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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

STATE OF CONNECTICUT, ET AL.,

Plaintiffs,

v.

AMERICAN ELECTRIC POWER COMPANY, INC., ET AL.,

Defendants.

OPEN SPACE INSTITUTE, INC., ET AL.,

Plaintiffs,

v.

AMERICAN ELECTRIC POWER COMPANY, INC., ET AL.,

Defendants.

04 CV 05669 (LAP)(DFE)
ECF CASE

04 CV 05670 (LAP)(DFE)
ECF CASE

**MEMORANDUM OF LAW IN SUPPORT OF THE MOTIONS OF
THE SOUTHERN COMPANY, TENNESSEE VALLEY AUTHORITY,
XCEL ENERGY INC., AND CINERGY CORP. TO DISMISS FOR
LACK OF PERSONAL JURISDICTION**

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INTRODUCTION

Defendants The Southern Company (“Southern”), Tennessee Valley Authority (“TVA”), Xcel Energy Inc. (“Xcel Energy”), and Cinergy Corp. (“Cinergy”) file this Memorandum of Law in support of their motions to dismiss the captioned civil actions: *Connecticut et al. v. American Electric Power Company, Inc. et al.*, Civil Action No. 1:04-CV-5669 (the “States Complaint”), and *Open Space Institute, Inc. et al. v. American Electric Power Company, Inc. et al.*, Civil Action No. 1:04-CV-5670 (the “OSI Complaint”). In these Complaints, Plaintiffs allege that the carbon dioxide emissions at power-generating plants in twenty different states—which conspicuously do not include a single plant in New York or in any other plaintiff State with the exception of Wisconsin—contribute to global climate change, thus giving rise to an actionable public nuisance under both federal common law and the law of each state in which the generating plants are located. In the OSI Complaint, Plaintiffs also assert a theory of private nuisance under the law of each of the twenty states. Plaintiffs allege various vague and hypothetical future injuries to public health, coastal resources, water supplies, ecology, agriculture, and economic interests. (*See generally* States Compl. ¶¶ 103-146; OSI Compl. ¶¶ 66-88.) Both lawsuits ask the Court to hold each defendant jointly and severally liable and to enjoin permanently “each defendant to abate its contribution to the nuisance by requiring it to cap its carbon dioxide emissions and then reduce them by a specified percentage each year for at least a decade.” (States Compl., Prayer for Relief, ¶ b; OSI Compl., Prayer for Relief, ¶ B.)

Southern, Xcel Energy, Cinergy, and TVA (collectively, “Defendants”)¹ move to dismiss the Complaints pursuant to Federal Rule of Civil Procedure 12(b)(2) for lack of personal jurisdiction. Plaintiffs strain unsuccessfully to invoke the Court’s jurisdiction to enjoin non-

¹ Defendants American Electric Power Company, Inc. and American Electric Power Service Corporation have not filed a motion to dismiss for lack of personal jurisdiction.

resident defendants from conducting lawful activities outside of New York with alleged effects occurring almost entirely outside of New York, all based upon the application of the law of jurisdictions other than New York. These out-of-state activities have no special, immediate, or direct effect in New York. As a result, Defendants could not reasonably have expected to be haled into court in New York, and New York has no legitimate interest in adjudicating Plaintiffs' claims. Doing so would violate the New York personal jurisdiction statutes and all notions of fair play and substantial justice required by due process.

FACTS RELEVANT TO PERSONAL JURISDICTION

Southern is a Delaware corporation with its principal place of business in Atlanta, Georgia. (States Compl. ¶ 21; OSI Compl. ¶ 18.) Southern is a registered public utility holding company that owns all of the outstanding common stock of five retail operating electric utility companies: Alabama Power Company, Georgia Power Company, Gulf Power Company, Mississippi Power Company, and Savannah Electric and Power Company. (States Compl. ¶ 21; OSI Compl. ¶ 18.) These retail operating companies have provided electricity to the public in Alabama, Georgia, Florida, and Mississippi continuously since the early 1900s. (States Compl. ¶¶ 21, 102; OSI Compl. ¶ 18.)

Xcel Energy is a Minnesota corporation with its principal place of business in Minneapolis, Minnesota. (States Compl. ¶ 27; OSI Compl. ¶ 23.) Xcel Energy is a registered public utility holding company that owns all of the outstanding common stock of certain retail operating companies. (States Compl. ¶ 27; OSI Compl. ¶ 23.) These retail operating companies have fossil fuel-fired electric generating facilities only in Colorado, Minnesota, New Mexico, South Dakota, Texas, and Wisconsin. (States Compl. ¶¶ 27, 102; OSI Compl. ¶ 23.)

Cinergy is a Delaware corporation with its principal place of business located in Cincinnati, Ohio. (States Compl. ¶ 31; OSI Compl. ¶ 26.) As alleged in the Complaints, Cinergy is a registered public utility holding company that owns all of the outstanding common stock of two retail operating electric utility companies: The Cincinnati Gas & Electric Company and PSI Energy, Inc. (States Compl. ¶ 31; OSI Compl. ¶ 26.) Cinergy’s retail operating companies have provided electric service to the public in Indiana, Kentucky, and Ohio continuously since the nineteenth century. (States Compl. ¶¶ 31, 102; OSI Compl. ¶ 26.)

Plaintiffs allege that TVA is a federal corporation with its principal place of business located in Knoxville, Tennessee. (States Compl. ¶ 25; OSI Compl. ¶ 21.) Plaintiffs also allege that TVA owns and operates fossil fuel-fired electric generating facilities in Alabama, Kentucky, Mississippi, and Tennessee, and that TVA’s generating facilities have provided electricity to the public in those states since the 1940s. (States Compl. ¶¶ 26, 102; OSI Compl. ¶ 22.)

According to Plaintiffs’ allegations, the electric-generating facilities owned and operated by TVA and the Operating Companies² of Southern, Xcel Energy, and Cinergy collectively emit less than 2% of all annual man-made carbon dioxide emissions worldwide. (States Compl. ¶¶ 24, 26, 30, 34, 100; OSI Compl. ¶¶ 19, 22, 24, 27, 53.)

ARGUMENT

A court must dismiss an action against a defendant over which it has no personal jurisdiction. *See* Fed. R. Civ. P. 12(b)(2); *Laborers Local 17 Health and Benefit Fund v. Philip Morris, Inc.*, 26 F. Supp. 2d 593, 597 (S.D.N.Y. 1998). It is Plaintiffs’ burden to establish, by a preponderance of the evidence, that the Court has personal jurisdiction over each Defendant. *See*

² For purposes of this brief, “Operating Companies” refers to the retail operating companies of Southern, Xcel Energy, and Cinergy, as identified in the Complaints. The Complaints do not allege that TVA owns any retail operating companies.

Kernan v. Kurz-Hastings, Inc., 175 F.3d 236, 240 (2d Cir. 1999); *Robinson v. Overseas Military Sales Corp.*, 21 F.3d 502, 507 (2d Cir. 1994). To survive a motion to dismiss, a plaintiff must plead legally sufficient facts to make a *prima facie* showing of personal jurisdiction. *Whitaker v. Am. Telecasting, Inc.*, 261 F.3d 196, 208 (2d Cir. 2001); *Jazini v. Nissan Motor Co.*, 148 F.3d 181, 184 (2d Cir. 1998); *Koehler v. Bank of Bermuda, Ltd.*, 101 F.3d 863, 865 (2d Cir. 1996). “In order for a plaintiff to subject an out-of-state defendant to jurisdiction in New York, it is necessary to do more than put forward an unsupported allegation. The plaintiff must come forward with some definite evidentiary facts to connect the defendant with transactions occurring in New York.” *Falik v. Smith*, 884 F. Supp. 862, 865 (S.D.N.Y. 1995) (quotations omitted).

Determining whether the Court has personal jurisdiction over Defendants involves a two-step analysis. First, the Court must determine whether New York law provides a statutory basis for personal jurisdiction. Second, the Court must determine whether the exercise of personal jurisdiction is consistent with the requirements of due process. *Cutco Indus., Inc. v. Naughton*, 806 F.2d 361, 365 (2d Cir. 1986); *J.L.B. Equities, Inc. v. Ocwen Fin. Corp.*, 131 F. Supp. 2d 544, 547 (S.D.N.Y. 2001).

Defendants move to dismiss the Complaints for lack of personal jurisdiction on two grounds. First, there is no statutory basis under New York law for the Court to exercise personal jurisdiction over Defendants. General jurisdiction cannot be asserted over any Defendant pursuant to CPLR 301 because the allegations, either by themselves or together, do not rise to the level of such continuous and systematic contacts with New York that Defendants can be deemed to be “doing business” in New York. Plaintiffs’ conclusory allegations that certain Defendants’ subsidiaries are agents or “mere departments” of any Defendant such that the subsidiaries’ contacts with New York can be imputed to their respective parents are insufficient as a matter of

law. In addition, specific jurisdiction cannot be asserted over any Defendant pursuant to CPLR 302(a)(3) because the “original event” or “first effect” of the alleged tortious conduct did not occur in New York, or pursuant to CPLR 302(a)(1) because Defendants do not transact business in New York. No Defendant regularly does business or solicits business, engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered in New York. Second, in any event, Defendants do not have sufficient minimum contacts with New York such that the assertion of personal jurisdiction here would comport with due process.

I. THERE IS NO STATUTORY BASIS FOR EXERCISING PERSONAL JURISDICTION OVER DEFENDANTS UNDER NEW YORK LAW.

A. Plaintiffs Have Not Made a *Prima Facie* Showing That Defendants Are Subject to General Jurisdiction in New York.

Under CPLR 301, a foreign corporation is subject to general jurisdiction and amenable to suit in New York only if it is “engaged in such a continuous and systematic course of ‘doing business’ here as to warrant a finding of its ‘presence’ in this jurisdiction.” *Landoil Res. Corp. v. Alexander & Alexander Servs., Inc.*, 918 F.2d 1039, 1043 (2d Cir. 1990) (citations omitted). The foreign corporation must be found to conduct business in New York “not occasionally or casually, but with a fair measure of permanence and continuity.” *Id.*; *Aerotel Ltd. v. Sprint Corp.*, 100 F. Supp. 2d 189, 191-92 (S.D.N.Y. 2000). “The doing business standard is a stringent one because a corporation which is amenable to the Court’s general jurisdiction may be sued in New York on causes of action wholly unrelated to acts done in New York.” *Jacobs v. Felix Bloch Erben Verlag Fur Buhne Film Und Funk KG*, 160 F. Supp. 2d 722, 731 (S.D.N.Y. 2001).

To determine whether a foreign corporation is “doing business” in New York, courts consider “a traditional set of indicia”:

whether the company has an office in the state, whether it has any bank accounts or other property in the state, whether it has a phone listing in the state, whether it does public relations work there, and whether it has individuals permanently located in the state to promote its interests.

Wiwa v. Royal Dutch Petroleum Co., 226 F.3d 88, 98 (2d Cir. 2000); *Landoil*, 918 F.2d at 1043.

No one contact is determinative, but “[p]erhaps the most important factor needed for a finding of jurisdiction under CPLR 301 is the in-state presence of employees engaged in business activity.”

Wiwa, 226 F.3d at 98 (quoting *Lane v. Vacation Charters, Ltd.*, 750 F. Supp. 120, 125 (S.D.N.Y. 1990)); *Metro. Life Ins. Co. v. Robertson-Ceco Corp.*, 84 F.3d 560, 570 (2d Cir. 1996).

1. *None of Defendants’ Alleged Activities in New York Constitute “Doing Business” in New York Sufficient To Establish General Jurisdiction.*

Plaintiffs have not alleged facts sufficient to show that any Defendant is continuously or systematically “doing business” in New York such that it can properly be considered “present” in New York and therefore subject to general jurisdiction. Specifically, Plaintiffs have not alleged that any Defendant is authorized to do business in New York, has offices or employees in New York, or owns property or pays taxes in New York. Rather, Plaintiffs merely string together a hodge-podge of discrete “facts” that, under established precedent, fall far short of satisfying Plaintiffs’ burden of demonstrating that the Court has general personal jurisdiction over Defendants.

Plaintiffs allege that Defendants supply electricity to the Eastern Interconnection, a vast

interstate power grid that includes New York.³ (States Compl. ¶¶ 41, 43; OSI Compl. ¶ 34.) Defendants' mere link to this multi-state grid, however, does not constitute "doing business" in New York. That some of the electricity generated by the Operating Companies' and TVA's out-of-state facilities may be transmitted into or through the Eastern Interconnection does not establish that any Defendant purposefully conducts continuous, permanent, and substantial activities in New York sufficient to confer jurisdiction in the courts of New York. Even if some of the electricity generated by the Operating Companies' and TVA's out-of-state facilities could possibly be transmitted into New York and ultimately sold to New York consumers by sheer happenstance through the Eastern Interconnection, without any deliberate intention of selling electricity into New York, this does not constitute continuous and systematic activity in New York. The linking to the Eastern Interconnection is the antithesis of the type of directed activity that would support long-arm jurisdiction. Indeed, as the Supreme Court has described it:

no individual utility ... has "control over the actual transfers of electric power and energy with any particular electric system with which it is interconnected." Electricity flows at extremely high voltages across the network in uncontrollable ways and cannot be easily directed through a particular path from a specific generator to a consumer. ... And "trying to predict the flow of electrons is akin to putting a drop of ink into a water pipe flowing into a pool, and then trying to

³ As one court has accurately described:

Over two thousand (2,000) electric utilities [are] in the Eastern Interconnection, an interconnected grid system covering much of the eastern two-thirds of the United States. ... The Eastern Interconnection includes virtually all the electric facilities east of the Rocky Mountains, fourteen hundred (1400) generating facilities, and over two hundred and forty thousand (240,000) miles of transmission lines. ... [P]ower flows over every part of the interconnected grid system and is instantaneously commingled with all the electricity present. Consequently, electricity present at any individual interconnection within the Eastern Interconnection system is a combination of all the electricity produced at all the generating plants within the Eastern Interconnection.

Indiana-Kentucky Elec. Corp. v. Indiana Dep't of State Revenue, 598 N.E.2d 647, 650 (Ind. Tax Court 1992).

predict how the ink drop will diffuse into the pool, and which combination of outflow pipes will eventually contain ink.”

New York v. FERC, 535 U.S. 1, 31-32 (2002) (internal citations omitted). Mere awareness that the stream of commerce *may* sweep some electricity generated by the Operating Companies and TVA into New York should not and cannot be deemed a purposeful sale of power into New York. *See Asahi Metal Indus. Co. v. Superior Court*, 480 U.S. 102, 112 (1987).

In addition to the Supreme Court’s observation about the Eastern Interconnection’s vast and unpredictable nature, New York precedent recognizes that jurisdiction cannot be based on mere grid interconnection. In *Niagara Mohawk Energy Marketing, Inc. v. Entergy Power Marketing Corp.*, 706 N.Y.S.2d 794, 270 A.D.2d 872 (4th Dep’t 2000), the defendant, a Delaware corporation with its principal offices in the State of Texas, had entered into a contract with PCA, a New York company, to deliver electricity into a Midwest market. 706 N.Y.S.2d at 795. When the defendant canceled its agreement with PCA, Niagara Mohawk was forced to purchase power at additional cost from a source other than PCA to meet its contractual obligations to a third party. *Id.* Niagara Mohawk filed suit in New York, asserting tort and contract causes of action. In support of its motion to dismiss for lack of personal jurisdiction, the defendant established that it was not authorized to do business in New York, had no offices or employees in New York, owned no property in New York, paid no taxes in New York, and neither sold power directly to customers in New York nor purchased power directly from New York. *Id.* at 796. Under those circumstances, and despite the fact that the defendant participated in the wholesale energy market and interconnected grid, the court held that the defendant was not continuously and systematically doing business in New York such that it was subject to general jurisdiction in New York courts under CPLR 301. *Id.* at 795.

Similarly, in *Sowards v. Switch Energy Co.*, 744 F. Supp. 1399 (W.D. Va. 1990), a Virginia federal district court refused to exercise personal jurisdiction over an electric utility under circumstances compellingly similar to the situation here. The defendant in *Sowards* was a Kentucky utility that might send power eastward through the Eastern Interconnection during periods of peak demand. *Id.* at 1403. The court found that “it would be unreasonable to suggest that a western utility could be haled into court in Virginia because its electricity might have been routed [to Virginia].” *Id.* Under those facts, “the utility would have no control as to where it might be subject to suit, [and] jurisdiction would rest on nothing more than ‘random, isolated, or fortuitous’ circumstances.” *Id.* Accordingly, the court, “mindful of the broader implications of its decision for the electric power industry,” concluded that the defendant did not purposefully conduct activities in Virginia and granted the defendant’s motion to dismiss for lack of personal jurisdiction. *Id.* at 1403-04.

Plaintiffs also seek to base personal jurisdiction over Southern, Xcel Energy, and Cinergy on their memberships in the Edison Electric Institute (“EEI”), an industry trade organization alleged to advertise and host meetings occasionally in New York. (States Compl. ¶¶ 44-47; OSI Compl. ¶¶ 42-43.) With respect to TVA, Plaintiffs do not allege membership in EEI, but do allege in conclusory fashion that EEI acts as the “agent” for TVA in Power Partners, a joint government-industry program relating to global warming. (States Compl. ¶ 46; OSI Compl. ¶ 43.) Plaintiffs further allege that Southern is a member of the Clean Air Markets Group (“CAMG”), an organization that initiated unrelated litigation in a New York federal court on behalf of its members. (States Compl. ¶ 56; OSI Compl. ¶ 38(d).) Even if true, however, the allegations regarding membership and participation in trade organizations that have contacts or activities in New York are insufficient to support jurisdiction over Defendants. *See, e.g., Donald*

& Co. Sec., Inc. v. U.S. Stock Transfer Corp., 2000 U.S. Dist. LEXIS 3580, at *1 (S.D.N.Y. Jan. 21, 2000) (stating that membership in trade association located in New York is insufficient to subject defendant to jurisdiction in New York); *World Wide Minerals Ltd. v. Republic of Kazakhstan*, 116 F. Supp. 2d 98, 106 (D.D.C. 2000) (finding that trade associations' representation of business interests in New York lacks the level of involvement required to constitute business of a substantial character); *Clamp-All Corp. v. Cast Iron Steel Pipe Inst.*, 1986 U.S. Dist. LEXIS 25184, at *6 (D. Mass. May 22, 1986) (stating that membership in a trade association does not subject members to jurisdiction in every state in which the trade association does business or impose on members liability for the conduct of the organization); *cf. Travelers Cas. & Sur. Co. v. Interclaim (Bermuda) Ltd.*, 304 F. Supp. 2d 1018, 1025 (N.D. Ill. 2004) (refusing to predicate jurisdiction on participation in unrelated litigation in the forum state); *Payton v. Summit Loans, Inc.*, 253 A.2d 459, 461 (D.C. 1969) (“[I]nitiation of an action by a foreign corporation does not in and of itself constitute doing business in the jurisdiction where suit is brought.”); 19 C.J.S. *Corporations* § 942 (2003) (“A corporation is not necessarily doing business in the state merely because it . . . initiates litigation in the state.”).

Next, Plaintiffs allege that Southern, TVA, and Xcel Energy do business in New York through the participation of certain officers and employees at industry meetings and seminars in New York. (States Compl. ¶¶ 55, 57, 60, 65; OSI Compl. ¶¶ 38(c) & (f), 39(b), 40(d).) Similarly, Plaintiffs allege that TVA does business in New York by holding annual financial analyst and investor meetings in New York. (States Compl. ¶ 60; OSI Compl. ¶39(b).) Plaintiffs also contend that Xcel Energy does business in New York because certain Xcel Energy executives made a presentation in New York concerning its financial position. (States Compl. ¶¶ 60, 66; OSI Compl. ¶¶ 39(b).) These allegations again fall well short of establishing personal

jurisdiction. It is well established under New York law that occasional meetings in New York cannot establish general jurisdiction over a foreign defendant. *See Pieczenik v. Dolan*, 2003 U.S. Dist. LEXIS 23295, at *15 (S.D.N.Y. Dec. 29, 2003) (stating that traveling to New York for speaking engagements and presentations does not constitute “doing business” in New York); *Savoleo v. Couples Hotel*, 136 A.D.2d 692, 693, 524 N.Y.S.2d 52 (2d Dep’t 1988) (finding no jurisdiction where the defendant had no office or telephone number in New York and stating that “[t]he mere periodic sending of corporate officers or employees into the State on corporate business is not enough to predicate a finding that a foreign corporate defendant is present for jurisdictional purposes ...”).

Plaintiffs further allege that Southern does business in New York through its use of an advertising agency that runs advertisements in New York. (States Compl. ¶ 58; OSI Compl. ¶ 38(e).) In general, however, New York has no jurisdiction over a foreign company whose only contacts with New York are largely limited to advertising and marketing activities plus occasional visits by representatives. *McGowan v. Smith*, 52 N.Y.2d 268, 272 (1981); *Chamberlain v. Peak*, 176 A.D.2d 1109, 1110 (3d Dep’t 1991); *see also New England Laminates Co. v. Murphy*, 79 Misc. 2d 1025, 1027 (Sup. Ct. Nassau Co. 1974) (finding no personal jurisdiction where contracts had to be approved by California main office and only 4% of the defendant’s business was from New York even though the foreign defendant advertised in New York media, shipped goods to New York buyers, and maintained two employees in the state).

Plaintiffs also contend that TVA does business in New York by regularly retaining the services of New York-based investment banks to underwrite bond offerings on the New York Stock Exchange. (States Compl. ¶ 60; OSI Compl. ¶ 39(c).) However, a foreign corporation is not “doing business” and subject to personal jurisdiction simply because it has contracted for the

services of an investment bank here. *See Bush v. Stern Bros. & Co.*, 524 F. Supp. 12, 14 (S.D.N.Y. 1981) (“The location in New York of firms, such as law firms and investment services, which perform services for [an out-of-state defendant] for a fee does not represent activity by [the out-of-state defendant] in New York for jurisdictional purposes.”).

Plaintiffs’ allegations that Xcel Energy and Cinergy (through its “agents”) do business in New York by buying natural gas and executing trades on the New York Mercantile Exchange (“NYMEX”), a financial exchange located in New York City, are equally deficient. (States Compl. ¶¶ 64, 77-78; OSI Compl. ¶¶ 40(c), 41(c).)⁴ New York law affords foreign corporations substantial latitude to hold bank accounts in New York and to participate in New York-based financial exchanges and markets without subjecting themselves to general jurisdiction in New York. A foreign corporation is not “doing business” in New York merely because it purchases securities or commodities on a New York exchange or takes steps necessary to maintain its listing on a New York stock exchange. *See Neewra, Inc. v. Manakh Al Khaleej Gen. Trading*, 2004 U.S. Dist. LEXIS 13556, at *23 (S.D.N.Y. July 12, 2004) (holding that a bank account or investment activity in New York, without more, is insufficient to show that a foreign corporation was doing business in New York); *see also Wiwa*, 226 F.3d at 97-98 (citing cases and stating “absent other substantial contacts, a company is not ‘doing business’ in New York merely by taking ancillary steps in support of its listing on a New York exchange”); *Barington Capital Group, L.P. v. Arsenault*, 281 A.D.2d 166, 166, 721 N.Y.S.2d 58, 59 (1st Dep’t 2001) (finding that a California domiciliary who made phone calls to New York brokerage firm that resulted in

⁴ As discussed in Part I.A.2, *infra*, the allegations that Cinergy Marketing & Trading, L.P. (“CMT”) and The Cincinnati Gas & Electric Co. (“CG&E”) are “agents” of Cinergy are wholly conclusory and insufficient on their face to establish personal jurisdiction over Cinergy based on any agency theory.

the purchase of stock did not engage in purposeful activity within New York sufficient to confer personal jurisdiction).

2. *The Alleged Activities of Defendants' Subsidiaries in New York Are Insufficient To Confer Personal Jurisdiction Over Defendants.*

Plaintiffs also allege that Southern, Xcel Energy, and Cinergy are subject to personal jurisdiction because certain of their current and, in some instances, former subsidiaries are “present” in New York. (States Compl. ¶¶ 49, 54, 61, 66, 67, 74; OSI Compl. ¶¶ 38(a)-(b), 40(a)-(b), 41(a)-(b).) It is well established, however, that the presence of a subsidiary in New York does not establish the parent holding company’s presence in New York. *Volkswagenwerk Aktiengesellschaft v. Beech Aircraft Corp.*, 751 F.2d 117, 120 (2d Cir. 1984); *J.L.B. Equities, Inc.*, 131 F. Supp. 2d at 549. Rather, to confer personal jurisdiction over the foreign parent corporation in New York courts, a subsidiary must be shown to be an “agent” or “mere department” of the parent. *Jazini v. Nissan Motor Co.*, 148 F.3d 181, 184 (2d Cir. 1998). Courts consider four factors when determining whether a subsidiary is a mere department of the parent: (1) “common ownership, which is essential”; (2) “financial dependency of the subsidiary on the parent corporation” (including indicia such as no-interest loans, control of the subsidiary’s finances, the parent’s financing of inventory, and whether the subsidiary borrows money or issues debt in its own name); (3) “the degree to which the parent interferes in the selection and assignment of the subsidiary’s executive personnel and fails to observe corporate formalities”; and (4) “the degree of control over the marketing and operational policies of the subsidiary exercised by the parent.” *Id.* at 185.

To predicate jurisdiction on the agency theory, Plaintiffs *must state facts* showing that the subsidiary “does all the business which [the parent] could do were it [in New York] by its own officials.” *Frummer v. Hilton Hotels Int’l, Inc.*, 19 N.Y.2d 533, 537, 281 N.Y.S.2d 41 (1967);

see J.L.B. Equities, Inc., 131 F. Supp. 2d at 549 (finding no personal jurisdiction over parent on agency theory where the plaintiff failed to aver a single fact demonstrating that the subsidiary conducted business in New York that the parent would have conducted with its own employees but for the existence of subsidiary).

Here, Plaintiffs fail to allege *any facts* to establish that any of Southern's, Xcel Energy's, or Cinergy's current or former subsidiaries are the agents or "mere departments" of their respective parents for purposes of establishing personal jurisdiction. Instead, Plaintiffs simply parrot the legal standards for agency and "mere department" without providing any supporting facts whatsoever. (*See, e.g.*, States Compl. ¶¶ 50, 55, 62, 66, 68, 76, 78; OSI Compl. ¶¶ 38(a)-(b), 40(a)-(b), 41(a)-(b).) Plaintiffs also fail to allege any facts showing that any of the current or former subsidiaries conducted any business in New York on behalf of their respective parents. Rather, Plaintiffs merely allege that certain subsidiaries are registered to do business in New York without identifying any alleged business activities actually performed in New York by the subsidiaries, let alone how they are sufficiently important that the Defendant parent companies would have conducted those activities themselves had the subsidiaries not done so.

Similarly, Plaintiffs do not allege, much less demonstrate, that any of the current or former subsidiaries are financially dependent on Defendants. Plaintiffs also do not allege facts to demonstrate that Defendants intruded on any subsidiary's personnel decisions. There is no allegation that the corporate formalities of Defendants or the subsidiaries were compromised. Plaintiffs' allegations that there is some exchange of employees among Defendants and their various related companies are insufficient to establish personal jurisdiction. Sharing officers, directors, and business addresses is intrinsic to a parent-subsidiary relationship and is not

determinative on the question of whether the subsidiary is a mere department of the parent. *See Jazini*, 148 F.3d at 185.

Moreover, several of the allegations Plaintiffs' rely upon concerning certain alleged subsidiaries suffer from fatal legal defects. For example, Plaintiffs allege that prior to 2001 Southern owned a company called Mirant Corp. ("Mirant"), which itself at that time owned and operated electric generating facilities in New York. (States Compl. ¶ 54; OSI Compl. ¶ 38(b)). Apparently Plaintiffs expect the Court to overlook the plain fact that, even if Mirant's activity could be attributed Southern at the time it was occurring prior to 2001 (which it cannot), the pre-2001 activity of this *former* subsidiary cannot be used to establish that Southern is subject to personal jurisdiction *today*. Existence of sufficient presence to justify the exercise of personal jurisdiction is measured at the time the action was commenced. *J.L.B. Equities, Inc.*, 131 F. Supp. 2d at 548; *Lancaster v. Colonial Motor Freight Line, Inc.*, 177 A.D. 2d 152, 581 N.Y.S.2d 283 (1st Dep't 1992) (holding that the defendant was not subject to jurisdiction where it had ceased operations in New York one year before the action was commenced). Therefore, Plaintiffs' attempt to predicate jurisdiction over Southern based on Mirant's alleged activities fails. For the same reasons, Xcel Energy's former ownership of NRG Energy, Inc. ("NRG") and NRG's contacts with New York are also wholly irrelevant. (States Compl. ¶ 62; OSI Compl. ¶ 40(b).) Plaintiffs do not allege that Xcel owned NRG at or near the time of the filing of the Complaints.

Similarly defective are the allegations that Southern Company Services, Inc. ("SCS") (a subsidiary of Southern) and Cinergy Services, Inc. ("CSI") (a subsidiary of Cinergy) acted as the agents of Southern's Operating Companies and Cinergy's Operating Companies, respectively, in the Enron bankruptcy proceedings in the U.S. Bankruptcy Court for the Southern District of New

York. Even if SCS and CSI had acted as the agents of Southern and Cinergy (which Plaintiffs do not allege), rather than as the agents of their respective Operating Companies, it is clear that participation in litigation in New York is not sufficient to establish personal jurisdiction (especially since creditor status must be asserted where the debtor chooses to file its bankruptcy petition). *Cf. Girl Scouts of Am. v. Steir*, 2004 U.S. App. LEXIS 12515, at *6 (2d Cir. June 24, 2004); *Travelers Cas. & Sur. Co. v. Interclaim (Bermuda) Ltd.*, 304 F. Supp. 3d 1018, 1025 (N.D. Ill. 2004); *Payton v. Summit Loans, Inc.*, 253 A.2d 459, 461 (D.C. 1969); 19 C.J.S. *Corporations* § 942 (2003).

In sum, this Court cannot exercise general jurisdiction over any of the Defendants under CPLR 301, and Plaintiffs have alleged no facts to support a contrary conclusion.

B. New York’s Long-Arm Statute Does Not Provide a Basis for Specific Jurisdiction Over Any of the Defendants.

New York’s long-arm statute provides in pertinent part that

a court may exercise personal jurisdiction over any nondomiciliary ... who in person or through an agent ... (1) transacts any business within the state or contracts anywhere to supply goods or services in the state; or ... (3) commits a tortious act without the state causing injury to person or property within the state ... if he (i) regularly does or solicits business, or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered, in the state, or (ii) expects or should reasonably expect the act to have consequences in the state and derives substantial revenue from interstate or international commerce.

CPLR 302(a). Although Plaintiffs do not explicitly cite CPLR 302(a)(1) or CPLR 302(a)(3) in the Complaints, they appear to rely on these provisions to allege personal jurisdiction over Defendants. (*See* States Compl. ¶¶ 38-40; OSI Compl. ¶¶ 32-35, 40(d).) Their factual allegations, however, are insufficient to establish a *prima facie* case of personal jurisdiction against any Defendant.

1. Defendants Are Not Subject to Personal Jurisdiction Under CPLR 302(a)(3) Because the Situs of the Purported Injury Was Not New York.

CPLR 302(a)(3) requires courts to apply a “situs of the injury test” to determine whether the original event that caused the alleged tortious injury occurred in New York. *Bank Brussels Lambert v. Fiddler, Gonzalez & Rodriguez*, 171 F.3d 779, 791 (2d Cir. 1999). “The ‘situs of the injury’ is the location of the original event which caused the injury, not the location where the resultant damages are subsequently felt by the plaintiff.” *Hermann v. Sharon Hosp., Inc.*, 135 A.D.2d 682, 683, 522 N.Y.S.2d 581 (2d Dep’t 1987) (citations omitted); *see also O’Brien v. Hackensack Univ. Med. Ctr.*, 305 A.D.2d 199, 202, 760 N.Y.S.2d 425 (1st Dep’t 2003) (“[I]t is well established that the situs of the injury is the location where the event giving rise to the injury occurred, and not where the resultant damages occurred.”). Stated another way, the “original event” occurs “where the first effect of the tort . . . that ultimately produced the final economic injury is located.” *DiStefano v. Carozzi North Am., Inc.*, 286 F.3d 81, 84-85 (2d Cir. 2001) (internal quotation omitted). Unless the “original event” or “first effect” occurs in New York, the Court cannot exercise long-arm jurisdiction under CPLR 302(a)(3).

Plaintiffs have not alleged that the “original event” or the “first effect” of any alleged tortious conduct occurred in New York. Indeed, the Complaints themselves belie such a finding. First, Plaintiffs repeatedly acknowledge that global warming is a worldwide environmental phenomenon to which they allege Defendants contribute. They further claim that the climate of the entire United States (and indeed the entire world) has been altered by carbon dioxide emissions. (*See, e.g., States Compl.* ¶ 3; *OSI Compl.* ¶ 2.) Thus, as this case pertains to alleged emissions by the Operating Companies and TVA’s out-of-state facilities, the “original event” that caused the harm alleged by Plaintiffs unquestionably did not occur in New York. Furthermore, the fact that seven states other than New York and nonprofit land trusts located

outside of New York are claiming precisely the same types of injuries in their states allegedly resulting from precisely the same alleged tortious emissions precludes any finding that the “original event” occurred in New York.⁵

Moreover, even if the Court were to find that New York is the “situs of the injury,” Plaintiffs also must establish that each Defendant (1) regularly solicited business or engaged in any other persistent course of conduct; or (2) derived substantial revenue from goods used or consumed or services rendered in New York; or (3) should have reasonably expected its alleged tortious conduct would have consequences in the state and derived substantial revenue from interstate or international commerce. *Bank Brussels Lambert*, 171 F.3d at 793. As discussed above in detail, Plaintiffs’ allegations are insufficient to show that any Defendant “regularly does or solicits business, or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered, in the state.” CPLR 302(a)(3)(i); *see also Niagara Mohawk*, 706 N.Y.S.2d at 796 (finding allegations were insufficient to establish specific jurisdiction under New York’s long-arm statute). Plaintiffs’ allegations regarding Defendants’ expectations and revenues from interstate and international commerce, which merely recite the statutory language without any supporting facts, are insufficient to satisfy the requirement of establishing a *prima facie* case of personal jurisdiction. *Plunkett v. Estate of Doyle*, 2001 U.S. Dist. LEXIS 2001, at *8 (S.D.N.Y. Feb. 22, 2001) (citing *Jazini*, 148 F.3d at 184-85).

2. Defendants Are Not Subject to Personal Jurisdiction Under CPLR 302(a)(1) Because Defendants Do Not Transact Business in New York.

⁵ There is an additional compelling reason that Defendants are unquestionably not subject to personal jurisdiction under the New York long-arm statute as to the claims asserted by the non-New York Plaintiffs in both cases—not one of those non-New York Plaintiffs has or can allege, much less establish, that New York is the situs of its alleged injuries.

Plaintiffs also allege that Xcel Energy “transacts business in New York through the participation of its officers and employees in industry meetings and seminars held in New York.” (States Compl. ¶ 65; OSI Compl. ¶ 40(d).) To the extent Plaintiffs argue that Xcel Energy or any other Defendant is subject to personal jurisdiction pursuant to the “transacting business” prong of CPLR 302(a)(1), that argument fails. Under the “transacting business” prong, there must be “a substantial relationship between that transaction and the alleged injury.” *O’Brien*, 305 A.D.2d at 200; *see also Armouth Int’l, Inc. v. Haband Co.*, 277 A.D.2d 189, 190 (2d Dep’t 2000). Here, there is no relationship at all between attending an industry meeting or seminar in New York and the alleged injury, namely global warming based on the emission of carbon dioxide, nor do Plaintiffs even attempt to concoct such a relationship.⁶ Plaintiffs’ allegation that “TVA has contracted to buy power from New York entities” (OSI Compl. ¶ 39(a)) likewise fails to rise to the level of “transacting business” in New York. Plaintiffs’ injuries, as alleged in the Complaints, stem from the emission of carbon dioxide from the Operating Companies and TVA’s out-of-state facilities (States Compl. ¶¶ 24, 26, 29, 33; OSI Compl. ¶¶ 19, 22, 24, 27), not TVA’s alleged unrelated purchases of power from New York entities.

Moreover, a foreign corporation does not “transact business” pursuant to CPLR 302(a)(1) by executing a trade on a New York exchange. *See Advance Realty Assoc. v. Krupp*, 636 F. Supp. 316, 318 (S.D.N.Y. 1986) (“Phone calls and correspondence with a New York broker do not add up to a transaction of business in New York.”); *Glassman v. Hyder*, 23 N.Y.2d 354, 363 (1968) (“[T]here is no transaction of business in New York where an offer placed outside the State by telephone is received and accepted in New York.”); *L.F. Rothschild, Unterberg, Towbin*

⁶ For the same reasons, Plaintiffs’ allegations that Southern “does business in New York through the participation of its officers and employees in industry meetings and seminars held in New York” (States Compl. ¶ 57; OSI Compl. ¶ 38(f)) are insufficient to establish personal jurisdiction over Southern.

v. McTamney, 89 A.D.2d 540, 631, 452 N.Y.S.2d 630 (1st Dep't 1982), *aff'd*, 59 N.Y.2d 651 (1983) (finding that a Pennsylvania resident who made several telephone calls to a New York brokerage firm resulting in the purchase of certain stock did not have sufficient contact with New York to confer personal jurisdiction).

II. THE EXERCISE OF PERSONAL JURISDICTION OVER DEFENDANTS WOULD VIOLATE SUBSTANTIVE DUE PROCESS.

Even if the assertion of jurisdiction were proper under CPLR 301 or 302 (which it is not), exercising personal jurisdiction over Defendants under the circumstances of these cases would violate the substantive due process protections afforded by the United States Constitution. Due process requires that, unless a defendant is present within the territory, it must have “certain minimum contacts with it such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice.” *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945); *Whitaker v. Am. Telecasting, Inc.*, 261 F.3d 196, 208 (2d Cir. 2001); *Fort Knox Music Corp. v. Baptiste*, 203 F.3d 193, 196 (2d Cir. 2000). The defendant also must have taken affirmative steps to create a substantial connection with the forum state, and the contacts must come about by an action “purposefully directed” to the forum state. *Asahi Metal*, 480 U.S. at 112. “[T]he foreseeability critical to due process analysis is not the mere likelihood that a product will find its way into the forum State. Rather it is that the defendant’s conduct and connection with the forum State are such that [it] should reasonably anticipate being haled into court there.” *World-Wide Volkswagen v. Woodson*, 444 U.S. 286, 297 (1980); *U.S. Titan, Inc. v. Guangzhou Zhen Hua Shipping Co.*, 241 F.3d 135, 152 (2d Cir. 2001).

As described in detail above, none of the Defendants have sufficient minimum contacts with New York to satisfy the mandates of due process. Under the circumstances presented here, Defendants had no expectation whatsoever that they would be haled into a New York court to

defend allegations that power plants operated by their wholly-owned subsidiaries (or operated by TVA, a federal agency in the Tennessee Valley region) in states far removed from the forum contribute to a global environmental phenomenon that is allegedly associated with a potential risk of future harm to Plaintiffs. If the exercise of personal jurisdiction by the New York courts is constitutionally permissible under these circumstances, each Defendant could be haled into the courts of virtually every jurisdiction to defend its operational practices (TVA) or those of its subsidiaries (Southern, Cinergy and Xcel Energy).

Courts have routinely rejected such an expansive view of minimum contacts. For example, in *Shaw v. Excelon Corp.*, 167 F. Supp. 2d 917 (S.D. Miss. 2001), the plaintiff argued that a defendant who gave credit information to a national credit agency should have known that the information could be “published” in any state, thereby establishing sufficient minimum contacts with the State of Mississippi. The court found that the plaintiff was seeking to expand the “foreseeability” element of *World-Wide Volkswagen* beyond the limits set by the Supreme Court. “[I]t would be beyond the realm of fair play and substantial justice to hold that a defendant avails itself to personal jurisdiction in every state each time it reports information in the state in which it is doing business to a consumer credit reporting agency merely because the possibility exists that the information may have an effect outside the state in which it was reported.” *Id.*, at 920. Similarly in this case, it would be well “beyond the realm of fair play and substantial justice” to find that Defendants are subject to personal jurisdiction in every state due to carbon dioxide emissions in distant states that contribute to alleged global climatic phenomena.

An assertion of personal jurisdiction must also be “reasonable under the circumstances of the particular case.” *Bank Brussels Lambert*, 305 F.3d at 129. Reasonableness is determined by

evaluating four factors: (1) the burden on defendant of defending itself in the forum; (2) the interest of the forum state in adjudicating the controversy; (3) the interest of the plaintiff in obtaining convenient and effective relief; and (4) “the procedural and substantive policies of other nations whose interests are affected by the assertion of jurisdiction by the ... court.” *Asahi Metal*, 480 U.S. at 113, 115.

Three factors in particular weigh against exercising personal jurisdiction in this case. First, New York does not have a special interest in adjudicating this case. As Plaintiffs themselves describe it, global warming is an international phenomenon that gives no state any special standing or interest. Second, Plaintiffs’ asserted interest in obtaining relief from the alleged effects of global warming cannot be protected in a single lawsuit against five utilities. Third, the interests of the governments of the United States and the fourteen states in which the Operating Companies do business would be dramatically affected by the assertion of jurisdiction by this Court. The federal government and each of those fourteen states in which the facilities are located are responsible for ensuring the widespread availability of affordable electricity and for regulating electric-generating facilities; the citizens of those fourteen states should not be required to bear a disproportionate burden in resolving an alleged global problem, particularly when the Plaintiff states (with the exception of Wisconsin) seek to exempt their own citizens from the draconian measures that they ask the Court to impose on distant power plants in other states.

If Plaintiffs’ scant and inadequate allegations of Defendants’ purported contacts with New York were deemed to allow the exercise of personal jurisdiction consistent with fundamental notions of constitutional due process, these eight states, one municipality, and three nonprofit organizations could seek similar relief as to the operational practices of virtually every

industrial facility in this country. In addition, if this Court were to exercise personal jurisdiction and were to grant the requested relief, other states, municipalities, and nonprofit organizations, if dissatisfied with the remedy fashioned by this Court in these two lawsuits, could assert nuisance claims in different federal courts in other states and ask those courts to implement stricter controls and injunctive relief against these very same Defendants. Constitutional due process limitations foreclose this type of extraterritorial regulation and preclude the Court from exercising personal jurisdiction over Defendants.

CONCLUSION

For the foregoing reasons, Defendants The Southern Company, Tennessee Valley Authority, Xcel Energy, Inc., and Cinergy Corp. respectfully request that the Court grant their Motions To Dismiss for Lack of Personal Jurisdiction pursuant to Federal Rule of Civil Procedure 12(b)(2), thereby dismissing all claims with prejudice.

Dated: New York, New York
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Certificate of Service

I, Bradford C. Mulder, hereby certify that on September 30, 2004, I served the attached Memorandum of Law in Support of the Motions of The Southern Company, Tennessee Valley Authority, Xcel Energy Inc., and Cinergy Corp. to Dismiss for Lack of Personal Jurisdiction, electronically, or via First Class Mail, postage pre-paid as indicated below:

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