama. The Municipalities of Puerto Rico and/or their
25 citizens have invested in BHP as a publicly traded company
26 and are customers of BHP. (Id., at ¶179).

27 (xii) Defendant Rio Tinto as a publicly traded company in which
28 the Municipalities of Puerto Rico and/or their citizens have
invested in. (Id., at ¶186).

⁴ Occidental avers that as a company engaged primarily in the upstream segment of the oil-and-gas industry, OPC’s business is in states and countries where it extracts hydrocarbons, not Puerto Rico. (Docket No. 232 at pg. 1).

1 At this stage and relying on Plaintiffs' well-pleaded allegations claiming that
2 Defendants marketed, promoted, and sold products in Puerto Rico, I conclude that the
3 purposeful availment test is met. However, I understand that limited discovery on the
4 issue of jurisdiction is proper in this case because a more developed record would assist
5 the Court in making its jurisdictional finding.
6

7 A court has "broad discretion in determining whether to grant jurisdictional
8 discovery." *Blair v. City of Worcester*, 522 F.3d 105, 110–11 (1st Cir. 2008)(citing *United*
9 *States v. Swiss Am. Bank, Ltd.*, 274 F.3d at 626). In general, the threshold showing to
10 allow limited discovery "is relatively low." *Id.* (citing *Surpitski v. Hughes–Keenan Corp.*,
11 362 F.2d 254, 255–256 (1st Cir. 1966)(per curiam)); see also *United States v. Swiss Am.*
12 *Bank, Ltd.*, 274 F.3d at 625) (citing *Sunview Condominium Ass'n v. Flexel Int'l, Ltd.*,
13 116 F.3d 962, 964 (1st Cir.1997)) ("We have long held that 'a diligent plaintiff who sues
14 an out-of-state corporation and who makes out a colorable case for the existence of *in*
15 *personam* jurisdiction *may* well be entitled to a modicum of jurisdictional discovery if
16 the corporation interposes a jurisdictional defense."); *Orchid Biosciences, Inc. v. St.*
17 *Louis Univ.*, 198 F.R.D. 670, 672–73 (S.D. Cal. 2001)(citing *America West Airlines, Inc.*
18 *v. GPA Group, Ltd.*, 877 F.2d 793, 801 (9th Cir.1989)(citations omitted)("It is clear that
19 the question of whether to allow discovery is generally within the discretion of the trial
20 judge. [W]here pertinent facts bearing on the question of jurisdiction are in dispute,
21 discovery should be allowed.")
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25 **b. Relatedness**

26 The least developed prong of the due process inquiry is the relatedness prong.
27 *Sawtelle*, 70 F.3d at 1389 (citing *Ticketmaster-New York, Inc. v. Alioto*, 26 F.3d 201,
28

1 206 (1st Cir. 1994)). It focuses on whether the claim underlying the litigation is related
2 to or directly arose out of Defendants’ forum-state activities. *Id.* The First Circuit has
3 adopted the view that a flexible approach to the jurisdictional inquiry, particularly in the
4 early stages of a case. In that respect, the Court has expressed:

5
6 By this approach, we intend to emphasize the importance of
7 proximate causation, but to allow a slight loosening of that
8 standard when circumstances dictate. We think such
9 flexibility is necessary in the jurisdictional inquiry:
relatedness cannot merely be reduced to one tort concept for
all circumstances.

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11 *Nowak v. Tak How Invs., Ltd.*, 94 F.3d 708, 716 (1st Cir. 1996). Within this framework,
12 I analyze the contacts between the Defendants and the forum.

13 Plaintiffs allege that Defendants had a duty to disclose information regarding the
14 impact of its products on the environment, particularly in the acceleration of climate
15 change and the formation of super storms. This failure to disclose allegedly caused the
16 Municipalities to underestimate the potential impact to their citizens and to continue
17 purchasing Defendants’ products. Both parties rely on *Ford Motor Co. v. Montana*
18 *Eighth Jud. Dist. Ct.*, 592 U.S. 351, 359, 141 S. Ct. 1017, 1024, 209 L. Ed. 2d 225 (2021)
19 for support, though each offer a different reading of its holding.
20

21 *Ford* held that personal jurisdiction may exist over an out-of-state company
22 where “[1] it serves a market for a product in the forum State and [2] the product
23 malfunctions there” “[3] caus[ing] injury in the State to one of its residents.” *Ford*, 141 S.
24 Ct. at 1022, 1026-27. Defendants distinguish the exercise of personal jurisdiction in that
25 case because, unlike the *Ford* plaintiffs, the Municipalities’ claims are unrelated to the
26 use and malfunction of Defendants’ products within the State. Furthermore, they state
27

1 that Plaintiffs cannot tie the purported climate change injuries solely to their conduct.
2 Climate change, they add, is a complex phenomenon that cannot be ascribed only to
3 Defendants' actions.

4 For their part, Plaintiffs respond that the standard for personal jurisdiction does
5 not require a strict but-for causal relationship between the defendant's in-forum
6 activities and the injury. Rather, the nexus needed to establish personal jurisdiction is a
7 "flexible, relaxed standard." *Pritzker v. Yari*, 42 F.3d 53, 61 (1st Cir. 1994). Citing to *Ford*,
8 they argue instead that the Court rejected the causation-only approach in favor of
9 requiring a mere "affiliation between the forum and the underlying controversy,
10 principally, an activity or an occurrence that takes place in the forum State and is
11 therefore subject to the State's regulation." *Id.* at 1025.

14 Following those requirements, Plaintiffs claim they satisfy the relatedness factor
15 because Defendants have conducted extensive activities in Puerto Rico that are related
16 to this litigation and have also engaged in fraudulent acts to misinform Plaintiffs.
17 Specifically, Plaintiffs point to the following actions: (1) Defendants "promote[d] and/or
18 s[old] fossil fuel products throughout Puerto Rico, have done so for years, and have
19 worked together through trade organizations, such as the API and the previously active
20 GCC, to target consumers including Plaintiffs' residents as well as municipal officials";⁵
21 (2) at least two of the Defendants, Exxon and Chevron, operated at some point service
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27 ⁵ (Docket No. 205, ¶¶ 25, 207, 211(a)-(h), 362-385); Docket No. 205-1, ¶¶ 3(b), 8(b)(xii), 8(d)(ii)(a)-(c),
8(e), 9, 18, 30.

1 stations in Puerto Rico, through their own businesses or their subsidiaries⁶; (3)
 2 Defendants have promoted, marketed, and sold their branded fossil fuel products in
 3 Puerto Rico and to Puerto Rico consumers⁷;(4) Defendants have individually and in
 4 concert failed to warn the Plaintiffs about the risks posed by the intended use of their
 5 fossil fuel products.;⁸ (5) Defendants have continuously and deliberately exploited the
 6 forum for fossil fuel products. (Docket No. 281, at 28).

8 The First Circuit has held that in-forum effects of non-forum activities, standing
 9 alone, may be too indirect to fulfill the relatedness prong. *See, A Corp. v. All Am.*
 10 *Plumbing, Inc.*, 812 F.3d 54, 60 (1st Cir. 2016)(citing *Sawtelle v. Farrell*, 70 F.3d at
 11 1390–91). Instead, courts must “look to whether the plaintiff has established cause in
 12 fact (i.e., the injury would not have occurred ‘but for’ the defendant’s forum-state
 13 activity) and legal cause (i.e., the defendant’s in-state conduct gave birth to the cause of
 14 action).” *Scottsdale Cap. Advisors Corp. v. The Deal, LLC*, 887 F.3d 17, 20–21 (1st Cir.
 15 2018)(citing *Mass. School of Law at Andover, Inc. v. Am. Bar Ass’n*, 142 F.3d 26, 35 (1st
 16 Cir. 1998) (internal quotation marks and citations omitted)); *see also United States v.*
 17 *Swiss Am. Bank, Ltd.*, 274 F.3d at 625 (citing *Mass. Sch. of Law v. Amer. Bar Ass’n*, 142
 18 F.3d 26, 35–36 (1st Cir.1998)) (“We have wrestled before with this issue of whether the
 19 in-forum effects of extra-forum activities suffice to constitute minimum contacts and
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⁶ (Docket No. 205, ¶¶ 99, 126.).

⁷ (Id., ¶¶ 101-103, 111, 113, 123, 128, 137, 140- 141, 150, 153, 163, 169, 174, 176, 179, 184, 186).

⁸ (Id., ¶¶ 7(d), 346, 586, 616, 643, 652, 697, 711, 783-797.)

1 have found in the negative.”); *Vapotherm, Inc. v. Santiago*, 38 F.4th 252, 261 (1st Cir.
2 2022).

3 Entering into a contract, for example, is not in and of itself sufficient to establish
4 minimum contacts with a forum. *Swiss Am. Bank*, 274 F.3d at 621.⁹ Neither are isolated
5 phone and email communications. *Sawtelle*, 70 F.3d at 1389–90.

7 The basis of the consumer fraud, fraudulent misrepresentation, negligent
8 misrepresentation, negligent fraudulent concealment, conspiracy to defraud, and RICO
9 claims are that Defendants engaged in a nationwide marketing campaign with the
10 purpose of deceiving or misleading consumers regarding the hazardous effects of their
11 fossil fuel products. Defendants’ marketing and promotional activities in Puerto Rico are
12 conceivably related to the misrepresentations and falsities that Plaintiffs claim. So are
13 the injuries. According to Plaintiffs, Defendants relied on those false statements to
14 continue purchasing Defendants’ products.¹⁰

16 Similarly, the RICO claim is premised on Defendants’ knowingly and intentionally
17 devising a scheme to defraud and sell their product to consumers by relying on materially
18 false and fraudulent representations regarding the impact of fossil fuels on climate
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⁹ In contractual disputes, “the Court must examine prior negotiations and contemplated future consequences of the contract in addition to the parties’ actual course of dealing.” *Swiss Am. Bank*, 274 F.3d at 621; *see also Naicom Corp.*, 2024 WL 1363755, at *17; and *PREP Tours, Inc. v. Am. Youth Soccer Org.*, 913 F.3d 11, 26 (1st Cir. 2019).

¹⁰ Defendants cite the case of *City of Oakland v. BP p.l.c.*, where the Court applied the “but for” standard to determine whether the effects of the sea level rise induced by global warming would have occurred but for the defendants’ California-related activities. The Court concluded that global warming would not have stopped absent defendants’ activities in the forum. *City of Oakland v. BP p.l.c.*, No. C 17-06011 WHA, 2018 WL 3609055, at *3 (N.D. Cal. July 27, 2018). This case, however, is not about emissions or accusations of global warming. The suit charges Defendants with engaging in a disinformation campaign that misled the public to continue reaping financial benefits from gas and oil sales.

1 change. These representations were allegedly made as part of the marketing and
2 advertising disinformation campaign in Puerto Rico.

3 I find that, taking as true plaintiffs' allegations that defendants are conducting a
4 sweeping marketing and promotional activities in Puerto Rico, there is sufficient
5 relatedness. However, I recommend that further discovery would put the Court in a
6 better position to decide these issues.
7

8 **c. Reasonableness**

9 Having found that the first two requirements were fulfilled, I next evaluate the
10 "reasonableness" factor. This prong is analyzed using the so-called "gestalt factors"
11 which include: (1) the defendant's burden of appearing, (2) the forum state's interest in
12 adjudicating the dispute, (3) the plaintiff's interest in obtaining convenient and effective
13 relief, (4) the judicial system's interest in obtaining the most effective resolution of the
14 controversy, and (5) the common interests of all sovereigns in promoting substantive
15 social policies. *Foster-Miller, Inc. v. Babcock & Wilcox Canada*, 46 F.3d 138, 150 (1st
16 Cir. 1995).
17

18 Courts must consider the inconvenience of travelling to the forum when assessing
19 the burden of appearing. *See Ticketmaster*, 26 F.3d at 210 ("The burden associated with
20 forcing a California resident to appear in a Massachusetts court is onerous in terms of
21 distance, and there are no mitigating factors to cushion that burdensomeness here. This
22 burden, and its inevitable concomitant, great inconvenience, are entitled to substantial
23 weight in calibrating the jurisdictional scales."). The concept of burden, however, is
24 "inherently relative, and, insofar as staging a defense in a foreign jurisdiction is almost
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1 always inconvenient and/or costly,...this factor is only meaningful where a party can
2 demonstrate some kind of special or unusual burden.” *Pritzker*, 42 F.3d at 64.

3 Defendants have not convinced me that there is an unusual burden in litigating
4 this case in Puerto Rico.

5
6 On the second factor, and taking as true plaintiff’s allegations, as I am bound to
7 do, I find that Puerto Rico has an interest in exercising jurisdiction in this case. “The
8 forum state has a demonstrable interest in exercising jurisdiction over one who causes
9 tortious injury within its borders.” *See Ticketmaster-New York*, 26 F.3d 211 (citing
10 *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 776, 104 S. Ct. 1473, 1479, 79 L.Ed.2d
11 790 (1984)).

12
13 Plaintiffs are Puerto Rico Municipalities and have chosen to litigate their claims
14 here. In addition, several causes of action are based on Puerto Rico law. Thus, Puerto
15 Rico demonstrably has an interest in serving as forum for a purported class action related
16 to fraud and misinformation to its consumers. Thus, this factor weighs in favor of the
17 exercise of specific jurisdiction.

18
19 Regarding plaintiffs’ convenience, the First Circuit has held that a plaintiff’s
20 choice of forum must be given deference with respect to the issue of its own convenience.
21 *See Sawtelle*, 70 F.3d at 1395. Certainly, it would be more convenient for the
22 Municipalities to litigate their claims in their home state rather than elsewhere.

23
24 As to the last factor, I find that it weighs in favor of finding that jurisdiction in
25 Puerto Rico is reasonable. All sovereigns share an interest in preventing disinformation
26 and fraudulent communications in detriment of its cities, Municipalities and
27 dependencies. Seeing this case would promote that goal insofar as it seeks to vindicate

1 the rights of Puerto Rico Municipalities against an alleged concerted misinformation
2 campaign.

3 In the aggregate, these factors weigh in favor of finding that Puerto Rico has
4 jurisdiction over the Defendants.

5
6 **2. 18 U.S.C. § 1965(b) jurisdiction**

7 Most courts to have interpreted the statute—including the Second, Seventh, Ninth,
8 and Tenth Circuits—have found that Section 1965(b) is the controlling provision for
9 jurisdictional purposes in civil RICO actions. *Dispensa v. Nat'l Conf. of Cath. Bishops*,
10 No. 19-CV-556-LM, 2020 WL 2573013, at *9 (D.N.H. May 21, 2020).¹¹ Under Section
11 1965(b), two requirements are needed: (1) “personal jurisdiction over another civil RICO
12 defendant otherwise exists in the forum,” and (ii) “‘the ends of justice require’ that the
13 court exercise personal jurisdiction over the civil RICO codefendant lacking the requisite
14 contacts.” *Id.* (citing *Cory v. Aztec Steel Bldg., Inc.*, 468 F.3d 1226, 1232 (10th Cir. 2006)).
15

16 Several cases from this district have analyzed the extent of Section 1965(b)
17 jurisdiction. In *Marrero-Rolón*, 2015 WL 5719801, at *3, the Court applied Section
18 1965(b) to find personal jurisdiction, after concluding that the ends of justice
19 requirement was satisfied. In *Naicom Corp. v. DISH Network Corp.*, however, the Court
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26 ¹¹ A minority of Courts have found instead that the controlling jurisdictional provision is Section 1965(d),
27 which does not require an “ends of justice” inquiry. *Id.* (citing *Republic of Panama v. BCCI Holdings*
(Luxembourg) S.A., 119 F.3d 935, 942 (11th Cir. 1997) and *ESAB Group, Inc. v. Centricut, Inc.*, 126 F.3d
28 617, 626 (4th Cir. 1997)).

1 declined to “break new ground on an unsettled jurisdictional issue” and focused instead
2 on assessing the claims on the merits. *Id.*, 2024 WL 1363755, at *20.¹²

3 Other sister courts within the First Circuit, are also split. In *Dispensa*, the Court
4 adopted the majority approach, thus deeming Section 1965(b) as the controlling statute.
5 As to the “ends of justice” requirement, it found that it was a “flexible concept uniquely
6 tailored to the facts of each case.” *Dispensa*, 2020 WL 2573013, at *10 (citing *Cory*, 468
7 F.3d at 1232). Ultimately, though, the Court found that plaintiffs had not established
8 personal jurisdiction because there was an alternative forum that had a closer
9 relationship to the parties’ dispute. *See also*, *Ayasli v. Korkmaz*, No. 19-CV-183 -JL,
10 2020 WL 4287923, at *16 (D.N.H. July 27, 2020), *on reconsideration in part*, 559 F.
11 Supp. 3d 1 (D.N.H. 2020); *Ginsburg v. Dinicola*, No. 06-11509, 2007 WL 1673533, at *4
12 (D. Mass. Jun. 7, 2007) (Zobel, J.); *but see Bridge v. Invest Am., Inc.*, 748 F. Supp. 948,
13 950 (D.R.I. 1990).

14 Because § 1965(b) requires a finding of jurisdiction over at least one defendant, I
15 recommend that the analysis under this section be conducted once jurisdictional
16 discovery is completed. This recommendation falls in line with the *Naicom* decision and
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24 ¹² In *Naicom*, the Court did a survey of the case law regarding the central issue on how to determine the
25 “ends of justice” requirement. *Naicom*, No. 3:21-CV-01405-JAW, 2024 WL 1363755, at *20 (D.P.R. Mar.
26 29, 2024). While some Courts require plaintiffs to “show that there is no other district in which a court
27 will have personal jurisdiction over all of the alleged co-conspirators,” *Id.* (citing *Butcher’s Union Loc.
No. 498, United Food & Com. Workers v. SDC Inv., Inc.*, 788 F.2d 535, 539 (9th Cir. 1986), others have
found the ends of justice to be a “flexible concept uniquely tailored to the facts of each case”). *Id.* (citing
Cory v. Aztec Steel Bldg., Inc., 468 F.3d 1226, 1232 (10th Cir. 2006)).

1 recognizes that the applicability of Section 1965(b) to RICO actions is not a settled matter
2 in our Circuit.

3 Having examined the jurisdictional arguments presented in Defendants' joint
4 motion, I now turn to those raised in their individual motions to dismiss.
5

6
7 **Occidental's Supplemental Motion to Dismiss (Docket No. 232)**

8 One such defendant is Occidental, which alleges that it was improperly served.
9 (Docket No. 232 at pg. 4). According to Occidental, Plaintiffs failed to comply with Fed.
10 R. Civ. P. 4(h), thus divesting the court of jurisdiction.
11

12 Under Rule 4(h), a corporation must be served either: (1) in the manner
13 prescribed for serving an individual; or (2) by delivering a copy of the summons and
14 complaint to an officer, managing or general agent authorized to receive service of
15 process and also mailing a copy of each to the defendant. Under the first option, service
16 can be effectuated by:

17 (A) delivering a copy of the summons and of the complaint to
18 the individual personally;

19 (B) leaving a copy of each at the individual's dwelling or usual
20 place of abode with someone of suitable age and discretion
21 who resides there; or

22 (C) delivering a copy of each to an agent authorized by
23 appointment or by law to receive service of process.

24 Fed. R. Civ. P. 4(e)(2). Rule 4(h), on the other hand, states that service on a corporation
25 is proper if the service complies with the legal requirements of the state where the
26 District Court is located (Puerto Rico), or where service is made (Texas). Fed. R. Civ. P.
27 4(h).
28

1 P.R. R. of Civ. P. 4.4(e) mirrors the provisions of Fed. R. Civ. P. 4(e)(2), stating
2 that a corporation may be served by “delivering a copy of the summons and of the
3 complaint to an officer, managing or general agent, or to any other agent authorized by
4 appointment or designated by law to receive service of process.” In Texas, on the other
5 hand, proper service is in line with the state’s requirements by serving the president, vice
6 president, or registered agent of the corporation. *See* Tex. Bus. Orgs. Code §§ 5.255 (1),
7 5.201(a), (b).
8

9 According to Occidental, on February 13, 2023, a process server went to OPC’s
10 Houston, Texas headquarters to serve process. (Docket No. 232, at 5). However, instead
11 of serving one of OPC’s authorized agents, the server “left” the summons and complaint
12 with an unidentified individual in its mailroom. (Id., n. 5). The box, rather than being
13 addressed to OPC, was addressed to: “The UPS Store, 11152 Westheimer Rd, Houston,
14 TX 77042” with a return address of “ABC Legal Services, 633 Yesler Way, Seattle, WA
15 98104-9678.” (Docket No. 232-2). Leaving the box in Occidental’s mailroom does not
16 constitute effective service of process, it argues. Its mailroom is not an agent for service
17 of process by law or through internal designation.
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20 Plaintiffs respond that, as indicated in the Proof of Service, they delivered copy of
21 the Summons and of the Complaint “to Office Services who indicated they were the
22 person authorized to accept with identity confirmed by subject stating their name.”
23 (Docket No. 8-1). In any case, says Plaintiffs, Occidental has not been prejudiced since it
24 has been on due notice of the claims against it and has actively participated in the case.
25

26 The Proof of Service that Plaintiffs submitted indicates that summons was served
27 on “Office Services” and expands on the circumstances:
28

1 I delivered the documents to Office Services who indicated
2 they were the person authorized to accept with identity
3 confirmed by subject stating their name. The individual tried
4 to refuse service by refusing to take documents and did not
5 state reason for refusal (documents left, seen by subject). The
6 individual appeared to be a black-haired black male contact
7 45-55 years of age, 5'8"-5'10" tall and weighing 180-200 lbs
8 with glasses.

9 (Docket No. 3-1, at 7).

10 In its Opposition, Plaintiffs do not expand on what division within Occidental is
11 "Office Services" or who in Office Services indicated that they were authorized to accept
12 the service documents. In fact, the notes state that the individual refused to take the
13 documents and, thus, the documents were left there. (Id.) Plaintiffs have not cited any
14 local or federal law which authorizes unnamed Office Services or—taking Occidental's
15 version of the facts—mailroom staff, to receive process on behalf of corporation. There is
16 no indication that the unnamed man who is mentioned in the Proof of Service was
17 appointed to receive service of process for Occidental. Therefore, I cannot assume such
18 appointment. For a similar analysis, see *Boateng v. Inter Am. Univ. of P.R.*, 188 F.R.D.
19 26, 29 (D.P.R. 1999). I thus find that Occidental was not served in accordance with the
20 requirements of Rule 4(h).

21 **BHP Group Limited's Supplemental Motion to Dismiss (Docket No. 245)**

22 BHP claims that Cerrejón's activities cannot be considered for the minimum
23 contacts analysis because the mines are not owned or operated by BHP, but rather by
24 separate corporate entities of which BHP subsidiaries were only 1/3 shareholders. BHP
25 goes into a detailed explanation of the corporate governance and structure of the entities,
26 affiliates and subsidiaries. Furthermore, they claim that the last coal imports from the
27

1 Cerrejón mines to the coal plant in Guayama, Puerto Rico, occurred in 2009, 13 years
2 before the Complaint was filed. In fact, they state that the BHP Subsidiaries sold their
3 interests in the Cerrejón Entities in January 2022. For these reasons, BHP posits that
4 Plaintiffs cannot overcome the presumption of corporate separateness between BHP's
5 subsidiaries and these other entities.
6

7 Plaintiffs counter that BHP admitted being a 1/3 owner of the Cerrejón entities,
8 which exported 1.6 million short tons of coal every year to Puerto Rico's coal-fired
9 electricity plant. Plaintiffs cite to the portions of the Amended Complaint where they
10 alleged that BHP conducted sales, marketing, and promotion activities in Puerto Rico.
11

12 The doctrine of corporate separateness provides that a corporation is legally
13 independent from its subsidiary. *United Elec., Radio & Mach. Workers of Am. v. 163*
14 *Pleasant St. Corp.*, 960 F.2d 1080, 1091 (1st Cir. 1992)(citations omitted)("Ordinarily,
15 courts respect the legal independence of a corporation and its subsidiary when
16 determining if a court's jurisdiction over the offspring begets jurisdiction over the
17 parent."). That presumption, however, "[may] be overcome by clear evidence that the
18 parent in fact controls the activities of the subsidiary." *Id.* (citing *Escudé Cruz v. Ortho*
19 *Pharmaceutical Corp.*, 619 F.2d 902, 905 (1st Cir. 1980); accord *Third Nat'l Bank v.*
20 *WEDGE Group Inc.*, 882 F.2d 1087, 1090 (6th Cir.1989), *cert. denied*, 493 U.S. 1058,
21 110 S.Ct. 870, 107 L.Ed.2d 953 (1990); cf. *Mangual v. General Battery Corp.*, 710 F.2d
22 15, 21 (1st Cir. 1983)).
23
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25 To conduct that analysis, Courts look at the facts on the record. *Id.* Here, however,
26 the record needs to be further developed to make such a determination. I find that, at
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28

1 this stage, limited discovery is needed regarding the extent of BHP’s activities in Puerto
2 Rico to determine where it had sufficient minimum contacts on the forum.

3 **Motiva’s Supplemental Motion to Dismiss (Docket No. 240)**

4 Motiva moves for dismissal on jurisdictional grounds. It alleges that the Amended
5 Complaint improperly attributes conduct from Saudi Arabia Oil Company (“Aramco” or
6 “Saudi Aramco”) to Motiva, which is a wholly owned subsidiary of Saudi Refining, Inc.
7 and Aramco Financial Services Co. (Docket No. 26).

8 Likewise relying on the corporate separateness doctrine, it argues that Aramco is
9 not a defendant in this lawsuit and that the Complaint fails to allege facts sufficient to
10 pierce the corporate veil between Aramco and Motiva. Further, Motiva states that the
11 Amended Complaint’s allegation that Aramco is “the world’s largest contributor to global
12 industrial GHG” is not attributable to Motiva and should not be included in the Court’s
13 analysis of the motions to dismiss. (Docket No. 205, ¶1642.).

14 As previously noted, these alleged grounds for dismissal should be revisited
15 following an opportunity to conduct discovery.

16 **Rio Tinto’s Motion to Dismiss (Docket No. 246)**

17 Rio Tinto alleges that Plaintiffs have failed to establish personal jurisdiction
18 because the Amended Complaint merely alleges that Plaintiffs invested in Rio Tinto as a
19 public company. Even taking that allegation as true, it is insufficient to establish the
20 minimum contacts required for the exercise of jurisdiction. According to Rio Tinto, this
21 application of the jurisdictional requirement does not consider the voluntariness factor
22 that is key to establish purposeful availment.
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1 To support its motion, Rio Tinto attached the Sworn Declaration of Michael
2 Pasmore, Head Secretariat at Rio Tinto. (Docket No. 246-1). Pasmore affirms that Rio
3 Tinto does not sell or market its products in Puerto Rico and never has, nor does it have
4 any other contacts with Puerto Rico. (Id). Furthermore, Rio Tinto asserts that it “ has
5 never sold or marketed coal, or any other fossil fuel, in or to Puerto Rico, its
6 municipalities, or its citizens.” (Docket Nos. 246, at 7, and 246-1, at ¶ 9.) In fact, Rio
7 Tinto affirms that none of its affiliates has produced or sold coal anywhere in the U.S.
8 since 2013, and that it divested itself of all coal production operations globally years ago.
9 (Id. ¶¶ 9-11).
10

11
12 Plaintiffs respond that Rio Tinto’s membership and participation with the
13 National Mining Association, the GCC, and the America Political Action Committee took
14 place in the United States. (Docket No. 281, at 11-12). The actions that they carried out
15 through those groups had a direct impact on the citizens of the U.S. and P.R. (Id., at 12,
16 citing Docket No. 205, ¶¶ 183, 211(b), 368, 381, 430(c), 483, 575).
17

18 Without more, I am not prepared to recommend dismissal for lack of jurisdiction
19 without further record development.

20 **C. Statute of limitations**

21 Defendants’ Joint Motion to Dismiss asserts that Plaintiffs’ claims fail on both
22 procedural and substantive grounds. As to the former, Defendants argue that the statute
23 of limitations began to run on September of 2017 at the latest. It was during that time
24 when Hurricanes Irma and Maria hit the island, which should have put Plaintiffs on
25 notice of their injuries. Even prior to that date, Defendants claim, a plethora of articles
26 and reports were available that tied climate change to oil companies’ activities. Plaintiffs,
27

1 however, claim that they only became aware of Defendants’ causal link to their injuries
2 after a report published in March 2022.

3
4 **1. Judicial Notice**

5 Before delving into the statute of limitations argument, I will discuss Defendants’
6 requests for judicial notice because the documents submitted for judicial notice are
7 directly tied to Defendants’ position on whether the claims are time-barred. Defendants
8 move the Court to take judicial notice of several articles and reports (Docket No. 238),
9 and a legal services contract. (Docket No. 241). Their proffer is that the articles—Exhibits
10 A-B—are not being offered for the purported truth of their contents, but to show that
11 information was publicly available. (Docket No. 238, at 2). Under the same rationale, the
12 reports—Exhibits C-G—are being offered to show information was publicly available.
13 (Id.). As to the legal services contract between the Municipality of Vega Baja and Milberg
14 Coleman Bryson Phillips Grossman LLC, dated November 17, 2022, Defendants offer it
15 to prove that the investigation into Plaintiffs’ claims has been ongoing since at least 2019.
16 (Docket No. 241).
17

18
19 Plaintiffs oppose, arguing that Defendants are using the judicial notice rule
20 improperly to submit the documents for the truth of their contents to bolster their
21 argument that the claims are time-barred. (Docket No. 282).

22 Under Rule 201(b) of the Federal Rules of Evidence, a district court can take
23 judicial notice of a fact not subject of reasonable dispute when it: “(1) is generally known
24 within the trial court’s territorial jurisdiction; or (2) can be accurately and readily
25 determined from sources whose accuracy cannot reasonably be questioned.” Fed. R. Evid.
26 201(b). Regarding newspaper articles, a judge in this district has found that “[a]t the
27

1 motion to dismiss stage, a Court may take judicial notice of the fact that press coverage,
2 prior lawsuits or regulatory filings contained certain information, without regard to the
3 truth of the contents.” *Gov't of Puerto Rico v. Carpenter Co.*, 442 F. Supp. 3d 464, 470
4 n. 15 (D.P.R. 2020) (citing *Rodi v. S. New England Sch. Of Law*, 389 F.3d 5, 12-19 (1st
5 Cir. 2004) and *Staehr v. Hartford Fin. Servs. Grp., Inc.*, 547 F.3d 406, 425 (2d Cir.
6 2008)). Other sister courts in our District have ruled accordingly. *See Seguin v. Textron*,
7 No. 13-CV-012-SJM-LM, 2013 WL 5704947, at *2 (D.R.I. Oct. 17, 2013); *Seguin v.*
8 *Suttell*, No. 13-CV-095-JNL-LM, 2013 WL 5523703, at *1 (D.R.I. Oct. 3, 2013); *Crespo-*
9 *Caraballo v. United States*, 200 F. Supp. 2d 73, 78 (D.P.R. 2002), *aff'd sub nom,*
10 *Caraballo v. U.S. D.E.A.*, 62 Fed. Appx. 362 (1st Cir. 2003) (Taking judicial notice that
11 The San Juan Star is a general circulation newspaper in Puerto Rico.). And the Plaintiffs
12 have not refuted that the articles and reports were published.
13
14

15 I thus take judicial notice only of the fact that Exhibits A through E were
16 published, but do not take judicial notice regarding the truth of their contents. I also take
17 judicial notice only of the fact that Exhibit F was published by the Union of Concerned
18 Scientists in July 2015 and made available online, and that Exhibit G was published by
19 the Puerto Rico Climate Change Council in 2013.
20

21 Finally, with regards to the legal services contract, I can take judicial notice of
22 information from an official government website that is “not subject to reasonable
23 dispute.” *Morales Posada v. Cultural Care, Inc.*, 554 F. Supp. 3d 309, 314 n. 2 (D. Mass.
24 2021)(citing *Gent v. CUNA Mut. Ins. Soc'y*, 611 F.3d 79, 84 n.5 (1st Cir. 2010)(internal
25 citations omitted.).
26
27
28

1 The contract in question is published on a government website as is required
2 because one of its parties is a Municipality. However, a legal document between two
3 parties published on a government website is not the same as official information
4 published or posted by a government entity on its website. The cases Defendants cite
5 from our jurisdiction all refer to information from agencies, such as the CDC. In fact, the
6 sole case that Defendants cite where the Court takes judicial notice of a “contract”
7 pertains to an Auction Terms and Conditions prepared and published by the City of
8 Chicago. *See Sroga v. Laboda*, 748 Fed Appx. 77, 78 n. 1 (7th Cir. 2019).

9
10 Here, in contrast, the Contract between the Municipality and the law firm makes
11 no mention of the purported investigation. The information that Defendants allude to is
12 contained in a proposal and brochure that are attached to the Contract and seems to have
13 been prepared by the law firm. (Docket No. 241-1). Therefore, I find that the information
14 here is “subject to reasonable dispute” and I am not permitted to take judicial notice.

15
16 Therefore, I recommend that the motion at Docket 238 be granted, but only as to
17 taking notice of the fact that the articles and reports were published. I also recommend
18 that the motion at Docket No. 241 be denied.

19 20 **2. Continuous tort**

21 The statute of limitations for Plaintiffs’ RICO and antitrust claims is four years¹³
22 and one year for the Puerto Rico law claims.¹⁴ The statute of limitations begins to run
23

24
25
26 ¹³ See *Álvarez-Maurás v. Banco Popular of P.R.*, 919 F.3d 617, 625 (1st Cir. 2019)(Although RICO does
27 not specify a statute of limitations, the Supreme Court imported the four-year deadline from the Clayton
Act’s civil enforcement provisions).

28 ¹⁴10 P.R. Laws Ann. tit. 31, § 5298.

1 from the time the aggrieved person had notice of the injury and notice of the person who
2 caused it. *M.R. (Vega Alta), Inc. v. Caribe Gen. Elec. Prods., Inc.*, 31 F. Supp. 2d 226,
3 239 (D.P.R. 1998)(citing *Colón Prieto v. Geigel*, 115 D.P.R. 232, 247 (1984); and *Rosado*
4 *Serrano v. E.I. Dupont de Nemours & Co.*, 797 F. Supp. 98, 102 (D.P.R.1992)). Notice
5 “does not require actual knowledge; it is enough that the would-be plaintiff had notice
6 that would have led a reasonable person to investigate and so uncover the needed
7 information.” *Lopez-Flores v. Cruz-Santiago*, 526 F. Supp. 2d 188, 190 (D.P.R. 2007).

9 According to Defendants, Plaintiffs were aware of the RICO and antitrust injuries
10 as of September 2017, when hurricanes Irma and Maria passed through Puerto Rico. The
11 statute of limitations therefore expired in September 2021, more than one year before
12 Plaintiffs filed suit.

14 Plaintiffs respond that they filed within one year of knowing that the Hurricanes
15 could be tied to Defendants’ activities; that Defendants’ actions constitute continuous
16 wrongful conduct; that the doctrine of equitable tolling applies; and that class actions
17 such as this one automatically toll the statute of limitations.

19 The Puerto Rico Supreme Court has defined the continuous tort doctrine as a
20 “continued, or uninterrupted, disturbance of unlawful acts or omissions which cause
21 foreseeable lasting damages.” *McMillan v. Rodriguez-Negron*, 511 F. Supp. 3d 75, 83
22 (D.P.R. 2020)(citing *Rivera Ruiz v. Mun. de Ponce*, 196 P.R. Dec. 410, 417 (P.R. 2016)).
23 “Since the tortfeasor’s illegal acts are continuous, the cause of action continually renews
24 itself, for the statute of limitation purposes, until the tortfeasor ceases his harmful
25 conduct.” *Id.* A “continuous tort”, however, arises from ongoing unlawful conduct, not
26 from a continuing harmful effect. *See Torres v. Hosp. San Cristobal*, 831 F. Supp. 2d
27

1 540, 544 (D.P.R. 2011), *M.R. (Vega Alta), Inc. v. Caribe Gen. Elec. Prods., Inc.*, 31 F.
2 Supp. 2d 226, 240 (D.P.R.1998)(citing *Arcelay v. Sanchez*, 77 D.P.R. 824, 838 (1955)).

3 In that respect, this District has expressed:

4 For there to be a continuous tort, Defendants must be
5 continuously acting, i.e., continuing to dump pollutants
6 on Plaintiffs' land. Defendants are not continuously
7 acting when the pollutants entering the land are doing so
8 without any further impetus on the part of the
9 Defendants beyond that committed in 1988.

9 *Id.*

10 In this case, Plaintiffs pleaded a pattern of interrupted acts of deceit on
11 Defendants' part.

12 Through the GCC, Defendants funded a marketing campaign of deception
13 that continues to this day, in violation of federal and Puerto Rico consumer
14 protection rules, anticompetitive practices, racketeering statutes, and
15 common law. (Docket No. 205, ¶6).

16 Because Defendants continue to this day to deceive the public and harm
17 the Plaintiffs and their injury is ongoing and extends the limitations period.
18 (*Id.*, ¶¶ 23-25).

19 In response to this development, and to stave off approval of the treaty by
20 the U.S. Senate and other climate action in the United States, the GCSCCT's
21 memo ("GCSCCT Action Memo") mapped out a multifaceted deception
22 strategy for the fossil fuel industry that continues to this day—outlining
23 plans to reach the media, the public, and policy makers with a message
24 emphasizing "uncertainties" in climate science. (*Id.*, ¶429).

25 While Defendants now outsource outright climate denial, their public-
26 facing deception continues to this day through a variety of "greenwashing"
27 campaigns. (*Id.*, ¶501).

28 All of these greenwashing tactics have been and continue to be used to
conceal the Defendants' continuous sponsorship of climate denial and their
record-breaking profits from fossil. (*Id.*, ¶557).

1 At this stage, based on the above, I find that Plaintiffs have sufficiently alleged
2 that Defendants engaged in a continued pattern of unlawful acts or omissions which
3 cause foreseeable damages. Although my analysis could stop at this point, I will address
4 Plaintiffs' other arguments regarding tolling of the statute of limitations.
5

6 7 8 **3. Equitable Tolling**

9 Even if the Court deems that the conduct is not continuous, Plaintiffs argue, the
10 limitations period is tolled regarding Defendants pre-2017 statements because they
11 fraudulently concealed the nature of their disinformation campaign.
12

13 “The equitable tolling doctrine extends statutory deadlines in extraordinary
14 circumstances for parties who were prevented from complying with them through no
15 fault or lack of diligence of their own.” *See Neves v. Holder*, 613 F.3d 30, 36 (1st Cir.
16 2010) (citing *Fustaguio Do Nascimento v. Mukasey*, 549 F.3d 12, 18–19 (1st Cir.2008)
17 and *Gonzalez v. United States*, 284 F.3d 281, 291 (1st Cir. 2002)).
18

19 To receive the benefit of equitable tolling, a plaintiff must satisfy two essential
20 elements: “(1) that he has been pursuing his rights diligently, and (2) that some
21 extraordinary circumstance stood in his way.” *Bah v. Enter. Rent-A-Car Co. of Bos., LLC*,
22 699 F. Supp. 3d 133, 138 (D. Mass. 2023), judgment entered, No. CV 17-12542-MLW,
23 2024 WL 185446 (D. Mass. Jan. 17, 2024)(citations omitted). In addition, the First
24 Circuit has identified five criteria that courts may consider “as factors within the
25 Supreme Court’s two-part standard”: (1) a lack of actual notice of a time limit; (2) a lack
26 of constructive notice of a time limit; (3) diligence in the pursuit of one’s rights; (4) an
27

1 absence of prejudice to a party opponent; and (5) the claimant’s reasonableness in
2 remaining ignorant of the time limit. *Id.* (citing *Neves*, 613 F.3d at 36 n.5.).

3 Plaintiffs argue that they have been diligently pursuing their rights and that they
4 were unable to file suit before because Plaintiffs deliberately concealed the extent of their
5 actions. Plaintiffs point to the release in March 2022 of a report titled “How Much Have
6 the Oil Supermajors Contributed to Climate Change? Estimating the Carbon Footprint
7 of the Oil Refining and Petroleum Product Sales Sectors” as the pivotal point in their
8 awareness of the injury. (Docket No. 280, at 7)(“After reviewing this report, Plaintiffs
9 learned which entities have a causal link to Plaintiffs’ injuries and their respective market
10 shares in the fossil fuel industry.”).

11
12
13 Defendants refute that analysis and argue instead that Plaintiffs should have
14 known of their alleged injuries when the storms passed in 2017. In fact, they state, several
15 municipalities across the nation filed similar complaints in the aftermath of the
16 Hurricanes, *e.g. Cnty. of San Mateo v. Chevron Corp.*, ECF No. 1-2, No. 17-cv-4929 (N.D.
17 Cal. Aug. 24, 2017). Plaintiffs also cite several major media outlets that covered the
18 subject, such as the New York Times. Based on this wealth of evidence, Defendants argue,
19 Plaintiffs should have uncovered the connection between fossil fuels and climate change
20 with minimal diligence.¹⁵
21

22
23
24
25 ¹⁵ Defendants Conoco, API and Chevron argue that Plaintiffs’ claims are time-barred in their separate
26 Motions to Dismiss. (Docket Nos. 237, 254 and 239). Conoco avers that its publicly filed 2012 Form 10-K
27 discusses state, national, and international responses to climate change that should have put Plaintiffs on
28 notice that they could be injured. (Docket No. 237, at 14). API argues that in their case, the statute of
limitations is even further expired because Plaintiffs’ claims against API do not relate back to the original
Complaint. Finally, Chevron alleges that Plaintiffs’ counsel undertook a three-year investigation into
Defendants’ potential liability that began no later than 2018 or 2019. Thus, since at least that time,

1 Plaintiffs riposte that general knowledge of fossil fuels’ connection to climate
2 change would not be enough to trigger the statute of limitations. Because this is an action
3 based on fraud and concealment, the key is when Plaintiffs learned of the deception.

4 The doctrine of equitable tolling only applies “if a plaintiff exercising reasonable
5 diligence could not have discovered information essential to the suit.” *Abdallah v. Bain*
6 *Cap. LLC*, 752 F.3d 114, 120 (1st Cir. 2014)(citing *Bernier v. Upjohn Co.*, 144 F.3d 178,
7 180 (1st Cir.1998) and *Protective Life Ins. Co. v. Sullivan*, 425 Mass. 615, 631, 682 N.E.2d
8 624 (1997)).

9
10 Examining the criteria for equitable tolling set forth above, I find that Plaintiffs
11 have established that the doctrine applies here. Plaintiffs have alleged that they pursued
12 their rights diligently, conducting investigations prior to filing. They also allege that
13 extraordinary circumstances exist because Defendants conducted a well-organized
14 campaign of deceit. I am not convinced by Defendants pointing to several articles and
15 reports regarding the relationship between climate change and fossil fuels and even the
16 concerted efforts of the major fuel companies to misinform the public. Their contention
17 that these articles should have put Plaintiffs on notice even prior to 2017 of their potential
18 cause of action is unavailing because I only took judicial notice of the fact that those
19 documents were published, not of the truth of their contents.
20
21
22
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24

25
26 Plaintiffs should have been aware that they had a cause of action. (Docket No. 239, at 11-12). I need not
27 address these arguments because they do not alter the conclusion that Plaintiffs’ claims are timely based
28 on the continuous tort doctrine.

1 For these reasons, I find that even if the injury wasn't continuous, equitable tolling
2 would make Plaintiffs' claims timely.

3 **4. Class action tolling**

4 As to the last point, Plaintiffs cite a Puerto Rico case for the proposition that the
5 filing of a class action automatically tolls the statute of limitations. In *Nevarez Agosto v.*
6 *United Surety & Indemnity Company*, 209 D.P.R. 346, 2022 WL 1523597 (P.R., 2022),
7 the Court held that when a case is presented as a class action, the statute of limitations
8 is automatically tolled both for the plaintiffs who were part of the original lawsuit and
9 for all potential plaintiffs who are members of the class, including those who were
10 unaware of the proceedings. *Id.* The tolling, however, applies to prospective claims, not
11 the original class action. That case, which triggers the tolling, which must be brought
12 within the statutory limits. In *Nevarez Agosto*, for example, the plaintiff benefitted from
13 the tolling of the statute of limitations to bring an independent action against insurance
14 company United after the Secretary of the Department of Consumer Affairs filed a class
15 action against several insurance companies, United included.

16 Moreover, *Gonzalez v. Merck*, 166 D.P.R. 659, 683–84, 2006 TSPR 2 (Jan. 5,
17 2006), clearly delineates the rule by stating: “There is no doubt of the tolling effect that
18 filing a class action has for a later action filed by the individual defendants.”

19 In conclusion, I find that Plaintiffs' claims are not time-barred, as discussed above,
20 under the continuous tort rule. However, their arguments regarding class action tolling
21 under Puerto Rico law are unconvincing.

22 **D. Failure to State a Claim**

23 **1. RICO**

1
2 Plaintiffs' fourth, fifth, sixth, and seventh causes of action allege RICO violations
3 in the form of mail and wire fraud under Sections 1962(a)-(d). Defendants move for
4 dismissal on several grounds. First, because Plaintiffs' RICO claims are based on
5 Defendants' membership on API and GCC and participation in public debates about
6 climate change they are precluded by the First Amendment and the *Noerr-Pennington*
7 doctrine. Second, that the Complaint fails adequately to plead the elements of a RICO
8 cause of action. And third, that Plaintiffs' RICO claims improperly seek damages for
9 injuries allegedly sustained by the Municipalities' residents, rather than Plaintiffs
10 themselves, and for the costs of government services.
11

12 ***a. First Amendment and the Noerr-Pennington doctrine***

13 Defendants categorize all of Plaintiffs' RICO allegations as protected speech or
14 membership in a lawful organization. In essence, Defendants state that Plaintiffs are
15 suing them for their public statements on climate change through the course of decades.
16 Those are protected activities and the First Amendment and the *Noerr-Pennington*
17 doctrine bar Plaintiffs' attempts to hold Defendants liable for political speech.
18

19 “[T]he First Amendment means that the government has no power to restrict
20 expression because of its message, its ideas, its subject matter, or its content.” *United*
21 *States v. Alvarez*, 567 U.S. 709, 716 (2012) (quoting *Ashcroft v. Am. Civil Liberties Union*,
22 535 U.S. 564, 573 (2002)); *see also* U.S. Const. amend. I (“Congress shall make no law . . .
23 abridging the freedom of speech . . . or the right of the people . . . to petition the
24 Government for a redress of grievances.”). Relevant to this case, the Supreme Court has
25 held that “political speech does not lose First Amendment protection ‘simply because its
26
27
28

1 source is a corporation.” *Citizens United v. Fed. Election Comm’n*, 558 U.S. 310, 342,
2 130 S. Ct. 876, 900, 175 L. Ed. 2d 753 (2010)(citing *First Nat. Bank of Boston v. Bellotti*,
3 435 US. 765, 784 98 S. Ct. 1407 and *Pacific Gas & Elec. Co. v. Public Util. Comm’n of*
4 *Cal.*, 475 U.S. 1, 8, 106 S. Ct. 903, 89 L.Ed.2d 1 (1986)).

5
6 In their response, Defendants distinguish between protected speech and
7 fraudulent statements within a concerted disinformation campaign. Given that the
8 Amended Complaint charges Defendants with deliberately misleading the public
9 through fraud, they reason that neither the First Amendment, nor the *Noerr-Pennington*
10 doctrine apply to bar their claims.

11
12 Fraudulent statements are not protected by the First Amendment. *IMS Health*
13 *Inc. v. Ayotte*, 550 F.3d 42, 84 (1st Cir. 2008), *abrogated by Sorrell v. IMS Health Inc.*,
14 564 U.S. 552, 131 S. Ct. 2653, 180 L. Ed. 2d 544 (2011)(“Such communications—e.g.,
15 insider information about securities, fraudulent statements, or speech that would violate
16 intellectual property laws—are routinely regulated without First Amendment inquiry.”);
17 *Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 496, 116 S. Ct. 1495, 1504, 134 L. Ed. 2d
18 711 (1996)(The Supreme Court has held that the First Amendment “protect[s] the
19 dissemination of truthful and nonmisleading commercial messages about lawful
20 products and services.”).

21
22 The Noerr-Pennington doctrine, “which derives from the First Amendment’s
23 guarantee of ‘the right ... to petition the government for redress of grievances,’ U.S.
24 Const. amend. I, shields from antitrust liability entities who join together to influence
25 government action—even if they seek to restrain competition or to damage competitors.”
26

1 *Davric Maine Corp. v. Rancourt*, 216 F.3d 143, 147 (1st Cir. 2000). The doctrine has a
2 “sham” exception, “which withholds immunity when a party’s resort to governmental
3 process from antitrust immunity when such resort is objectively baseless and intended
4 only to burden a rival with the governmental decision-making process itself.” *Guimerfe,*
5 *Inc. v. Perez-Perdomo*, No. CIV. 08-1243CCC, 2009 WL 918933, at *3 (D.P.R. Mar. 31,
6 2009)(citing *Davric Maine Corporation*, 216 F.3d. at 147).

8 This is precisely the type of conduct that Plaintiffs denounce in their allegations.
9 Making the assessment of whether Noerr-Pennington immunity applies is a highly
10 factual determination. Our District has taken the position that assessing the applicability
11 of Noerr-Pennington amounts to a “highly factual determination[] inappropriate for a
12 dismissal motion.” *Abarca Health, LLC v. PharmPix Corp.*, 915 F. Supp. 2d 210, 216
13 (D.P.R. 2012)(citing *Guimerfe, Inc.*, 2009 WL 918933, at *3–4). “Whether this is, in fact,
14 the case, and whether or not defendant fall within the immunity provided by the Noerr–
15 Pennington doctrine, are highly factual determinations inappropriate for a dismissal
16 motion.” *Guiferme*, 2009 WL 918933, at *4.

19 I thus find that, at this stage, Defendants’ request for dismissal under the First
20 Amendment and the Noerr-Pennington doctrine should be denied.¹⁶

24 ¹⁶ Four defendants, Conoco, Chevron, Chevron, Shell, and API raised First Amendment and/or Noerr-
25 Pennington doctrine arguments in their individual motions to dismiss. (Docket Nos. 237, 239, 244 and
26 254). Their arguments, however, mirror those in the Joint Motion and were discussed and ruled upon in
27 that section. Only Chevron raised specific arguments regarding the insufficiency of the allegations as to its
28 participation in the alleged scheme at the heart of this suit. However, a review of the Amended Complaint
shows otherwise. Plaintiffs alleged particularized facts regarding Chevron’s involvement in the RICO
conspiracy. (Docket No. 205, ¶¶205, 211(a), 309, 327, 365, 368, 369, 372, 386, 406, 498).

1 **b. Proximate Cause**

2 Next, Defendants move for dismissal for failure to adequately plead a RICO cause
3 of action. According to Defendants, Plaintiffs have failed to plead any of the essential
4 elements: no causation, no enterprise, no racketeering activity, no pattern, no
5 management or control, no investment, no acquisition, and no conspiracy.
6

7 RICO makes it unlawful for “any person employed by or associated with any
8 enterprise engaged in, or the activities of which affect, interstate or foreign commerce,
9 to conduct or participate, directly or indirectly, in the conduct of such enterprise’s affairs
10 through a pattern of racketeering activity or collection of unlawful debt.” 18 U.S.C.
11 §1962(c). To state a plausible RICO claim under §1962(c), a plaintiff must allege each of
12 the four elements required by the statute: (1) conduct (2) of an enterprise (3) through a
13 pattern (4) of racketeering activity. *Efron v. Embassy Suites (Puerto Rico), Inc.*, 223 F.3d
14 12, 14–15 (1st Cir. 2000); *Giuliano v. Fulton*, 399 F.3d 381, 386 (1st Cir. 2005).
15 “Racketeering activity,” as defined in § 1961(1)(B), may include, among others, two
16 “predicate acts” of mail or wire fraud under 18 U.S.C. § 1341 and 18 U.S.C. § 1343,
17 respectively. To constitute a “pattern”, at least two acts of racketeering activity must
18 occur within ten years of each other. *Id.* § 1961(5). In addition, a RICO plaintiff must
19 show that “the racketeering predicates are related, and that they amount to or pose a
20 threat of continued criminal activity.” *Giuliano v. Fulton*, 399 F.3d at 386–87 (quoting
21 *H.J. Inc. v. Northwestern Bell Tel. Co.*, 492 U.S. 229, 239, 109 S. Ct. 2893, 106 L.Ed.2d
22 195 (1989)).
23
24
25

26 Defendants posit that Plaintiffs’ RICO claims fail on the first requirement, because
27 they failed to plead that anybody relied on Defendants’ purported misrepresentations.
28

1 Plaintiffs don't even plead that they in fact purchased Defendants' products. Instead,
2 they allege that they are Defendants' customers "on information and belief". (Docket No.
3 235, at 26, referencing Docket No. 205, at ¶¶103–186). But more importantly,
4 Defendants argue, that the causal link is too attenuated because there are too many steps
5 in the causal chain. As Defendants put it, the injury to Plaintiffs would depend on the
6 acts of possibly every human being or entity on Earth that has combusted oil and gas. In
7 that sense, Defendants categorize Plaintiffs' claims as speculative and "facially
8 implausible" because they suggest that the damage of the 2017 storms and its impact was
9 caused by Defendants' actions.
10

11 Plaintiffs counter that they plead enough to survive dismissal at this stage,
12 pointing to Claims Four through Seven of the Amended Complaint and to the RICO
13 statement. (Docket No. 205, at 250-269 and 206). Regarding causation, Defendants
14 describe their causal theory as follows: "Defendants...have funded a fraudulent
15 marketing campaign of deception that continues to this day, to convince all consumers,
16 including Plaintiffs, that Defendants' fossil fuel-based products did not—and would not—
17 adversely alter the climate, while knowing the disastrous consequences of their
18 combined carbon pollution on the world and Plaintiffs more so than most." (Docket No.
19 280, at 34). The harm adduced is that Plaintiffs increased their consumption of fossil
20 fuels, under those false pretenses, which in turn destroyed Puerto Rico's infrastructure
21 and property during the 2017 Hurricane Season. (Docket No. 206, ¶¶ 2(h), 5, 8(a), 30,
22 31.).
23
24
25

26 According to the Supreme Court, proximate causation requires a direct
27 relationship between the injury asserted and the injurious conduct alleged. *Holmes v.*
28

1 *Sec. Inv. Prot. Corp.*, 503 U.S. 258, 274, 112 S. Ct. 1311, 1321, 117 L. Ed. 2d 532
2 (1992)(citing *Associated General Contractors of Cal., Inc. v. Carpenters*, 459 U.S. 519,
3 545, 103 S. Ct. 897, 74 L. Ed. 2d 723 (1983)).

4 Defendants correctly point out that the First Circuit has identified three functional
5 factors to assess whether there is proximate cause under RICO. *Sterling Suffolk*
6 *Racecourse, LLC v. Wynn Resorts, Ltd.*, 990 F.3d 31, 35–36 (1st Cir. 2021) (citing *In re*
7 *Neurontin Mktg. & Sales Pracs. Litig.*, 712 F.3d 21, 35-36 (1st Cir. 2013) and *Holmes*,
8 503 U.S. at 269-70)). The first factor is “concerns about proof” because “the less direct
9 an injury is, the more difficult it becomes to ascertain the amount of a plaintiff’s damages
10 attributable to the violation, as distinct from other, independent, factors”. *Sterling*, 990
11 F.3d at 35-36 (citing *In re Neurontin*, 712 F.3d at 36.). The second factor is “concerns
12 about administrability and the avoidance of multiple recoveries.” *Id.* The third and final
13 factor is “the societal interest in deterring illegal conduct and whether that interest would
14 be served in a particular case.” *Id.*

15 Defendants direct the Court to *Hemi Group, LLC v. City of New York*, 559 U.S. 1,
16 130 S. Ct. 983, 175 L. Ed. 2d 943 (2010), arguing that dismissal at the pleading stage for
17 an “attenuated causal link” is proper. In *Hemi Group*, the Supreme Court held that the
18 chain of causation was too attenuated because the Defendant’s theory of liability rested
19 not only on separate actions, but on separate actions carried out by separate parties. *Id.*
20 at 11. Defendants say that the *Hemi* Court granted dismissal with a “far less attenuated
21 chains of causation” than the one in this case. (Docket No. 235, at 27).

22 A case from our Circuit, *In re Neurontin Mktg. & Sales Pracs. Litig.*, 712 F.3d 21,
23 25–26 (1st Cir. 2013), provides a more fitting factual scenario. The case concerned a class
24

1 action claiming that defendants had engaged in the fraudulent marketing of Neurontin
2 for off-label uses. Plaintiffs asserted claims under RICO, as well as state-law claims for
3 common law fraud, violation of consumer protection statutes, and unjust enrichment.

4 *Id.* at 26.

5
6 On the issue of causality, the Court of Appeals echoed the holding of *Bridge v.*
7 *Phoenix Bond & Indemnity Co.*, 128 S. Ct. 2131, to find that first-party reliance on
8 misrepresentations is not an element of proximate cause in a mail fraud RICO claim.
9 That means that even where the citizens instead of the Municipalities were the direct
10 recipients of the misrepresentations, Plaintiffs have asserted enough for proximate
11 causation under RICO. *In re Neurontin Mktg. & Sales Prac. Litig.*, 712 F.3d at 38
12 (internal citations omitted) (“The *Bridge* Court rejected the attempt to impose a direct
13 reliance requirement on top of the statutory language providing a private right of action
14 under RICO, finding no support for it in the common law. We likewise find none here.”).
15 The First Circuit thus rejected the multiple steps defense, finding that the argument
16 “misconstrue[d] the way in which the Court framed the direct relation test.” *Id.* at 38.

17
18
19 Plaintiffs pled that they directly suffered the consequences of Plaintiffs’
20 intentional misrepresentations. (Docket No. 205, ¶¶3, 7(h), 614,652, 654). Therefore,
21 like the *In re Neurontin* court, I believe the amended complaint has set forth enough
22 factual allegations of proximate cause under RICO.

23
24 ***c. Failure to allege an “enterprise”***

25 Civil RICO requires a showing “(1) that there existed an enterprise, which affected
26 interstate commerce; (2) that codefendants were employed by or associated with the
27 enterprise; (3) that codefendants participated in the conduct of the enterprise’s affairs;

1 and (4) that codefendants’ participation was through a pattern of racketeering activity.”
2 *Corporación Insular de Seguros v. Reyes-Muñoz*, 849 F. Supp. 126, 133–34 (D.P.R.
3 1994). The RICO statute provides that an enterprise “includes any individual,
4 partnership, corporation, association, or other legal entity, and any union or group of
5 individuals associated in fact although not a legal entity.” § 1961(4). The term thus has a
6 broad reach, “encompassing ‘any ... group of individuals associated in fact.’” *Boyle v.*
7 *United States*, 556 U.S. 938, 944, 129 S. Ct. 2237, 2243, 173 L. Ed. 2d 1265 (2009) (citing
8 § 1961(4)).
9

10 So-called associations-in-fact may be an enterprise “proved by evidence of an
11 ongoing organization, formal or informal, and by evidence that the various associates
12 function as a continuing unit.” *Boyle*, 556 U.S. 938, 944 (citing *United States v. Turkette*,
13 452 U.S. 576, 583, 101 S. Ct. 2524, 2528, 69 L. Ed. 2d 246 (1981)). RICO does not require
14 that the enterprise be driven by an economic motive. *Nat’l Org. for Women, Inc. v.*
15 *Scheidler*, 510 U.S. 249, 257, 114 S. Ct. 798, 803–04, 127 L. Ed. 2d 99 (1994).
16

17 Plaintiffs allege that Defendants acted “through their enterprises-in-fact—the
18 GCC, API, and [their] members.” (Docket No. 206, ¶ 2(h)). To be more specific, Plaintiffs
19 allege that only the Oil and Gas Defendants participate in the conduct of the API
20 Enterprise’s affairs, and that all Defendants (basically all Defendants except API)
21 participate in the conduct of the GCC Enterprise’s affairs. (Docket No. 205, ¶ 729). The
22 purpose of the enterprises was to mislead regarding climate science and influence public
23 perception of fossil fuel’s contribution to climate change. (Docket No. 205, ¶¶ 718-723).
24

25 Defendants, point out that the GCC ceased operating in 2002, and Plaintiffs
26 cannot rely on that entity to establish the enterprise because they failed to plead that
27

1 Defendants operated as a “continuing unit” after 2002. In their Amended Complaint,
2 Plaintiffs admitted that the GCC “was discontinued in 2001.” However, it allegedly
3 continues to operate “informally today through other associations like API and the
4 National Association of Manufacturers as an association-in-fact of the Defendants.”
5 (Docket No. 205, ¶ 211(a); and 206 ¶¶ 3(b)(v), 10)).
6

7 The law does not require that a RICO enterprise be a legal entity. *See United States*
8 *v. Rodriguez-Torres*, 939 F.3d 16, 24 (1st Cir. 2019). In fact, the group does not need a
9 “hierarchical structure,” “chain of command,” or “decisionmaking framework.” *Boyle*,
10 556 U.S. at 948. What is required is that the group have “[1] a purpose, [2] relationships
11 among those associated with the enterprise, and [3] longevity sufficient to permit these
12 associates to pursue the enterprise’s purpose.” *Id.* at 946; *see also Rodriguez-Torres*,
13 939 F.3d at 24.
14

15 Regarding the “purpose” factor, the association must have the “common purpose
16 of engaging in a course of conduct.” *Id.* (citing *Boyle*, 556 U.S. at 946). To establish the
17 “relationships” there must be “evidence that the group members came together to
18 advance ‘a certain object’ or ‘engag[e] in a course of conduct.’” *Id.* Finally, as to
19 “longevity”, the association must have a shared purpose for a “sufficient duration to
20 permit an association to ‘participate’ in [the enterprise's affairs] through ‘a pattern of
21 racketeering activity,’ ” *Id.* There is no requirement, however, that the duration factor
22 be continuous. *Id.* (“nothing in RICO exempts an enterprise whose associates engage in
23 spurts of activity punctuated by periods of quiescence.”).
24
25

26 A review of Plaintiffs’ allegations shows that they sufficiently pled that the API
27 and the GGC operated as an as an association-in-fact enterprise. Plaintiffs allege that the
28

1 purpose of the organizations was to engage in a propaganda campaign to misrepresent
2 the effects of fossil fuels on climate change. Plaintiffs also pled that the members of those
3 organizations came together for a common purpose. To that end, they commissioned
4 reports, distributed videos, and issued statements and directives as a united group.
5 (Docket No. 205, at ¶¶362-392). As to the last point, Plaintiffs include allegations that
6 the associations have engaged in that common purpose for decades and continue to do
7 so until today. Defendants allege specific actions undertaken by the associations for at
8 least a decade. In *Rodriguez-Torres*, the Court found that continuing as a cohesive unit
9 for at least eight years was enough to satisfy the “longevity” requirement. *Rodriguez-*
10 *Torres*, 939 F.3d at 25.

11
12
13 **d. Racketeering Activity**

14 Plaintiffs in RICO mail and wire fraud actions such as this one, must comply with
15 the Fed. R. Civ. P. 9(b) heightened pleading standard¹⁷ and “state the time, place and
16 content of the alleged mail and wire communications perpetrating that fraud.” *N. Bridge*
17 *Assocs., Inc. v. Boldt*, 274 F.3d 38, 43 (1st Cir. 2001); *New England Data Servs., Inc. v.*
18 *Becher*, 829 F.2d 286, 290 (1st Cir. 1987).

19 Defendants argue that the Amended Complaint does not comply with this
20 standard and fails to plead adequately a pattern of racketeering activity and the
21 individual Defendants’ participation in conducting the affairs of the enterprise. As noted,
22
23

24
25
26 ¹⁷ Fed. R. Civ. P. 9(b) provides that when “alleging fraud or mistake, a party must state with particularity
27 the circumstances constituting fraud or mistake. Malice, intent, knowledge, and other conditions of a
28 person's mind may be alleged generally.”

1 to sufficiently allege a “pattern,” a plaintiff must establish at least two acts of racketeering
2 occurred within ten years of each other. 18 U.S.C § 1961(5). Additionally, a “pattern” also
3 requires “that the racketeering predicates are related, and that they amount to or pose a
4 threat of continued criminal activity.” *H.J. Inc. v. Nw. Bell Tel. Co.*, 492 U.S. 229, 239,
5 109 S. Ct. 2893, 106 L. Ed. 2d 195 (1989).
6

7 According to Defendants, Plaintiffs fail to allege mail and wire fraud with
8 particularity as to each Defendant and in the aggregate. Defendants distinguish between
9 schemes that lead their victims to enter into unwanted transactions versus those that
10 include a misrepresentation of a key factor of the bargain. *See Medina-Rodriguez v.*
11 *\$3,072,266.59 in United States Currency*, 471 F. Supp. 3d 465, 478 (D.P.R. 2020)
12 (quoting *United States v. Kelerchian*, 937 F.3d 895, 912 (7th Cir. 2019)). The former does
13 not violate mail and wire fraud statutes, while the latter does. Defendants cite a recent
14 Supreme Court case, *Ciminelli v. United States*, 598 U.S. 306 (2023), 143 S. Ct. 1121,
15 1124–25, 215 L. Ed. 2d 294 (2023), in support of their argument that the mail and wire
16 fraud statutes are inapplicable where a victim was denied information as opposed to
17 property. Defendants thus move the Court to adopt the view that Plaintiffs can only be
18 defrauded when they are denied actual property. In essence, because Plaintiffs received
19 fuel when they bought fuel, they cannot sustain a claim under the mail and wire statutes.
20
21

22 The wire fraud statute criminalizes “scheme[s] or artifice[s] to defraud, or for
23 obtaining money or property by means of false or fraudulent pretenses, representations,
24 or promises.” *See* 18 U.S.C. § 1343. The Supreme Court has interpreted the statute to
25 require that the Government prove not only that wire fraud defendants “engaged in
26 deception,” but also that money or property was “an object of their fraud.” *Kelly v. United*
27

1 *States*, 590 U.S. 391, 391, 140 S. Ct. 1565, 1566, 206 L. Ed. 2d 882 (2020); *Ciminelli*, 598
2 U.S. at 312. Further interpreting and defining the contours of the *Kelly* decision, the First
3 Circuit recently held that “property need only be ‘an object’ of [defendants’] scheme, not
4 the sole or primary goal.” *United States v. McGlashan*, 78 F.4th 1, 8 (1st Cir. 2023)
5 (quoting *United States v. Gatto*, 986 F.3d 104, 116 (2d Cir. 2021)).
6

7 In *Ciminelli*, which Defendants rely upon, the Supreme Court held that
8 “potentially valuable economic information necessary to make discretionary economic
9 decisions is not a traditional property interest,” and thus, does not form “a valid basis for
10 liability under § 1343.” *Ciminelli*, 598 U.S. at 309 (international quotations omitted).¹⁸
11

12 The allegations in this case, however, do not turn on whether Defendants crafted
13 a scheme to deprive Plaintiffs of their intangible right to “valuable economic
14 information.” The object of the RICO conspiracy, as alleged, was to create and
15 disseminate erroneous, misleading information, with the purpose of obtaining property
16 of value, i.e., money, from the sale of Defendants’ products to Plaintiffs. (Docket No. 205,
17 at ¶480). Thus, the facts in this case are distinguishable.
18

19 Next, Defendants argue that Plaintiffs fail to plead fraudulent conduct with the
20 requisite particularity required under Fed. R. Civ. P. 9(b). Plaintiffs failed to allege the
21 essential “when, where, and how often the allegedly false statements were made or what,
22 specifically, was stated.” *Woods v. Wells Fargo Bank, N.A.*, 733 F.3d 349, 358 (1st Cir.
23
24

25
26
27 ¹⁸ The ruling thus rejected the Second Circuit’s “right to control” theory of property. *Ciminelli*, 598 U.S. at
314.
28

1 2013) and *Hayduk v. Lanna*, 775 F.2d 441, 444 (1st Cir. 1985). Such omissions warrant
2 dismissal according to the Defendants.

3 Plaintiffs respond that the First Circuit is reluctant to automatically dismiss RICO
4 cases at the pleading stage if some details are missing. *New England Data Servs., Inc. v.*
5 *Becher*, 829 F.2d 286, 290 (1st Cir. 1987). Instead, they move the Court to allow
6 discovery after considering the following factors laid out in *Becher*: (1) whether the
7 plaintiff presents “a general scheme to defraud,” (2) whether the plaintiff’s allegations
8 “make it likely that the defendant used interstate mail or telecommunications facilities,”
9 and (3) whether “the specific information as to use is likely in the exclusive control of the
10 defendant.” *Id.* at 290-91.
11

12 Looking at Plaintiffs’ pleadings, I find that more information is needed to satisfy
13 Rule 9(b). Although plaintiffs alleged a “general scheme to defraud” that used mail and
14 wire communications for economic gain (Docket No. 205, at ¶¶ 718, 720, 721, 723,
15 724(a)-(l), 725, 728, 729, 757) and identified certain sender, dates, and content of
16 allegedly fraudulent correspondence, I find that the specificity required of Rule 9(b) falls
17 short.
18

19 However, following the ruling of *Becher*, I recommend that Plaintiffs be allowed
20 to conduct discovery on the RICO claims. Plaintiffs have sufficiently pled that most of
21 the information pertaining to the predicate acts is likely under the control of Defendants.
22 Taking as true Plaintiffs’ allegations, as I must, it is reasonable to deduce that Defendants
23 should have discoverable information regarding the “who, what, when, where” of the
24 communications. *See Becher*, 829 F.2d at 290 (“We advocate this procedure because of
25 the apparent difficulties in specifically pleading mail and wire fraud as predicate acts.”).
26
27

1 **e. A pattern of racketeering activity**

2 Defendants next argue that Plaintiffs have not alleged a “pattern”, which requires
3 “at least two predicate acts of ‘racketeering activity’” occurring within ten years of each
4 other. 18 U.S.C § 1961(5); *Kenda Corp. v. Pot O’Gold Money Leagues, Inc.*, 329 F.3d 216,
5 233 (1st Cir. 2003). Additionally, as noted earlier, a “pattern” also requires “that the
6 racketeering predicates are related, and that they amount to or pose a threat of continued
7 criminal activity.” *H.J. Inc. v. Nw. Bell Tel. Co.*, 492 U.S. at 239. Predicate acts of
8 racketeering are related if they “have the same or similar purposes, results, participants,
9 victims, or methods of commission, or otherwise are interrelated by distinguishing
10 characteristics and are not isolated events.” *Id.* at 240. To establish the continuity aspect
11 of a RICO claim, the scheme must extend “over a substantial period of time” or “show
12 signs of extending indefinitely into the future.” *Efron*, 223 F.3d at 16.

15 According to Plaintiffs, this is a case of closed continuity which involves “a series
16 of related predicates extending over a substantial period of time.”¹⁹ *H.J.*, 492 U.S. at 242.
17 (Docket No. 280, at 43). Defendants refute this view, stating that are no facts suggesting
18 that the alleged racketeering activities will continue. For one, GCC ceased its activities
19 more than two decades ago. And, secondly, Plaintiffs only state—at best—that
20 Defendants’ activities continue in the present day but without properly pleading
21 allegations to substantiate their statement.
22

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¹⁹ On the other hand, “open continuity” is applicable where (1) the defendants’ activities “involve a distinct threat of long-term racketeering activity[;]” and (2) the predicate acts “are part of an ongoing entity’s regular way of doing business.” *United States v. Chin*, 965 F.3d 41, 48 (1st Cir. 2020) (citation omitted).

1 Here, Plaintiffs proffer 81 predicate acts in the Appendix to the Amended
2 Complaint (Docket No. 205-1). These acts span decades, well above the ten-year
3 threshold. (Id.). Plaintiffs identify approximate dates, contents of the communications,
4 senders, and recipients. (Id.) The predicate acts identified “have a similar purpose” and
5 involve “similar participants.” (Id.) As alleged, the events are not isolated, but a link in
6 an elaborate, concerted scheme. That is enough to survive dismissal at this stage.
7

8 ***f. Conduct of the Enterprise***

9 Defendants also seek dismissal on the basis that Plaintiffs fail to plead sufficient
10 facts showing that each, or any Defendant, conducted the alleged enterprise.
11

12 RICO’s Section 1962(c) requires that a defendant “conduct or participate, directly
13 or indirectly, in the conduct” of the enterprise. 18 U.S.C. § 1962(c). All that is statutorily
14 required is that the defendant have “some participation in the operation or management
15 of the enterprise itself.” *Reves v. Ernst & Young*, 507 U.S. 170, 183, 113 S. Ct. 1163, 122 L.
16 Ed. 2d 525 (1993). Furthermore, “[a]n enterprise is ‘operated’ not just by upper
17 management but also by lower rung participants in the enterprise who are under the
18 direction of upper management.” *Id.* at 184. Although “primary responsibility for the
19 enterprise's affairs” is not necessary, “some part in directing the enterprise's affairs is
20 required.” *Id.* at 179; *see also United States v. Hurley*, 63 F.3d 1, 9 (1st Cir. 1995); *United*
21 *States v. Oreto*, 37 F.3d 739, 750 (1st Cir. 1994). For example, the First Circuit has held
22 that an accountant who only carries out ordinary accounting function does not control
23 the enterprise. *See United States v. Houlihan*, 92 F.3d 1271, 1298 (1st Cir. 1996).
24

25 Defendants’ position is that there are no plausible factual allegations asserting
26 that they exercised control over any enterprise. Whatever pleadings there may be that
27

1 address the issue are “conclusory,” “boilerplate,” and only claim mere association, not
2 “control.” (Docket No. 235, at 52).

3 Plaintiffs counter that their pleadings outline specific facts that show Defendants
4 were not mere associates in the GCC and API enterprises. As per their allegations,
5 Defendants effectively controlled the enterprises through several activities that
6 maintained operative power. Specifically, Plaintiffs allege: senior executives of
7 Defendants have served as API Board of Director; the API Board of Directors has been
8 chaired by executives of Defendants every year for the past five years Chevron (2022-
9 present), Conoco (2020-2022), Exxon(2018-2020), and Phillips 66, a subsidiary of
10 Defendant Conoco (2016-2018); Defendants have made financial contributions to API
11 that make up a large portion of its yearly income; Defendants have contributed
12 financially to the enterprises in tens of millions of dollars annually; Defendants have
13 organized, controlled and participated in API committees, task forces, initiatives,
14 marketing efforts, lobbying and communications for the past 50 years. (Docket No. 205,
15 at ¶746(a-d)). Plaintiffs provide additional examples of the involvement of some of the
16 Defendants in leadership positions in the enterprises. (Id., at ¶747).

17 Taking these facts as true, I find that Plaintiff has adequately pled that Defendants
18 participated in the operation and management of the alleged enterprise. *See, e.g.,*
19 *Duggan v. Martorello*, 596 F. Supp. 3d 158, 193 (D. Mass. 2022).

20
21
22
23 ***g. Dismissal of claims under 18 U.S.C. §§1962(a-b)***

24 Additionally, Defendants seek dismissal of Plaintiffs’ claims under sections
25 1962(a) and (b) for failing to plead any injuries attributable to Defendants’ actions.
26
27
28

1 RICO makes it a crime to invest income derived from a pattern of racketeering
2 activity in an enterprise “which is engaged in, or the activities of which affect, interstate
3 or foreign commerce,” 18 U.S.C. § 1962(a); or to acquire or maintain an interest in an
4 enterprise through a pattern of racketeering activity, § 1962(b). Under Section 1962(a),
5 the alleged “injury resulting from the investment of racketeering income” must be
6 “distinct from an injury caused by the predicate acts themselves.” *Compagnie De*
7 *Reassurance D’Ile de France v. New England Reinsurance Corp.*, 57 F.3d 56, 91 (1st Cir.
8 1995)(cleaned up). Likewise, Section 1962(b) requires proof of harm “beyond that
9 resulting from the fraud which constituted the predicate act.” *Id.* at 92. “It is not enough
10 for a plaintiff to allege an injury caused by defendants’ predicate acts of racketeering.”
11 *Puerto Rico Med. Emergency Grp., Inc. v. Iglesia Episcopal Puertorriquena, Inc.*, 118
12 F. Supp. 3d 447, 459 (D.P.R. 2015).

13
14
15 In their opposition, Plaintiffs do not rebut Defendants’ arguments regarding
16 Sections §§1962(a-b).

17
18 In this case, the damages alleged relate to the scheme to misinform the public and
19 the Municipalities, which are the predicate acts of racketeering described in the
20 Appendix to the Amended Complaint (Docket No. 205-1). Plaintiffs have not pled that
21 Defendants’ acquisition or maintenance of control over the enterprises is what caused
22 the harm, nor have they pled that they suffered injuries from the use or investment of
23 any income derived from the racketeering activities. *See Puerto Rico Med. Emergency*
24 *Grp., Inc.*, 118 F. Supp. 3d at 459. Therefore, Plaintiffs have failed to state a claim for
25 relief under sections 1962(a) and (b). I recommend that Defendants’ motion to dismiss
26 Plaintiffs’ sections 1962(a) and (b) be granted.
27

1 ***h. Failure to sufficiently allege a conspiracy***

2 Defendants urge the Court to also dismiss for failure to state a claim, the cause of
3 action under section 1962(d), which prohibits conspiracies to violate RICO.

4 In addition to the other elements under RICO, a claim of conspiracy under the
5 statute requires one additional element: “an agreement with others to commit a
6 substantive RICO violation.” *United States v. Marino*, 277 F.3d 11 (1st Cir. 2002).
7 Defendants affirm that Plaintiffs have only made conclusory allegations in support of
8 their claim of an agreement between any of the ten Defendants.
9

10 According to Plaintiffs, however, the First Circuit follows the standard set forth in
11 *Salinas v. United States*, 522 U.S. 52, 61, 118 S. Ct. 469, 139 L. Ed. 2d 352 (1997)). *Salinas*
12 merely requires a showing that a Defendant intended to further the enterprise “with the
13 knowledge and intent that at least one member of the RICO conspiracy would commit at
14 least two racketeering acts in pursuit of the goals of the enterprise.” *United States v.*
15 *Velazquez-Fontanez*, 6 F.4th 205, n.11 (1st Cir. 2021). (Docket No. 280, at 46).
16

17 The First Circuit has in fact adopted the *Salinas* standard. In so doing, it has held
18 that proving a RICO conspiracy does not require a showing that the defendant personally
19 committed or agreed to commit the two or more predicate acts required. *See United*
20 *States v. Cianci*, 378 F.3d 71, 90 (1st Cir. 2004) (citing *Salinas*, 522 U.S. at 61). In a case
21 with multiple Defendants, the plaintiff “does not need to allege that each conspirator
22 agreed to commit (or actually committed) two or more predicate acts.” *Laverty v.*
23 *Massad*, No. CIV. 08-40126-FDS, 2009 WL 1873646, at *6 (D. Mass. Mar. 10, 2009)
24 (citing *Salinas*, 522 U.S. at 64). In fact, “[n]o overt act is required.” *Id.* (citing *Salinas*,
25 522 U.S. at 64).
26
27

1 In their pleadings, Plaintiffs alleged the existence of an illicit agreement between
2 the Defendants, which they entered into with the knowledge an intent to commit
3 predicate acts in furtherance of their endeavor. (Docket Nos. 205, ¶ 757 and 205-1, ¶18).
4 The Amended Complaint states that Defendants “formulated, funded and supported the
5 GCC enterprise to deceive the public, investors, regulators, Plaintiffs and their citizens,
6 persons of ordinary prudence and comprehension, that their products and business
7 model did not accelerate climate change, and/or that climate change was not real or a
8 threat to the public, including the Municipalities and their citizens.” (Docket No. 205, ¶
9 757). Furthermore, Plaintiffs allege that Defendants conspired to “market[] false and
10 misleading public statements, through mail and wire, conceal[] and suppress[] internal
11 research data from the public and their investors which proximately caused the damage
12 to the Municipalities in Puerto Rico as alleged herein.” (Id.). These allegations are
13 enough to clear the 12(b)(6) threshold, and I thus also recommend denial of the motion
14 to dismiss on this ground.²⁰

15
16
17 Codefendants Motiva, API, Conoco, BP, Exxon, BHP, Chevron and Shell also
18 moved independently for dismissal for failure to allege a plausible RICO cause of action
19 as to them. I will briefly discuss each of their arguments.
20
21

22
23
24 ²⁰Additionally, Defendants raise lack of standing, arguing that Plaintiffs have not alleged that they suffered
25 a concrete injury directly caused by the alleged conspiracy. Other than citing one case, Defendants’
26 argument is not developed. *See, United States v. Ramdihall*, 859 F.3d 80, 95 (1st Cir. 2017)(citing *United*
27 *States v. Zannino*, 895 F.2d 1, 17 (1st Cir. 1990)(arguments raised in a “perfunctory manner” need not be
28 considered by the Court.) Plaintiffs have sufficiently alleged that they suffered an injury. (Docket No. 205,
at 760-61).

1 **Motiva’s Motion to Dismiss (Docket No. 240)**

2 Motiva argues that Plaintiffs have lumped it together with the other Defendants
3 and have failed to identify any Motiva-specific conduct that would satisfy the specificity
4 requirements of Rule 9(b). For example, Motiva posits that there’s no specific allegations
5 of fraudulent or deceptive practices, nor of predicate acts.
6

7 Plaintiffs respond that they have identified specific conduct by Motiva that
8 justifies their claim for relief. They point the Court to the following allegations: Motiva
9 was one of the organizers and funders of the Global Climate Science Communications
10 Team (“GCSCCT”). (Docket No. 205, ¶430). Created within the API, the GCSCCT “consisted
11 of representatives from the fossil fuel industry, trade associations, and public relations
12 firms. (Id., at 429). The GCSCCT prepared a memo where it mapped out a deception
13 strategy to advance the fossil fuel industry. (Id.). Motiva, together with other Defendants,
14 through the API, purposely hid scientific studies that showed the impact that fossil fuels
15 had on the environment. (Docket No. 205-1, ¶1).
16

17 I find that together with the rest of the allegations Plaintiffs have pled enough at
18 this stage to survive dismissal, particularly in light of my earlier recommendation that
19 limited discovery be allowed on the RICO claims.
20

21 **API’s Motion to Dismiss (Docket No. 254)**

22 API’s grounds for dismissing the RICO cause of action rest mainly on the
23 argument that it cannot be liable under RICO because it is the purported RICO enterprise.
24

25 It is clear that to establish RICO liability, a plaintiff “must allege and prove the
26 existence of two distinct entities: (1) a ‘person’; and (2) an ‘enterprise’ that is not simply
27 the same ‘person’ referred to by a different name.” *Cedric Kushner Promotions, Ltd. v.*
28

1 *King*, 533 U.S. 158, 161 (2001). Because of that distinctiveness requirement, Plaintiffs
2 cannot seek remedy against API both as the “enterprise” and the “person” subject to
3 RICO liability.

4 Plaintiffs do not refute the distinctiveness doctrine. Instead, they respond that the
5 enterprise can be held responsible under Section 1962(a) and cite First Circuit precedent
6 for that proposition. Plaintiffs are correct that the First Circuit has recognized that an
7 enterprise may be held liable under Section 1962(a). *Schofield v. First Commodity Corp.*
8 *of Bos.*, 793 F.2d 28, 31 (1st Cir. 1986)(“The language in section 1962(a) does not require
9 a relationship between the person and the enterprise as does section 1962(c), and so it
10 does not require the involvement of two separate entities.”).

11 However, I recommended that the claims under Section 1962(a) be dismissed for
12 failure to adequately plead a cause of action. Accordingly, I similarly recommend that
13 the claims against the API under RICO be dismissed.

14 **Conoco’s Motion to Dismiss (Docket No. 237)**

15 Conoco’s individual request for dismissal mirrors the Defendants’ joint motion on
16 the same grounds. In essence, Conoco argues that Plaintiffs fail to state with particularity
17 the circumstances constituting fraud, as required under Rule 9(b). In response, Plaintiffs
18 point to the specific allegations in their pleadings pertaining to Conoco. (Docket No. 280,
19 at 62). The allegations discuss Conoco’s membership in different organizations, task
20 forces, and committees related to promoting the interests of the fossil fuels industry
21 (Docket No. 205, ¶¶2, 05, 206, 211, 327, 365, 372, 430, 522); their individualized
22 statements and reports regarding climate change (*Id.*, ¶¶500, 569, 592); their funding
23 and lobbying efforts (*Id.*, at ¶503); their leadership position in the alleged RICO
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1 enterprises (Id., at ¶¶530, 746(b)); their knowledge of the detrimental effect of fossil fuel
2 products (Id., at ¶604(b)); and the racketeering acts in which they were involved (Id.,
3 ¶725).

4 Conoco further argues that some statements and reports Plaintiffs highlight are
5 not false, and even if they were, fraud has not been properly plead and lack factual details.
6 For example, they state, Plaintiffs have not indicated who at Conoco was aware of the
7 supposed falsity of the statements. Plaintiffs riposte that the issue of the falsity of the
8 statements should not be addressed at the motion to dismiss stage. I agree. The issue
9 may be revisited should the presiding District Judge adopt my recommendation of
10 allowing limited discovery on the RICO claims.
11

12 **BP's Motion to Dismiss (Docket No. 236)**

13 In similar fashion, BP argues that Plaintiffs have not pled racketeering conduct
14 specific to BP and have not established how BP directed or managed the alleged
15 enterprises. All that Plaintiffs proffer, according to Defendants, are conclusory
16 allegations that attribute conduct to BP only through third parties.
17

18 The First Amended Complaint contains allegations about BP's membership and
19 active participation in the enterprises and in other entities that promote fossil fuels.
20 (Docket No. 205, ¶¶205, 211, 309, 327, 430, 520-21,). Plaintiffs also make allegations
21 regarding the fraudulent information and theories that BP assisted in disseminating. (Id.,
22 at ¶¶365-371, 386, 395, 412, 514, 516-517, 536, 541-545, 669, 724-725 and 728). Plaintiffs
23 provide dates, names of the allegedly fraudulent reports and communications, names of
24 consultants retained to fuel the propaganda campaign (S. Fred Singer), and names of BP
25 executives who wrote communications about the company's policy regarding emissions
26
27
28

1 (Id., ¶¶545, 669). Based on the allegations contained in the Amended Complaint and the
2 RICO statement, I find that Plaintiffs proffer sufficient facts to support a cause of action
3 for RICO violations against BP.
4

5
6
7 **Exxon's Motion to Dismiss (Docket No. 242)**

8 In line with the other Codefendants' motions to dismiss, Exxon argues that
9 Plaintiffs have failed to plead with particularity any instances of fraud. Specifically,
10 Exxon states that the Amended Complaint only identifies six purportedly misleading
11 statements attributable to Exxon and even those, were not plead with particularity.
12 (Docket No. 242, at 5). Moreover, they claim, Plaintiffs failed to allege who supposedly
13 was deceived by any of the identified statements, or who relied on those statements to
14 their detriment. (Id., at 6-7). Lastly, Exxon argues that the remaining allegations fail
15 because they improperly attribute statements to Defendants by grouping them with
16 unrelated third parties. (Id., at 8-11).
17

18
19 After reviewing Plaintiffs' pleadings, I find that they have pled sufficient facts to
20 survive Defendants' motion to dismiss. Plaintiffs assert, rightfully so, that Exxon is the
21 Defendant for which they have pled the most separate acts of racketeering. (Docket Nos.
22 205, ¶ 725 and 205-1, ¶¶ 1-6, 7(g), 8(i), 17-18, 26-27, 29-41, 46, 51, 53-55, 69, 63-65, 66,
23 69, 77, 80.). In addition to allegations about membership in trade associations or
24 advocacy groups and their leadership in these organizations, (Id., ¶¶205, 211), Plaintiffs
25 provide details regarding studies and reports produced by either Exxon's employees or
26 commissioned experts, regarding the impact of fossil fuels. (Id., ¶¶ 301, 306, 307, 308,
27
28

1 312, 313, 315, 318, 319, 320, 321). Evidence that Plaintiffs claim was disregarded,
2 withheld, and spun into a different narrative to mislead the public.

3 As to pleading who were the recipients of Exxon’s allegedly fraudulent
4 communications and statements, Plaintiffs have repeatedly pled that it was Puerto Rico
5 consumers and the Plaintiff Municipalities. (Id., ¶¶13-16, 261, 618, 685, 691, 713).
6 Moreover, Plaintiffs have specifically pled that they relied on Defendants’ false
7 statements and misrepresentations to continue consuming their products. (Id., ¶¶ 3, 7(h),
8 73, 611, 614, 652, 677, 697, 711, 770, 781, 787, 796, 801, 807, 817, 827, 833).
9

10 Therefore, I find that Plaintiffs have met their burden, particularly given my
11 recommendation that additional discovery be allowed.
12

13 **BHP’s Motion to Dismiss (Docket No. 243)**

14 In its Motion to Dismiss, BHP argues that: (1) Plaintiffs have not tied BHP to any
15 RICO enterprise; (2) Plaintiffs do not allege that BHP committed a single racketeering
16 act, let alone “a pattern of racketeering activity,” as required under 18 U.S.C. § 1962(a),
17 (b), or (c); (3) Plaintiffs’ claim under 18 U.S.C. § 1962(d) must fail because Plaintiffs have
18 not adequately alleged that BHP was part of any conspiracy. (Docket No. 243, at 10).
19

20 After reviewing the Amended Complaint, I find that Plaintiffs have alleged specific
21 acts of fraud against BHP (Docket No. 205, ¶¶ 572-574, 725). Plaintiffs have also tied
22 BHP to the alleged enterprises and have asserted that BHP had leadership roles and
23 control and was also a funder of the enterprises. (Id., ¶¶211, 365, 372, 395 556, 572-574
24 and Docket No. 205-1, ¶¶ 64-65, 78-79).
25

26 Furthermore, Plaintiffs have adequately alleged that BHP was part of the RICO
27 conspiracy. As I previously discussed, the First Circuit does not require a plaintiff
28

1 alleging a RICO conspiracy to show that the defendant personally committed or agreed
2 to commit the two or more predicate acts required. *See Cianci*, 378 F.3d at 90 (*citing*
3 *Salinas*, 522 U.S. at 61). Here, Plaintiffs alleged the existence of an illicit agreement
4 between the Defendants, which they entered with the knowledge an intent to commit
5 predicate acts in furtherance of said conspiracy. Consistent with my previous
6 determination on this issue, I find that the RICO conspiracy is sufficiently pled as to BHP
7 as well.

8
9 **Chevron’s Motion to Dismiss (Docket No. 239)**

10 Chevron moves the Court to dismiss the RICO claims, alleging that Plaintiffs have
11 not pled “a single fact” related to Chevron’s participation in the RICO enterprise. (Docket
12 No. 239, at pg. 10). It further claims that Plaintiffs have failed to allege that Chevron
13 supported the statements of the trade associations and lobbying groups highlighted in
14 the Amended Complaint. I disagree.

15
16 Plaintiffs’ pleadings include allegations identifying Chevron, not only as a
17 member, but as a key player in these entities. (Docket No. 205-1, ¶¶1, 14-15, 17, 51, 56, 61,
18 64-65, 80). In addition, Plaintiffs have alleged that Chevron was involved in crafting the
19 narrative that the enterprises used to further their goals. (Docket No. 205, ¶¶ 498, 527(c),
20 536, 546-548, 565-567). Chevron’s motion to dismiss the RICO claims should be denied.

21
22 **Shell’s Motion to Dismiss (Docket No. 244)**

23 Shell moves for dismissal on the basis of failure to allege any predicate
24 racketeering acts or that Shell agreed to conspire with anyone. (Docket No. 244, at pg.
25 19). Plaintiffs respond that it has alleged 43 specific predicate acts under RICO, 15 of
26

1 which identify Shell (not Chevron) as also having a leadership role in the fraudulent acts.
2 (Docket No. 205-1, ¶1, 2, 14-15, 17, 19, 22, 51, 57, 61, 64-65, 72-73, 80).

3 Again, I find that dismissal for failure to allege is not appropriate at this juncture.
4 Plaintiffs have sufficiently pled the elements of a RICO cause of action against Shell and,
5 as I recommended, should be allowed limited discovery. Therefore, I recommend that
6 Shell's motion to dismiss the RICO claims be denied.
7

8 ***i. Applicability of parens patriae***

9 Defendants' last RICO-related argument is that Plaintiffs may not recover on
10 behalf of their residents under the doctrine of parens patriae so any claims that might be
11 construed under that theory should be dismissed.
12

13 States may exert their "quasi-sovereign" interest to represent the interests of
14 individual citizens. *Alfred L. Snapp & Son, Inc. v. Puerto Rico, ex rel., Barez*, 458 U.S.
15 592, 600–01, 102 S. Ct. 3260, 3265, 73 L. Ed. 2d 995 (1982)(internal citations omitted).
16 To establish a parens patriae action, "the State must articulate an interest apart from the
17 interests of particular private parties, *i.e.*, the State must be more than a nominal party.
18 The State must express a quasi-sovereign interest." *Id.* at 607.
19

20 According to Defendants, the Municipalities are political subdivisions that lack
21 their own sovereignty, and thus, they do not meet "quasi-sovereign interest" requirement.
22 (Docket No. 235, at 37).
23

24 Without the benefit of Plaintiffs' argument in rebuttal, I must agree with
25 Defendants' view. The parens patriae doctrine has developed as to States of the United
26 States and has been extended to the Commonwealth of Puerto Rico. *See Alfred L. Snapp*
27 *& Son, Inc.*, 458 U.S. at 609 (finding that the Commonwealth of Puerto Rico had parens
28

1 patriae standing “to pursue the interests of its residents in the Commonwealth’s full and
2 equal participation in the federal employment service scheme established pursuant to
3 the Wagner-Peyser Act and the Immigration and Nationality Act of 1952.”). However, it
4 has not been extended to a foreign nation “unless there is a clear indication of intent to
5 grant such standing expressed by the Supreme Court or by the two coordinate branches
6 of government.” *Estados Unidos Mexicanos v. DeCoster*, 229 F.3d 332, 336 (1st Cir.
7 2000).

9 Likewise, there is caselaw from other circuits holding that cities, counties and
10 other political subdivisions may “sue to vindicate such of their own proprietary interests
11 as might be congruent with the interests of their inhabitants,” but have no *parens patriae*
12 standing. *United States v. City of Pittsburg, Cal.*, 661 F.2d 783, 787 (9th Cir. 1981)(citing
13 *In Re Multidistrict Vehicle Air Pollution M.D.L. No. 31*, 481 F.2d 122, 131 (9th Cir. 1973);
14 *New Mexico v. McAleenan*, 450 F. Supp. 3d 1130, 1188 n. 15 (D.N.M. 2020)(gathering
15 cases); *City of Rohnert Park v. Harris*, 601 F.2d 1040, 1044 (9th Cir. 1979)(citing *In Re*
16 *Multidistrict*, 481 F.2d at 131).

19 Here, the Municipalities are suing to vindicate their own proprietary rights in
20 congruence with the interest of their residents. *See United States v. W.R. Grace & Co.-*
21 *Conn.*, 185 F.R.D. 184, 190 (D.N.J. 1999) (“The doctrine of *parens patriae* does not
22 extend to municipalities, except to the extent that a municipality’s own rights are
23 congruent with those of its residents.). Therefore, I find that Plaintiffs have standing to
24 bring this action only as to their own proprietary rights.

26 **2. Antitrust**

1 Defendants also move the Court to dismiss the Antitrust cause of action for failure
2 to allege the existence of any agreement and/or injury. In addition, Defendants argue
3 that Plaintiffs seek to improperly use antitrust laws to recover for alleged environmental
4 harms or for harms sustained by their residents. Defendants respond that making such
5 a determination is premature because Courts should reserve judgment on motions to
6 dismiss antitrust claims until discovery is conducted.
7

8 **a. Failure to allege an anticompetitive agreement**

9 To plausibly plead an antitrust conspiracy pursuant to the Sherman Act, a plaintiff
10 must establish: “(1) the existence of a contract, combination or conspiracy among two or
11 more separate entities that (2) unreasonably restrains trade and (3) affects interstate or
12 foreign commerce.” *Norte Car Corp. v. FirstBank Corp.*, 25 F. Supp. 2d 9, 16 (D.P.R.
13 1998) (citing *Standard Oil Co. v. United States*, 221 U.S. 1, 52 (1911)).
14

15 Defendants maintain that Plaintiffs have not alleged the existence of an
16 agreement, much less an anticompetitive one. (Docket No. 235, at pg. 38). Instead,
17 Plaintiffs merely refer to a supposed “agreement” between Defendants to “maintain their
18 energy monopoly, fix prices, and increase obstacles for competitive entry into the [energy
19 market].” (Id., referencing Docket No. 205, ¶ 767). Defendants view that statement as
20 “insufficient” to assert an antitrust conspiracy. (Id.).
21

22 For Sherman Act purposes, “[a]n agreement may be found when ‘the conspirators
23 had a unity of purpose or a common design and understanding, or a meeting of minds in
24 an unlawful arrangement.’” *Evergreen Partnering Group, Inc. v. Pactiv Corp.*, 720 F.3d
25 33, 43 (1st Cir. 2013) (citing *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S.
26 752, 771, 104 S. Ct. 2731, 81 L. Ed.2d 628 (1984))(internal quotation marks and citation
27
28

1 omitted)). At the pleading stage, the plaintiff “may present either direct or circumstantial
2 evidence of defendants’ ‘conscious commitment to a common scheme designed to
3 achieve an unlawful objective.’” *Id.* (citing *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465
4 U.S. 752, 764, 104 S. Ct. 1464, 79 L.Ed.2d 775 (1984)(citation and internal quotation
5 marks omitted)); *see also*, *Am. Tobacco Co. v. United States*, 328 U.S. 781, 809, 66 S. Ct.
6 1125, 1139, 90 L. Ed. 1575 (1946)(“Acts done to give effect to the conspiracy may be in
7 themselves wholly innocent acts. Yet, if they are part of the sum of the acts which are
8 relied upon to effectuate the conspiracy which the statute forbids, they come within its
9 prohibition.”). Therefore, the complaint must allege, at the very least, “the general
10 contours of when an agreement was made, supporting those allegations with a context
11 that tends to make said agreement plausible.” *Id.* at 46.

14 Plaintiffs allege that Defendants engaged in a coordinated effort to restrain trade.
15 (Docket No. 205, at 765-66). Specifically, Defendants “increased production to maintain
16 their energy monopoly,” “fix[ed] prices,” and increased obstacles to prevent alternative
17 energy companies from entering the market. (*Id.*, ¶767). According to Plaintiffs, the
18 agreement affected competition because it sought to exclude alternative energy
19 companies through anticompetitive means. (*Id.*, ¶¶ 616, 767). The agreement was
20 purportedly formalized through: (i) the dissemination of evidence that was passed off as
21 being scientific but was actually fabricated to further Defendants’ goals (Docket No. 280,
22 at pg. 56; Docket No. 205, ¶¶ 354-59, 361, 377, 378, 380, 384, 463-70); the funding of
23 contrarian climate scientists (*Id.*, ¶¶ 405-13, 441-62); the participation and leadership in
24 formal and informal trade associations (*Id.* ¶¶ 363-67, 368, 386-87, 391); and the
25
26
27
28

1 launching of misleading marketing and propaganda campaigns (Id. ¶¶ 370, 376, 388-89,
2 501-02, 525-57).

3 Through these activities, Defendants created allegedly doubt regarding the real
4 effects of climate change and the role of fossil fuels in accelerating it. (Id., ¶¶ 373, 473-
5 86, 593, 595, 610-11). The result being that Defendants effectively excluded renewable
6 energy sources from being available in the energy market. (Id. ¶¶ 3, 7(d), 80, 82, 88, 383,
7 616, 651-52).

9 Because they were competitors, Defendants state, they had an incentive to lower
10 their prices and increase their production. These actions, perfectly reasonable in
11 response to competition, cannot be ascribed to an anticompetitive agreement between
12 Defendants. Defendants' argument is not supported by caselaw. Courts have found
13 competitors liable for antitrust conspiracy. *See, e.g., Am. Tobacco Co.*, 328 U.S. at 809,
14 (finding the American Tobacco Company, Liggett & Myers Tobacco Company, R. J.
15 Reynolds Tobacco Company and American Suppliers, Inc., guilty for conspiracy in
16 restraint of trade, among other charges). In fact, "agreement among 'actual or potential
17 rivals' that 'eliminate[] some avenue of rivalry among them'—'have traditionally received
18 antitrust's highest level of scrutiny.'" *United States v. Am. Airlines Grp. Inc.*, 675 F. Supp.
19 3d 65, 108 (D. Mass. 2023), *aff'd*, 121 F.4th 209 (1st Cir. 2024)(citing 11 Phillip E. Areeda
20 & Herbert Hovenkamp, *Antitrust Law: An Analysis of Antitrust Principles & Their*
21 *Application* ¶¶ 1900, 1901b (4th ed. 2018)).
22
23
24

25 With regards to the anticompetitive aspect, Plaintiffs have pled that Defendants
26 agreed to fix prices and restrict the entry of renewable energy players into the energy
27

1 field. (Docket No. 205, ¶¶7(d) and 767).²¹ Defendants contend that an agreement needs
 2 to increase prices or decrease output to be anticompetitive.²² The caselaw, however,
 3 makes clear that although those two metrics are “paradigmatic examples of restraints of
 4 trade,”²³ injury is also measured in terms of “decreased efficiency in the marketplace
 5 which negatively impacts consumers.” *Sullivan v. Nat’l Football League*, 34 F.3d 1091,
 6 1096–97 (1st Cir. 1994) (citing *Town of Concord v. Boston Edison Co.*, 915 F.2d 17, 21–
 7 22 (1st Cir.1990), *cert. denied*, 499 U.S. 931, 111 S. Ct. 1337, 113 L.Ed.2d 268 (1991) and
 8 *Interface Group, Inc. v. Massachusetts Port Auth.*, 816 F.2d 9, 10 (1st Cir.1987)). In
 9 short, a practice is not anticompetitive because it harms competitors, but because it
 10 harms the “competitive process.” *Town of Concord*, 915 F.2d at 21–22)(internal citations
 11 omitted)(“It harms that process when it obstructs the achievement of competition's basic
 12 goals—lower prices, better products, and more efficient production methods.”). *See also*,
 13 *Grappone, Inc. v. Subaru of New England, Inc.*, 858 F.2d 792, 794 (1st Cir. 1988).

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19 ²¹ As per the Amended Complaint, Defendants “maintained their energy monopoly in Puerto Rico by
 20 conspiring, and succeeding, in keeping prices low, to prevent the development of noncarbon-based energy
 21 sources and maintain the dependency of the Municipalities and their citizens upon their products.”
 22 (Docket No. 205, ¶84).

23 ²² The cases that Defendants cite, *Nat’l Collegiate Athletic Ass’n v. Bd. of Regents of Univ. of Oklahoma*,
 24 468 U.S. 85, 114 (1984) and *In re German Auto. Mfrs. Antitrust Litig.*, 392 F. Supp. 3d 1059, 1072–73
 25 (N.D. Cal. 2019), do not do much to support their arguments. In the former, the Court found that plaintiff
 26 had “restricted rather than enhanced the place of intercollegiate athletics” through its anticompetitive
 27 practices. *Board of Regents*, 468 U.S. at 120. Whereas in the latter, the Court reasoned that Defendants’
 28 consensus to follow certain vehicle specifications and agreement not to use certain features was not a
 “compelling example of an agreement ‘to make a product of inferior quality.’” *In re German Auto.*
Manufacturers Antitrust Litig., 392 F. Supp. 3d at 1069. Particularly given the lack of allegations that
 consumers even wanted those features and common sense dictating that the opposite would be true for
 safety reasons. *Id.* This case, in contrast, claims that Defendants’ concerted actions presented a barrier to
 entry for cleaner and safer renewable energy technologies.

²³ *Board of Regents*, 468 U.S. at 104-7 (“Restrictions on price and output are the paradigmatic examples
 of restraints of trade.”).

1 Defendants also point out that membership in a trade organization, by itself,
2 cannot serve to establish an unlawful agreement. *See Clamp-All Corp. v. Cast Iron Soil*
3 *Pipe Inst.*, 851 F.2d 478, 484 (1st Cir. 1988). Here, however, Plaintiffs are not alleging
4 mere membership. Their claim is that Defendants created, funded, and led these
5 organizations to act as propaganda machines that put out deceptive materials. Such
6 activities “facilitate collusion,” *Evergreen*, 720 F.3d at 49-50, and are not shielded from
7 antitrust scrutiny merely because they emanate from a trade organization. *See, e.g.,*
8 *United Mine Workers of Am. v. Pennington*, 381 U.S. 657, 665–66, 85 S. Ct. 1585, 1591,
9 14 L. Ed. 2d 626 (1965) (finding that union that is otherwise guilty of a conspiracy in
10 violation of the antitrust laws cannot escape liability merely because some of the means
11 of accomplishing the goals of that conspiracy were embodied in a collective bargaining
12 agreement); *F.T.C. v. Indiana Fed’n of Dentists*, 476 U.S. 447, 459, 106 S. Ct. 2009, 2018,
13 90 L. Ed. 2d 445 (1986).

16 Lastly, Defendants argue that advertising and promotional activities are
17 permitted and even considered “procompetitive.” (Docket No. 235, at pg. 40). Actually,
18 Defendants enunciate, even false advertising is not considered antitrust conduct. (*Id.*).
19 Plaintiffs respond that a deceptive marketing campaign can constitute a violation of
20 Section 1 of the Sherman Act.

22 Defendants cite a series of cases worth discussing. In *Maple Flooring Mfrs.’ Ass’n*
23 *v. United States*, 268 U.S. 563, 565 45 S. Ct. 578, 578, 69 L. Ed. 1093 (1925), the Supreme
24 Court stated that defendant Maple Flooring Manufacturers’ Association, which was an
25 unincorporated ‘trade association, of which other defendants were members, engaged in
26 many activities that were “admittedly beneficial to the industry and to consumers.” *Id.*

1 These included “co-operative advertising” as well as the “standardization and
2 improvement of its product.” *Id.* The Court, however, makes a distinction that sets the
3 case apart from the facts in the instant action. The Court expressed that it was neither
4 alleged nor proved in the extensive record developed that there was an agreement among
5 the organization’s members to affect production or fix prices. *Id.* at 567. The Amended
6 Complaint in this case, however, specifically alleges that Defendants engaged in a
7 concerted effort to fix prices and prevent the entry of renewable energy competitors.
8

9 Another cited decision is *Retractable Techs., Inc. v. Becton Dickinson & Co.*, 842
10 F.3d 883, 895 (5th Cir. 2016), where it was held that “false advertising alone hardly ever
11 operates in practice to threaten competition.” Should this case turn only on false
12 advertising, that reasoning would perhaps warrant dismissal of the antitrust cause of
13 action. But Plaintiffs’ allegations of anticompetitive behavior do not rely solely on false
14 advertising. Instead, Plaintiffs claim that Defendants colluded to fix prices and create
15 barriers of entry in the market.
16

17 Likewise, in *Steward Health Care Sys. LLC v. Southcoast Health Sys., Inc.*, No.
18 CV 15-14188-MLW, 2016 WL 9022444, at *3 (D. Mass. Sept. 2, 2016), the Magistrate
19 Judge recommended dismissal of the federal antitrust claim. The Court reasoned that a
20 series of newspaper articles that Plaintiff claimed were defamatory “could logically be
21 considered a publicity campaign, which is immune from antitrust liability, even where
22 unethical and deceptive methods are employed.” *Id.*, at *7 (citing *Mercatus Grp., LLC v.*
23 *Lake Forest Hosp.*, 641 F.3d 834, 849 (7th Cir. 2011)). Again, unlike the *Steward*
24 complaint, the antitrust violations alleged here are not only supported by claims of false
25 advertising and deceptive marketing.
26
27
28

1 The procedural history of these cases is also telling. One of Plaintiffs' salient points
2 throughout their opposition is that Defendants cite cases that were decided at the
3 summary judgment stage, or after a trial was conducted. Having access to such a
4 developed record puts the court in a proper position to decide the issues at hand. But
5 here, Plaintiffs argue, those determinations are premature, and judgment should be
6 reserved until after discovery. For support, Plaintiffs cite *Ticket Ctr., Inc., Banco Popular*
7 *de Puerto Rico*, 2006 WL 2273603, at *1 (D.P.R. Aug. 8, 2006)(holding that "antitrust
8 actions should rarely be dismissed prior to giving the plaintiff ample opportunity for
9 discovery.")(citing *Morales-Villalobos v. Garcia-Llorens*, 316 F.3d 51, 56 (1st
10 Cir.2003)(reversing lower court dismissal because questions of fact, on which antitrust
11 actions routinely hinge, should not be decided on a motion to dismiss).
12
13

14 I partly agree with Plaintiffs. Although the benefit of a full record would assist in
15 deciding these issues, it is no less true than mere threadbare recitals and conclusory
16 statements do not suffice to establish a cause of action. *Ashcroft v. Iqbal*, 556 U.S.662.
17 678 (2009). Here, however, Plaintiffs have pled enough to survive dismissal regarding
18 the existence of an anticompetitive agreement.²⁴
19
20
21

22
23 ²⁴ Defendants Conoco, Motiva, Exxon, BHP and Shell also move for dismissal of the antitrust claims in
24 their individual motions to dismiss. (Docket Nos. 237, 240, 242, 243 and 244, respectively). All of the
25 independent motions contend that the pleadings do not allege specific instances of anticompetitive
26 conduct. Because I have already addressed those arguments through Defendants' Joint Motion at Docket
27 No. 235, I will not restate them here. BHP additionally claims that Plaintiffs failed to plead the existence
28 of an anticompetitive agreement. (Docket No. 243). I have also discussed and ruled upon said argument.
Finally, Exxon argues that Plaintiffs failed to meet a heightened pleading standard for antitrust claims set
in Rule 9(b). However, the First Circuit has held that the heightened pleading standard is not applicable
in § 1 claims. *Evergreen*, 720 F.3d at 50. Therefore, I recommend that the individual motions to dismiss
the antitrust cause of action be denied.

1 the energy market” and instituted a “common scheme designed to restrain trade” in that
2 market. (Id. ¶765). These actions prevented Plaintiffs from reducing their purchase of
3 Defendants’ products and buying instead “alternative, non-carbon-based energy
4 sources.” (Id. ¶ 767).

5
6 Though Plaintiffs cite a series of cases purportedly holding that actions leading to
7 decreased innovation are an actionable antitrust injury,²⁸ (Docket No. 280, at pgs. 65-
8 66), Defendants counter with the opposite. Citing to *Schuylkill Energy Res., Inc. v. Pa.*
9 *Power & Light Co.*, 113 F.3d 405, 414 (3d Cir. 1997), Defendants assert that the
10 deprivation of access to other energy sources is not a cognizable “antitrust injury.” In
11 *Schuylkill Energy*, the Court framed the proper antitrust inquiry as follows: “whether
12 [Defendant] unlawfully excluded independent power producers like [Plaintiff] from the
13 relevant market, not whether consumers receive electricity generated by nuclear, coal,
14 culm, solar, or any other energy source.” *Id.* As previously discussed, the key factor is
15 “injury to the market or to competition in general, not merely injury to individuals or
16 individual firms that is significant.” *Imperial Irrigation Dist. v. California Indep. Sys.*
17 *Operator Corp.*, 146 F. Supp. 3d 1217, 1238 (S.D. Cal. 2015).

18
19
20 Here, Plaintiffs allege that Defendants excluded other renewable players from
21 entering the market. Hence, they pled their claim within the framework laid out in
22 *Schuylkill Energy* and the case law related to antitrust liability previously cited.

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25
26 ²⁸ *In re Dealer Management Sys. Antitrust Litig.*, 362 F.Supp.3d 510, 535 (N.D. Ill. 2019); *Cascades*
27 *Comput. Innovation LLC v. RPX Corp.*, 2013 WL 316023, at *10 (N.D. Cal. Jan. 24, 2013); *Free FreeHand*
28 *Corp. v. Adobe Sys. Inc.*, 852 F. Supp. 2d 1171, 1185 (N.D. Cal. 2012); *Catch Curve, Inc. v. Venali, Inc.*, 519
F. Supp. 2d 1028, 1036 (C.D. Cal. 2007) and *Nat’l Soc. of Prof’l Eng’rs v. United States*, 435 U.S. 679, 695
(1978).

1 Furthermore, Plaintiffs reiterate the request to conduct discovery to fully develop the
2 record.

3 Because I find that Plaintiffs have sufficiently pled an antitrust injury, and in light
4 of the court’s remarks in *Ticket Ctr., Inc. v. Banco Popular de Puerto Rico*, 2006 WL
5 2273603, at *1, I recommend that dismissal of the antitrust cause of action be denied at
6 this time.
7

8 **c. Lack of parens patriae standing**

9 Defendants restate the same argument they raised for the RICO claims, namely,
10 that Plaintiffs lack standing to bring a parens patriae cause of action. Plaintiffs counter
11 that Municipalities are considered “persons” within Section 4 of the Clayton Act. But in
12 any case, they state they are not pursuing a parens patriae cause of action but suing on
13 their own capacity as Municipalities. Therefore, this ground for dismissal should be
14 denied.
15

16 **3. Puerto Rico Law Claims**

17 Plaintiffs bring nine claims under Puerto Rico law: Claim 1 (Common Law
18 Consumer Fraud); Claim 2 (Conspiracy to Commit Common Law Consumer Fraud);
19 Claim 3 (Violation of Puerto Rico Rule 7); Claim 9 (Public Nuisance); Claim 10 (Strict
20 Liability–Failure to Warn); Claim 11 (Strict Liability–Design Defect); Claim 12
21 (Negligent Design Defect); Claim 13 (Private Nuisance); and Claim 14 (Unjust
22 Enrichment). (Docket No. 205).
23

24 Defendants move to dismiss all the claims for three reasons: (1) claims for injuries
25 from transboundary pollution are preempted; (2) the allegations fail to state claims
26 under Puerto Rico law; and (3) Plaintiffs cannot seek relief on behalf of their residents.
27

1 In *City & Cnty. of Honolulu v. Sunoco LP*, 153 Haw. 326, 354, 537 P.3d 1173, 1201
2 (2023)—which Defendants cite—the Court referenced similar cases where the argument
3 that tort-based cases were really about greenhouse emissions was refused.
4

5 Numerous courts have rejected similar attempts by oil and gas
6 companies to reframe complaints alleging those companies
7 knew about the dangers of their products and failed to warn
8 the public or misled the public about those dangers. The Ninth
9 Circuit did so in this case. And in other cases alleging similar
10 deceptive promotion and failure to warn torts, the Fourth
11 Circuit, Tenth Circuit, and the Districts of Connecticut,
12 Massachusetts, and Minnesota have also rejected attempts to
13 characterize those claims as being about emissions and
14 pollution.

15 *Id.* (internal citations omitted).²⁹

16 Having carefully reviewed the allegations in this case, I find that Defendants’
17 characterization of Plaintiffs’ Puerto Rico law claims as claims about the effect of
18 emissions on the environment is incorrect.
19

20 Next, Plaintiffs assert that the Clean Air Act (“CAA”) has displaced the federal
21 common law that Defendants allude to and, therefore, the latter cannot have a
22 preemptive effect over their claims. *See Rhode Island v. Shell Oil Prods. Co.*, 35 F.4th 44,
23 55 (1st Cir. 2022) (citing *Mayor & City Council of Baltimore v. BP P.L.C.*, 31 F.4th 178,
24 199, 205-207 (4th Cir. 2022)) (“The Clean Water Act and the Clean Air Act — neither of
25

26 ²⁹ Recently, the United States Supreme Court denied a petition for writ of certiorari seeking review of the
27 Supreme Court of Hawaii’s decision. *See Sunoco LP v. City and Cnty. of Honolulu*, No. 23-947, ___ S.Ct.
28 ___, 220 L.Ed.2d 413, 2025 WL 76706, 2025 U.S. LEXIS 146 (Jan. 13, 2025) and *Shell PLC v. City and
Cnty. of Honolulu*, No. 23-952, ___ S.Ct. ___, 220 L.Ed.2d 413, 2025 WL 76704, 2025 U.S. LEXIS 256 (Jan.
13, 2025).

1 which Rhode Island invokes — ‘have statutorily displaced any federal common law that
2 previously existed.’ So we cannot rule that any federal common law controls Rhode
3 Island's claims.”). Defendants recognize that the CAA now governs domestic interstate
4 emissions but argue that the Court may still apply the “preemption defense” in
5 accordance with federal case law because state law is inadequate to regulate emissions
6 beyond its jurisdiction. Though both parties cite case law to support their position, I find
7 that Plaintiffs’ more closely follows applicable precedent.
8

9 Defendants, for one, rely heavily on the Second Circuit’s *City of New York*
10 decision whereas Plaintiffs look to *Rhode Island*, a case from our Circuit. Defendants, in
11 fact, argue that *Rhode Island*’s holding is not contrary to their position. I disagree with
12 Defendants’ interpretation. The *Rhode Island* opinion makes clear that the CAA did not
13 preempt the state-law claims. *Rhode Island*, 35 F.4th at 57–58 (gathering cases and
14 concluding that the CAA contains two saving clauses that preserve state and local
15 government’s right to impose standard and limitations on air pollution that are stricter
16 than national requirements.). I am not persuaded that I should depart from our Circuit’s
17 holding.
18

19
20 Next, Defendants argue that Plaintiffs’ claims are preempted because they
21 interfere with foreign affairs. In Defendants’ view, the causes of action against them have
22 global implications. For starters, Plaintiffs seek to impose monetary damages for sale of
23 fossil fuels that happen outside Puerto Rico and the United States. And second, global
24 emissions from Defendants’ products are the result of activities undertaken in foreign
25 countries. Defendants thus move the Court to dismiss Plaintiffs’ claims “to the extent
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27
28

1 they seek damages based on the exploration, production, marketing, sale, or combustion
2 of fossil fuels and resulting emissions outside the United States.” (Docket No. 235, at 50).

3 Defendants rely on *Am. Ins. Ass’n v. Garamendi*, 539 U.S. 396 (2003), which held
4 that “state legislation . . . produc[ing] something more than incidental effect in conflict
5 with express foreign policy of the National Government” is preempted. *Id.* at 420 (citing
6 *Zschernig v. Miller*, 389 U.S. 429 (1968)).
7

8 Plaintiffs cast doubt on whether *Garamendi* even applies with full force today.
9 Even if it did, they state Defendants have not shown that their claims have “something
10 more than an incidental effect” on foreign affairs. Other courts have rejected similar
11 arguments. *See Baltimore*, 31 F.4th at 214 (“Baltimore’s Complaint does not contain any
12 allegations that develop foreign policies with other countries, and nor does it undermine
13 the federal government in the international arena. At best, it involves an intersection
14 between Maryland law and private, international companies.”); *Massachusetts v. Exxon*
15 *Mobil Corp.*, 462 F. Supp. 3d 31, 44 (D. Mass. 2020) (“Contrary to ExxonMobil’s
16 caricature of the complaint, the Commonwealth’s allegations do not require any forays
17 into foreign relations or national energy policy.”).
18
19

20 Like those cases, the allegations here do not implicate greenhouse emissions or
21 foreign policy. These are tort-based claims based on advertising, unfair business
22 practices, and consumer protection, all issues within the purview of state regulation. Not
23 a single cause of action pertains to the “exploration, production, marketing, sale, or
24 combustion of fossil fuels and their emissions” as Defendants declare. The allegations
25 pertaining to marketing are related to misleading and deceitful materials in furtherance
26 of Defendants’ alleged misinformation campaign. The Court will thus not deem Plaintiffs’
27

1 state law claims intrusive of foreign affairs. Consequently, the Court should reject
2 Defendants’ arguments regarding preemption.

3 **b. Failure to State a Claim**

4 Defendants move to dismiss Plaintiffs’ Puerto Rico claims for failure to
5 sufficiently plead the required elements, especially with the particularity required by
6 Rule 9(b). I will examine each ground for dismissal.

7 **(i) Plaintiffs’ Fraud-based Claims**

8 Plaintiffs’ first, second, and third causes of action allege fraudulent behavior.
9 Defendants argue that Puerto Rico law does not recognize the causes of actions under
10 which Plaintiffs seek relief.
11

12 The first and second causes of action assert “common law consumer fraud,”
13 “deceptive practices” and conspiracy to do the same. (Docket No. 205, ¶¶634-700).
14 Defendants point out that Puerto Rico does not recognize “common law consumer fraud”
15 and has no specific consumer protection statute that provides a private right of action for
16 consumer fraud.³⁰ Likewise, there is no cause of action for civil conspiracy.³¹
17

18 Plaintiffs do not refute that those causes of actions are not codified. Instead, they
19 argue that the legal source of their claims is found in the Federal Trade Commission’s
20 “Guides for the Use of Environmental Marketing Claims.” *See* 16 C.F.R. § 260.1 et seq.;
21

22
23
24
25 ³⁰ *Simonet v. SmithKline Beecham Corp.*, 506 F. Supp. 2d 77, 91 (D.P.R. 2007) (Dismissing cause of action
26 for violation of consumer protections statutes because Puerto Rico has no specific consumer protection
statute that provides a private right of action for consumer fraud.)

27 ³¹ *Next Step Med. Co., Inc. v. Biomet, Inc.*, 2015 WL 993095, at *13 (P.R. Cir. Jan. 30, 2015) (holding that
28 Puerto Rico law does not recognize civil conspiracy pursuant to Article 1802 of the 1930 Civil Code).

1 *see also* Docket No. 205, ¶¶634- 688. The Guides discourage “unqualified general
2 environmental benefit claims,” 16 C.F.R. § 260.4(b), and instruct corporations to use
3 specific language. 16 C.F.R. § 260.4(c). But as Defendants correctly state, FTC
4 regulations “do not confer any rights on any person and do not operate to bind the FTC
5 or the public.” 16 C.F.R. § 260.1. Accordingly, “the FTC Act contains no private right of
6 action.” *Liu v. Amerco*, 677 F.3d 489, 492 (1st Cir. 2012). Therefore, I recommend that
7 the First Cause of Action be dismissed.
8

9 Regarding the third cause of action, Plaintiffs assert a claim under the Puerto Rico
10 Rules Against Misleading Practices and Advertisements. P.R. Dep’t of Consumer Aff.,
11 Regul. 9158 at Rule 14 (Feb. 6, 2020) (“Rules”). Defendants raise an issue with the
12 application of the Rules to municipalities because they state that it is limited to “natural
13 persons.”
14

15 As defined in the Rules, a “Consumer” is “any natural person who acquires or uses
16 products or services as their final destination. It includes any other person, association,
17 or entity appointed by Law who is authorized to present a claim to the Department.” Rule
18 5(J), Puerto Rico Regulations Against Misleading Practices and Advertisement, P.R.
19 Dep’t of Consumer Affairs, Regul. 8599 (May 29, 2015). Plaintiffs interpret the Rules, in
20 conjunction with the Puerto Rico Municipal Code, as granting municipalities the power
21 to pursue a cause of action under the Misleading Practices Rules. *See* PRS ST T. 21 §§
22 7013 and 7028. Defendants, however, aptly highlight that there is no private right of
23 action under the Rules because the Department of Consumer Affairs (DACO for its
24 Spanish acronym) has exclusive enforcement jurisdiction. P.R. Laws Ann. tit. 31, § 341e.
25
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1 Although Plaintiffs would have the Court read beyond the Rules and interpret the
2 Municipal Code as granting municipalities carte blanche, I decline to do so. Defendants
3 are correct in that dismissal of the Third Cause of Action is warranted.³²

4
5 **(ii) Design Defect**

6 Although the 1930 Civil Code did not explicitly incorporate the doctrine of strict
7 liability, Courts have interpreted it as including causes of action for negligent and strict
8 liability design defect. *Isla Nena Air Servs., Inc. v. Cessna Aircraft Co.*, 449 F.3d 85, 88
9 (1st Cir. 2006)(citing P.R. Laws. Ann., tit. 31 § 5141)³³. A plaintiff claiming a design defect
10 must show that: “(1) defendant owed a duty to prevent the harm by conforming to a
11 reasonable standard of conduct, (2) defendant breached that duty through a negligent
12 act or omission, and (3) the negligent act or omission caused the plaintiff’s harm.”
13 *Carballo-Rodriguez v. Clark Equip. Co.*, 147 F. Supp. 2d 66, 72 (D.P.R. 2001). As for
14 strict liability, “a plaintiff must prove that (1) the product had a defect that made the
15 product unsafe, and (2) the defect proximately caused the plaintiff’s injury.” *Id.* at 71.

16
17 Plaintiffs carry the burden of establishing the applicable standard of care, and
18 showing that Defendants acted below that minimum standard, and that Defendants’
19

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23
24 ³² Although Defendants proffer additional arguments regarding failure to plead with particularity under
25 Rule 9(b) and failure to plead causation, I see no need to address them as I recommend dismissal of the
26 causes of action for not being cognizable claims. Likewise, I need not analyze in depth Codefendants BP,
Conoco, BHP and Exxon’s arguments regarding failure to plead with particularity the state law claims and
BP’s failure to plead arguments under the same rationale.

27 ³³ Because the acts or omissions alleged in this case occurred before the effective date of the 2020 Puerto
28 Rico Civil Code, liability would be governed by the provisions of the 1930 Puerto Rico Civil Code.

1 negligence was the proximate cause of Plaintiffs' damages. *Id.* (citing *Tokio Marine &*
2 *Fire Ins. Co., Ltd. v. Grove Manuf. Co.*, 958 F.2d 1169, 1171-72 (1st Cir. 1992)).

3 Defendants state that Plaintiffs have alleged neither a defect, nor causation. To
4 establish a defect, a plaintiff must satisfy either the consumer expectation test or the cost-
5 benefit analysis test. *See Vazquez-Filippetti v. Banco Popular de Puerto Rico*, 504 F.3d
6 43, 52 (1st Cir. 2007). Under the consumer expectations test, a product is defective if it
7 "failed to perform as safely as an ordinary consumer would expect when used in an
8 intended or reasonably foreseeable manner." *Rivera et al. v. Superior Pkg., Inc. et al.*,
9 132 D.P.R. 115 (1992) (citing *Barker v. Lull Engineering Co., Inc.*, 573 P.2d 443, 455-56
10 (1978)); see also *Carballo-Rodriguez*, 147 F. Supp. 2d at 66.

11
12
13 The Cost-Benefit Analysis test, on the other hand, requires a plaintiff to establish
14 the defendant's product's design proximately caused its injuries. The burden of proof
15 then shifts to the defendant/manufacturer to show that the "benefits of the design at
16 issue outweighs the risk of danger inherent in such a design." *See Rivera*, 132 D.P.R. 115.

17
18 Guided by this framework, I find that Plaintiffs have failed to plead a design defect
19 cause of action. Plaintiffs allege that Defendants' fossil fuel products are defective
20 "because the risks they pose to consumers...outweigh their benefits." (Docket No. 205, at
21 ¶802). Plaintiffs' allegations are textbook conclusory and fail to comply with the
22 requirements of establishing a plausible cause of action. Moreover, to the extent they rely
23 on the consumer expectation test, Plaintiffs have not alleged what is the ordinary
24 consumer's expectation in using the product as intended. *See Collazo-Santiago v.*
25 *Toyota Motor Corp.*, 937 F. Supp. 134 (D.P.R. 1996), *aff'd*, 149 F.3d 23 (1st Cir. 1998).
26 The same pleading deficiencies are present under the cost-benefit-analysis test. Plaintiffs
27

1 have not established that Defendants' fossil fuel products proximately cause a design
2 defect injury. *See Ayala v. Kia Motor Corp.*, 633 F. Supp. 3d 555, 569 (D.P.R.
3 2022)(citing *Mendoza v. Cervecería Corona*, 97 P.R. Dec. 499, 512 (1969)("In sum, '[i]f
4 the damage is not attributable to a defect of the product, there is no ground for applying
5 the strict liability rule.'").

7 Therefore, I likewise find that Plaintiffs have failed to adequately plead a design
8 defect cause of action.

9 **(iii) Duty to Warn**

10 To prove a failure to warn cause of action under Puerto Rico law, Plaintiffs must
11 show that: "(1) the manufacturer knew or should have known of the risk inherent in the
12 product; (2) there were no warnings or instructions, or those provided were inadequate;
13 (3) the absence of warnings made the product inherently dangerous; and (4) the absence
14 of adequate warnings or instructions was the proximate cause of plaintiff's injury." *Cruz*
15 *Vargas v. R.J. Reynolds Tobacco Co.*, 348 F.3d 271, 276 (1st Cir. 2003) (citing *Aponte*
16 *Rivera v. Sears Roebuck*, 144 D.P.R. 830 (1998)).

17
18
19 Plaintiffs allege that Defendants were fully aware of the risk inherent to their fossil
20 fuel products yet failed to warn the public or their consumers. (Docket No. 250 ¶¶ 785-
21 790). Defendants counter that there is no legal basis under Puerto Rico law recognizing
22 a duty to disclose information about climate change. At most, they claim, Puerto Rico
23 courts recognize a duty to warn that "extends to all the uses that can be reasonably
24 foreseen by the defendant...to assure the safest use of the product." *Silva v. Am. Airlines,*
25 *Inc.*, 960 F. Supp. 528, 533 (D.P.R. 1997). Plaintiffs, however, do not allege that
26 Defendants failed to warn users of reasonably foreseeable dangers those users may
27

1 encounter using the product. Rather, Plaintiffs argue that Defendants failed to warn
2 users of the effects that fossil fuels had on climate change. I do not read the duty to warn
3 in such an expansive manner. For that reason, I recommend that the failure to warn
4 cause of action be dismissed.³⁴

5
6 **(iv) Nuisance Claims**

7 Private and public nuisances are actionable under Puerto Rico law. P.R. Laws Ann.
8 tit. 32, § 2761. In the Amended Complaint, Plaintiffs assert both. (Ninth Cause of Action-
9 Public Nuisance and Thirteenth Cause of Action: Private Nuisance).

10 A nuisance is defined as:

11
12 Anything which is injurious to health, indecent, or offensive
13 to the senses, or an obstruction to free use of property so as to
14 interfere with the comfortable enjoyment of life or property,
15 or that is a nuisance to the wellbeing of a neighborhood, or to
16 a large number of persons or that illegally obstructs free flow
17 traffic in the usual manner by a lake, river, bay, stream
18 channel or navigable basin or by a park, square, street, public
19 road and other similar sic constitute a nuisance and the
20 subject of an action.

21 P.R. Laws Ann. tit. 32, § 2761.

22 Plaintiffs defend against dismissal of this cause of action by stating that
23 Defendants are fossil fuel producers and generators of greenhouse emissions and thus
24 have engaged in conduct—causing extreme weather events and impacting climate
25 change—that created unreasonable and substantial interference with Plaintiffs’
26 enjoyment of their property.

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³⁴ Codefendant BP mirrored the allegations regarding failure to warn contained in the Joint Motion to Dismiss at Docket No. 235 in its individual motion at Docket No. 236.

1 Defendants refute Plaintiffs' position by arguing that the purpose of § 2761 actions
2 are to obtain (1) injunctive relief in the form of abatement and (2) indemnification in the
3 form of damages. *See Casiano Sales v. Lozada Torres*, 91 D.P.R. 488 (1964), 91 P.R.R.
4 473, 483 (1964); *Marrero-Hernandez v. Esso Standard Oil Co. (Puerto Rico)*, 429 F.
5 Supp. 2d 469, 471 (D.P.R. 2006). But Plaintiffs do not seek to abate by way of injunctive
6 relief, due to Defendants' fossil fuel activities. The cases cited seem to suggest that the
7 recovery of damages is dependent on abatement. In other words, that one goes with the
8 other.
9

10 Defendants also argue that Plaintiffs failed to properly plead causation for their
11 nuisance claims. (Docket Nos. 235, 254). I agree. On this score, Plaintiffs' allegations are
12 conclusory, at best. There are no allegations that Defendants are, for example, burning
13 fossil fuels themselves in Puerto Rico, or operating facilities in the Municipalities. In fact,
14 it is undisputed that none have plants or refineries on the island. Plaintiffs have failed to
15 show a causal nexus between Defendants' acts or omissions and the damages claimed for
16 any prior or ongoing conduct that can be said to be injurious to health and that interfered
17 with the enjoyment of property by the Municipalities. I thus recommend that the
18 nuisance causes of action be dismissed.
19
20

21 **(v) Unjust Enrichment**

22 Defendants seek dismissal of the unjust enrichment cause of action because they
23 claim that Puerto Rico law only permits the remedy where there are no other forms of
24 relief available. For support, they cite to *Rivera Muñiz v. Horizon Lines Inc.*, 737 F. Supp.
25 2d 57, 65 (D.P.R. 2010) (Unjust enrichment "is unavailable if the plaintiff may seek other
26 forms of relief.") and *P.R. Tel. Co. v. SprintCom, Inc.*, 662 F.3d 74, 97 (1st Cir. 2011).
27
28

1 Plaintiffs offer no substantive argument in response. Their opposition only
2 focuses on allowing them discovery prior to dismissing the unjust enrichment claim. But
3 to access discovery, a plaintiff's complaint must pass the plausibility test. *See Bell Atl.*
4 *Corp. v. Twombly*, 550 U.S. 544, 558 (2007). Plaintiffs have not passed that hurdle with
5 their unjust enrichment claim for there are other forms of relief available in this case.
6 *See Ocaso, S.A., Compania De Seguros Y Reaseguros v. Puerto Rico Mar. Shipping*
7 *Auth.*, 915 F. Supp. 1244, 1263 (D.P.R. 1996)(citing *Medina & Medina v. Country Pride*
8 *Foods Ltd.*, 631 F. Supp. 293, 302 (D.P.R.1986) *aff'd by* 901 F.2d 181 (1st
9 Cir.1990))("C]laims for unjust enrichment are 'subsidiary in nature and will only be
10 available in situations where there is no available action to seek relief.'").
11

12 Accordingly, I recommend that the unjust enrichment claim be dismissed.
13

14 **(vi) Lack of Parens Patriae Standing**

15 As they asserted for the other causes of action, Defendants once again argue that
16 Plaintiffs lack parens patriae standing because they are political subdivisions. However,
17 as I have previously reasoned, the Municipalities are suing to vindicate their own rights
18 which happen to be congruent with the interests of their residents. *See United States v.*
19 *W.R. Grace & Co.Conn.*, 185 F.R.D. at 190. Because I find that Plaintiffs have standing
20 to bring this action as to their own proprietary rights, this is not a basis to obtain
21 dismissal of any of the causes of action that survived.
22

23 **IV. CONCLUSION**

24 In view of the foregoing, I recommend that the Presiding Judge deny the Joint
25 Motion to Dismiss at Docket No. 234 for lack of jurisdiction.
26
27

1 I also recommend that the Joint Motion to Dismiss at Docket No. 235 be granted
2 in part and denied in part. The following Counts should be dismissed for failure to state
3 a claim: Common law consumer fraud (Count I); Conspiracy to commit common law
4 consumer fraud and deceptive business practices (Count II); Rule 7 of Puerto Rico Rules
5 against misleading practices and advertisements (Count III); public nuisance (Count
6 IX); strict liability failure to warn (Count X); strict liability design defect (Count XI);
7 negligent design defect (Count XII); private nuisance (Count XIII), and unjust
8 enrichment (Count XIV).
9

10 It is further recommended that dismissal be denied as to the RICO claims under
11 §§1962(c) and (d) but granted as to §§1962 (a) and (b). Dismissal should likewise be
12 denied as to the antitrust cause of action (Counts IV-VII and VIII, respectively).
13

14 As to Defendants' individual motions to dismiss, I recommend as follows:

- 15 (i) Grant in part and deny in part Occidental's motion to dismiss at
16 Docket No. 232. Grant as to the failure to serve summons but deny
17 on the other jurisdictional grounds. Grant in part and deny in part
18 regarding the failure to allege all counts of the Amended Complaint
19 as set forth for the Joint Motion at Docket No. 235.
20 (ii) Grant in part and deny in part BP's motion to dismiss at Docket No.
21 236 to reflect the recommendations as to the Joint Motion at Docket
22 No. 235.
23 (iii) Deny Conoco's motion to dismiss at Docket No. 237.
24 (iv) Deny Chevron's motion to dismiss at Docket No. 239.
25 (v) Grant in part and deny in part Motiva's motion at Docket No. 240
26 as recommended regarding the Joint Motion to dismiss at Docket
27 No. 235.
28

- 1 (vi) Grant in part and deny in part Exxon’s motion at Docket No. 242 as
2 recommended regarding the Joint Motion to dismiss at Docket No.
3 235.
- 4 (vii) Grant in part and deny in part BHP’s motion at Docket No. 243 as
5 recommended regarding the Joint Motion to dismiss at Docket No.
6 235.
- 7 (viii) Grant in part and deny in part Shells’ motion at Docket No. 244 as
8 set forth in the Joint Motion to dismiss at Docket No. 235.
- 9 (ix) Deny BHP’s motion to dismiss on the basis of lack of jurisdiction at
10 Docket No. 245.
- 11 (x) Deny Rio Tinto’s motion to dismiss for lack of jurisdiction at Docket
12 No. 246.
- 13 (xi) Grant in part and deny in part Rio Tinto’s motion to dismiss for
14 failure to plead at Docket No. 247, as recommended with respect to
15 the Joint Motion to Dismiss at Docket No. 235.
- 16 (xii) Grant in part and deny in part API’s motion to dismiss at Docket No.
17 254, as recommended for the Joint Motion to Dismiss at Docket No.
18 235.

19 Finally, I also recommend that the motion for judicial notice at Docket No. 238 be
20 granted, but only as to taking notice of the fact that the articles and reports were
21 published, and that the motion for judicial notice at Docket No. 241 be denied.

22 This report and recommendation is filed pursuant to 28 U.S.C. § 636(b)(1)(B) and
23 Rule 72(d) of the Local Rules of this Court. Any objections to the same must be specific
24 and must be filed with the Clerk of Court **within 14 days**. Failure to file timely and
25 specific objections is a waiver of the right to appellate review. *See Thomas v. Arn*, 474
26 U.S. 140, 155 (1985); *Davet v. Maccorone*, 973 F.2d 22, 30–31 (1st Cir. 1992); *Paterson-*
27 *Leitch Co. v. Mass. Mun. Wholesale Elec. Co.*, 840 F.2d 985 (1st Cir. 1988); *Borden v.*
28 *Sec’y of Health & Human Servs.*, 836 F.2d 4, 6 (1st Cir. 1987).

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IT IS SO RECOMMENDED

In San Juan, Puerto Rico this 20th day of February, 2025.

S/Héctor L. Ramos-Vega
HÉCTOR L. RAMOS-VEGA
UNITED STATES MAGISTRATE JUDGE