17-227

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

VIZIO, INC.,

Plaintiff-Appellant,

v.

ROBERT J. KLEE, in his official capacity as the Commissioner of the State of Connecticut Department of Energy and Environmental Protection,

Defendant-Appellee.

On Appeal from the U.S. District Court for the District of Connecticut

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JOINT APPENDIX (Pages JA001 to JA284)

Michael K. Skold
CONNECTICUT OFFICE OF THE ATTORNEY GENERAL
55 Elm Street
P.O. Box 120
Hartford, CT 06141
(860) 808-5020
michael.skold@ct.gov

Counsel for Appellee Robert J. Klee

Pratik A. Shah
James E. Tysse
Z.W. Julius Chen
Martine E. Cicconi*
AKIN GUMP STRAUSS HAUER & FELD LLP
1333 New Hampshire Avenue, NW
Washington, DC 20036
(202) 887-4000
pshah@akingump.com
* Licensed to practice in California only and under the direct supervision of a partner of Akin Gump Strauss Hauer & Feld LLP who is an enrolled, active member of the District of Columbia Bar; applicant for admission to the D.C. Bar.

Counsel for Appellant VIZIO, Inc.

JOINT APPENDIX

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APPEAL,CLOSED,EFILE

U.S. District Court
United States District Court for the District of Connecticut (New Haven)
CIVIL DOCKET FOR CASE #: 3:15-cv-00929-VAB

VIZIO, Inc. v. Klee
Assigned to: Judge Victor A. Bolden
Cause: 28:2201 Constitutionality of State Statute(s)

Date Filed: 06/17/2015
Date Terminated: 12/22/2016
Jury Demand: Plaintiff
Nature of Suit: 950 Constitutional - State Statute
Jurisdiction: Federal Question

Plaintiff

VIZIO, Inc.

represented by **Clare M. Bienvenu**
Glaser Weil Fink Howard Avchen & Shapiro LLP
10250 Constellation Blvd
19th Floor
Los Angeles, CA 90067
310-553-3000
Fax: 310-556-2920
Email: cbienvenu@glaserweil.com
LEAD ATTORNEY
PRO HAC VICE
ATTORNEY TO BE NOTICED

James E. Tysse
Akin, Gump, Strauss, Hauer & Feld -- Wash DC
Robert S. Strauss Bldg.
1333 New Hampshire Ave., N.W., Suite 400
Washington, DC 20036-1564
202-887-4000
Fax: 202-887-4288
Email: jtysse@akingump.com
LEAD ATTORNEY
PRO HAC VICE
ATTORNEY TO BE NOTICED

Noah Perch-Ahern
Glaser Weil Fink Howard Avchen & Shapiro LLP
10250 Constellation Blvd
19th Floor
Los Angeles, CA 90067
310-553-3000
Fax: 310-556-2920
Email: nperchahern@glaserweil.com
LEAD ATTORNEY
PRO HAC VICE
ATTORNEY TO BE NOTICED

Patrick M. Fahey
Shipman & Goodwin -ConstPlza-Htfd
One Constitution Plaza 18th Floor
Hartford, CT 06103-1919
860-251-5000
Fax: 860-251-5219
Email: pfahey@goodwin.com
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Pratik A Shah
Akin, Gump, Strauss, Hauer & Feld -- Wash DC
Robert S. Strauss Bldg.
1333 New Hampshire Ave., N.W., Suite 400
Washington, DC 20036-1564
202-887-4000
Fax: 202-887-4288
Email: pshah@akingump.com
LEAD ATTORNEY
PRO HAC VICE
ATTORNEY TO BE NOTICED

Terry D. Avchen
Glaser Weil Fink Howard Avchen & Shapiro LLP
10250 Constellation Blvd
19th Floor
Los Angeles, CA 90067
310-553-3000
Fax: 310-556-2920
Email: tavchen@glaserweil.com
LEAD ATTORNEY
PRO HAC VICE
ATTORNEY TO BE NOTICED

V.

Defendant

Robert Klee
in his official capacity as the Commissioner of the State of Connecticut Department of Energy and Environmental Protection

represented by

Michael Skold
Office of the Attorney General
55 Elm Street
Hartford, CT 06106
860-808-5020
Email: michael.skold@ct.gov
ATTORNEY TO BE NOTICED

Date Filed	#	Docket Text
06/17/2015	1	COMPLAINT against Robert Klee (Filing fee $400 receipt number 0205-3638630.), filed by VIZIO, Inc..(Fahey, Patrick) (Entered: 06/17/2015)

06/17/2015	2	Corporate Disclosure Statement by VIZIO, Inc.. (Fahey, Patrick) (Entered: 06/17/2015)
06/17/2015	3	MOTION for Attorney(s) Terry D. Avchen to be Admitted Pro Hac Vice (paid $75 PHV fee; receipt number 0205-3638681) by VIZIO, Inc.. (Fahey, Patrick) (Entered: 06/17/2015)
06/17/2015	4	MOTION for Attorney(s) Clare M. Bienvenu to be Admitted Pro Hac Vice (paid $75 PHV fee; receipt number 0205-3638689) by VIZIO, Inc.. (Fahey, Patrick) (Entered: 06/17/2015)
06/17/2015	5	MOTION for Attorney(s) Noah Perch-Ahern to be Admitted Pro Hac Vice (paid $75 PHV fee; receipt number 0205-3638698) by VIZIO, Inc.. (Fahey, Patrick) (Entered: 06/17/2015)
06/17/2015		Request for Clerk to issue summons as to Robert Klee. (Fahey, Patrick) (Entered: 06/17/2015)
06/17/2015		Judge Victor A. Bolden added. (Oliver, T.) (Entered: 06/17/2015)
06/17/2015	6	Order on Pretrial Deadlines: Motions to Dismiss due on 9/17/2015. Amended Pleadings due by 8/16/2015. Discovery due by 12/17/2015. Dispositive Motions due by 1/16/2016. Signed by Clerk on 6/17/2015.(Fazekas, J.) (Entered: 06/18/2015)
06/17/2015	7	STANDING PROTECTIVE ORDER Signed by Judge Victor A. Bolden on 6/17/2015.(Fazekas, J.) (Entered: 06/18/2015)
06/17/2015	8	ELECTRONIC FILING ORDER - PLEASE ENSURE COMPLIANCE WITH COURTESY COPY REQUIREMENTS IN THIS ORDER Signed by Judge Victor A. Bolden on 6/17/2015.(Fazekas, J.) (Entered: 06/18/2015)
06/18/2015	9	NOTICE TO COUNSEL: Counsel initiating or removing this action is responsible for serving all parties with attached documents and copies of 6 Order on Pretrial Deadlines, 4 MOTION for Attorney(s) Clare M. Bienvenu to be Admitted Pro Hac Vice (paid $75 PHV fee; receipt number 0205-3638689) filed by VIZIO, Inc., 2 Corporate Disclosure Statement filed by VIZIO, Inc., 3 MOTION for Attorney(s) Terry D. Avchen to be Admitted Pro Hac Vice (paid $75 PHV fee; receipt number 0205-3638681) filed by VIZIO, Inc., 7 Standing Protective Order, 1 Complaint filed by VIZIO, Inc., 8 Electronic Filing Order, 5 MOTION for Attorney(s) Noah Perch-Ahern to be Admitted Pro Hac Vice (paid $75 PHV fee; receipt number 0205-3638698) filed by VIZIO, Inc. Signed by Clerk on 6/18/2015.(Fazekas, J.) (Entered: 06/18/2015)
06/18/2015	10	ELECTRONIC SUMMONS ISSUED in accordance with Fed. R. Civ. P. 4 and LR 4 as to *Robert Klee* with answer to complaint due within *21* days. Attorney *Patrick M. Fahey* *Shipman & Goodwin -ConstPlza-Htfd* *One Constitution Plaza 18th Floor* *Hartford, CT 06103-1919*. (Fazekas, J.) (Entered: 06/18/2015)
06/18/2015	11	ORDER granting 3 Motion to Appear Pro Hac Vice, Terry D. Avchen. Certificate of Good Standing due by 8/17/2015. Signed by Clerk on 6/18/2015. (Fazekas, J.) (Entered: 06/18/2015)
06/18/2015	12	ORDER granting 4 Motion to Appear Pro Hac Vice, Clare M. Bienvenu Certificate of Good Standing due by 8/17/2015. Signed by Clerk on 6/18/2015. (Fazekas, J.) (Entered: 06/18/2015)
06/18/2015	13	ORDER granting 5 Motion to Appear Pro Hac Vice, Noah Perch-Ahern Certificate of Good Standing due by 8/17/2015. Signed by Clerk on 6/18/2015. (Fazekas, J.) (Entered: 06/18/2015)
06/25/2015	14	CERTIFICATE OF GOOD STANDING re 5 MOTION for Attorney(s) Noah Perch-Ahern to be Admitted Pro Hac Vice (paid $75 PHV fee; receipt number 0205-3638698) by VIZIO, Inc.. (Perch-Ahern, Noah) (Entered: 06/25/2015)
06/25/2015	15	NOTICE of Appearance by Noah Perch-Ahern on behalf of VIZIO, Inc. *with Certificate of*

		Good Standing for Noah Perch-Ahern; Terry Douglas Avchen and Clare Marie Bienvenu (Attachments: # 1 Exhibit, # 2 Exhibit, # 3 Exhibit)(Perch-Ahern, Noah) (Entered: 06/25/2015)
07/23/2015	16	NOTICE of Appearance by Michael Skold on behalf of Robert Klee (Skold, Michael) (Entered: 07/23/2015)
07/23/2015	17	MOTION for Extension of Time until September 4, 2015 to Respond to the Complaint 1 Complaint by Robert Klee. (Skold, Michael) (Entered: 07/23/2015)
07/24/2015	18	ORDER granting 17 Motion for Extension of Time 1 Complaint. Signed by Clerk on 7/24/2015. (Fazekas, J.) (Entered: 07/24/2015)
07/24/2015		Answer deadline updated for Robert Klee to 9/4/2015. (Fazekas, J.) (Entered: 07/24/2015)
08/19/2015	19	Joint MOTION for Extension of Time until 30 days after ruling on Motion to Dismiss*Plaintiff and Defendant* parties' conference, 26(f) Report, and Initial Disclosures by VIZIO, Inc.. (Perch-Ahern, Noah) (Entered: 08/19/2015)
08/19/2015	20	SCHEDULING ORDER: Telephonic Status Conference set for 8/28/2015 02:30 PM before Judge Victor A. Bolden. Counsel shall call Chambers at 203-579-5562 after all parties are on the line. Signed by Judge Victor A. Bolden on 8/19/2015.(Shin, D.) (Entered: 08/19/2015)
08/20/2015	21	MOTION to Dismiss by Robert Klee.Responses due by 9/10/2015 (Attachments: # 1 Memorandum in Support, # 2 Exhibit A through C)(Skold, Michael) (Entered: 08/20/2015)
08/28/2015	22	ORAL MOTION by VIZIO, Inc. for Extension of Time to File Response/Reply as to 21 MOTION to Dismiss until 9/30/2015 for Response and until 10/21/2015 for Reply. (Shin, D.) (Entered: 08/28/2015)
08/28/2015	23	Minute Entry. Proceedings held before Judge Victor A. Bolden: Telephonic Status Conference and Motion Hearing held on 8/28/2015 re 19 Joint MOTION for Extension of Time and 22 ORAL MOTION for Extension of Time; granting in part and denying in part 19 Motion for Extension of Time, the Court orders that the Rule 26 Meeting Report is due by 10/9/2015; granting 22 Motion for Extension of Time to File Response/Reply as to 21 MOTION to Dismiss until 9/30/2015 for Response and 10/21/2015 for Reply. SO ORDERED by Judge Victor A. Bolden on 8/28/2015. Total Time: 7 minutes. (Court Reporter S. Montini.) (Shin, D.) (Entered: 08/28/2015)
09/30/2015	24	Memorandum in Opposition re 21 MOTION to Dismiss filed by VIZIO, Inc.. (Perch-Ahern, Noah) (Entered: 09/30/2015)
10/09/2015	25	REPORT of Rule 26(f) Planning Meeting. (Perch-Ahern, Noah) (Entered: 10/09/2015)
10/16/2015	26	MOTION for Leave to File Excess Pages by Robert Klee. (Skold, Michael) (Entered: 10/16/2015)
10/19/2015	27	ORDER granting 26 Motion for Leave to File Excess Pages. Signed by Judge Victor A. Bolden on 10/19/2015. (Shin, D.) (Entered: 10/19/2015)
10/21/2015	28	REPLY to Response to 21 MOTION to Dismiss filed by Robert Klee. (Skold, Michael) (Entered: 10/21/2015)
10/30/2015	29	MOTION for Leave to File *Sur-Reply* by VIZIO, Inc.. (Perch-Ahern, Noah) (Entered: 10/30/2015)
10/30/2015	30	RESPONSE re 29 MOTION for Leave to File *Sur-Reply //VIZIO, INC.S SUR-REPLY BRIEF IN FURTHER OPPOSITION TO MOTION TO DISMISS* filed by VIZIO, Inc..

		(Perch-Ahern, Noah) (Entered: 10/30/2015)
01/04/2016	31	ORDER granting 29 Motion for Leave to File Surreply. Signed by Judge Victor A. Bolden on 1/4/2016. (Shin, D.) (Entered: 01/04/2016)
02/17/2016	32	NOTICE of Hearing on Motion re: 21 MOTION to Dismiss. ALL PERSONS ENTERING THE COURTHOUSE MUST PRESENT PHOTO IDENTIFICATION. Motion Hearing set for 3/16/2016 02:00 PM in Courtroom Two, 915 Lafayette Blvd., Bridgeport, CT before Judge Victor A. Bolden. Signed by Judge Victor A. Bolden on 2/17/2016. (Shin, D.) (Entered: 02/17/2016)
03/04/2016	33	NOTICE of Hearing on Motion re: 21 MOTION to Dismiss . ALL PERSONS ENTERING THE COURTHOUSE MUST PRESENT PHOTO IDENTIFICATION. Motion Hearing reset for 3/24/2016 10:00 AM in Courtroom Two, 915 Lafayette Blvd., Bridgeport, CT before Judge Victor A. Bolden. Signed by Judge Victor A. Bolden on 3/4/2016. (Shin, D.) (Entered: 03/04/2016)
03/23/2016	34	ORDER re: Hearing on Motion. To facilitate the oral argument scheduled for March 24, 2016 at 10:00 AM, the hearing shall proceed as follows: (1) a brief summary by Defendant of the purposes and benefits of the E-Waste Law (no more than 5 minutes, if possible); (2) a brief summary by Plaintiff of the burdens that it alleges the E-Waste Law imposes (no more than 5 minutes, if possible); and (3) discussion of the underlying legal issues with the respective claims in the following order: (i) the Equal Protection claim, (ii) the Due Process claim, (iii) the Takings claim, and (iv) the Commerce Clause claims. Signed by Judge Victor A. Bolden on 3/23/2016. (Shin, D.) (Entered: 03/23/2016)
03/24/2016	35	Minute Entry. Proceedings held before Judge Victor A. Bolden: Motion Hearing held on 3/24/2016 re 21 MOTION to Dismiss filed by Robert Klee.taking under advisement 21 Motion to Dismiss. Total Time: 2 hours and 13 minutes(Court Reporter S. Montini.) (Perez, J.) (Entered: 03/24/2016)
03/31/2016	36	ORDER granting 21 Motion to Dismiss. Signed by Judge Victor A. Bolden on 3/31/2016. (Shin, D.) (Entered: 03/31/2016)
04/03/2016	37	TRANSCRIPT of Proceedings: Type of Hearing: Oral Argument on Defendant's Motion to Dismiss. Held on 3/24/16 before Judge Victor Bolden. Court Reporter: S. Montini. **IMPORTANT NOTICE - REDACTION OF TRANSCRIPTS:** To remove personal identifier information from the transcript, a party must electronically file a Notice of Intent to Request Redaction with the Clerk's Office within seven (7) calendar days of this date. If no such Notice is filed, the court will assume redaction of personal identifiers is not necessary and the transcript will be made available through PACER without redaction 90 days from today's date. The transcript may be viewed at the court public terminal or purchased through the Court Reporter/Transcriber before the deadline for Release of Transcript Restriction. After that date it may be obtained through PACER. The policy governing the redaction of personal information is located on the court website at www.ctd.uscourts.gov. Redaction Request due 4/24/2016. Redacted Transcript Deadline set for 5/4/2016. Release of Transcript Restriction set for 7/2/2016. (Montini, S.) (Entered: 04/03/2016)
04/03/2016	38	TRANSCRIPT of Proceedings: Type of Hearing: Oral Argument on Defendant's Motion to Dismiss. Held on 3/24/16 before Judge Victor Bolden. Court Reporter: S. Montini. **IMPORTANT NOTICE - REDACTION OF TRANSCRIPTS:** To remove personal identifier information from the transcript, a party must electronically file a Notice of Intent to Request Redaction with the Clerk's Office within seven (7) calendar days of this date. If no such Notice is filed, the court will assume redaction of personal identifiers is not

		necessary and the transcript will be made available through PACER without redaction 90 days from today's date. The transcript may be viewed at the court public terminal or purchased through the Court Reporter/Transcriber before the deadline for Release of Transcript Restriction. After that date it may be obtained through PACER. The policy governing the redaction of personal information is located on the court website at www.ctd.uscourts.gov. Redaction Request due 4/24/2016. Redacted Transcript Deadline set for 5/4/2016. Release of Transcript Restriction set for 7/2/2016. (Montini, S.) (Entered: 04/03/2016)
04/20/2016	39	First MOTION for Extension of Time until May 20, 2016 to file amended complaint by VIZIO, Inc.. (Perch-Ahern, Noah) (Entered: 04/20/2016)
04/21/2016	40	ORDER granting 39 Motion for Extension of Time. Signed by Judge Victor A. Bolden on 4/21/2016. (Shin, D.) (Entered: 04/21/2016)
04/21/2016		Set Deadlines/Hearings: Amended Pleadings due by 5/20/2016. (Shin, D.) (Entered: 04/21/2016)
05/20/2016	41	AMENDED COMPLAINT *for Declaratory and Injunctive Relief* against Robert Klee, filed by VIZIO, Inc..(Perch-Ahern, Noah) (Entered: 05/20/2016)
05/27/2016	42	First MOTION for Extension of Time until July 5, 2016 To Respond to Amended Complaint 41 Amended Complaint by Robert Klee. (Skold, Michael) (Entered: 05/27/2016)
05/31/2016	43	ORDER granting 42 Motion for Extension of Time 41 Amended Complaint. Signed by Clerk on 5/31/2016. (Fazekas, J.) (Entered: 05/31/2016)
05/31/2016		Answer deadline updated for Robert Klee to 7/5/2016. (Fazekas, J.) (Entered: 05/31/2016)
06/30/2016	44	MOTION to Dismiss *the Amended Complaint* by Robert Klee.Responses due by 7/21/2016 (Attachments: # 1 Memorandum in Support, # 2 Exhibit A through C)(Skold, Michael) (Entered: 06/30/2016)
07/01/2016	45	MOTION for Extension of Time to File Response/Reply as to 44 MOTION to Dismiss *the Amended Complaint* until August 22, 2016 by VIZIO, Inc.. (Perch-Ahern, Noah) (Entered: 07/01/2016)
07/05/2016	46	ORDER granting 45 Motion for Extension of Time to File Response/Reply re 44 MOTION to Dismiss *the Amended Complaint*. Responses due by 8/22/2016. Signed by Judge Victor A. Bolden on 7/5/2016. (Shin, D.) (Entered: 07/05/2016)
07/26/2016	47	MOTION for Attorney(s) Pratik A. Shah to be Admitted Pro Hac Vice (paid $75 PHV fee; receipt number 0205-4080898) by VIZIO, Inc.. (Fahey, Patrick) (Entered: 07/26/2016)
07/26/2016	48	MOTION for Attorney(s) James E. Tysse to be Admitted Pro Hac Vice (paid $75 PHV fee; receipt number 0205-4080913) by VIZIO, Inc.. (Fahey, Patrick) (Entered: 07/26/2016)
07/27/2016	49	ORDER granting 47 Motion to Appear Pro Hac Vice for Pratik A. Shah. Certificate of Good Standing due by 9/25/2016. Signed by Clerk on 7/27/2016. (Fazekas, J.) (Entered: 07/27/2016)
07/27/2016	50	ORDER granting 48 Motion to Appear Pro Hac Vice for James E. Tysse. Certificate of Good Standing due by 9/25/2016. Signed by Clerk on 7/27/2016. (Fazekas, J.) (Entered: 07/27/2016)
07/27/2016	51	CERTIFICATE OF GOOD STANDING re 47 MOTION for Attorney(s) Pratik A. Shah to be Admitted Pro Hac Vice (paid $75 PHV fee; receipt number 0205-4080898) by VIZIO, Inc.. (Fahey, Patrick) (Entered: 07/27/2016)

07/27/2016	52	CERTIFICATE OF GOOD STANDING re 48 MOTION for Attorney(s) James E. Tysse to be Admitted Pro Hac Vice (paid $75 PHV fee; receipt number 0205-4080913) by VIZIO, Inc.. (Fahey, Patrick) (Entered: 07/27/2016)
08/22/2016	53	Memorandum in Opposition re 44 MOTION to Dismiss *the Amended Complaint* filed by VIZIO, Inc.. (Fahey, Patrick) (Entered: 08/22/2016)
08/24/2016	54	First MOTION for Extension of Time until 10/06/2016 To File Reply Brief in Support of His Motion to Dismiss the Amended Complaint by Robert Klee. (Skold, Michael) (Entered: 08/24/2016)
08/25/2016	55	ORDER granting 54 Motion for Extension of Time until 10/6/2016 for Defendant to file a Reply Brief in support of his 44 MOTION to Dismiss *the Amended Complaint*. Signed by Judge Victor A. Bolden on 8/25/2016. (Chen, C.) (Entered: 08/25/2016)
08/25/2016		Set Deadline as to 44 MOTION to Dismiss *the Amended Complaint*. Responses due by 10/6/2016 (LaMura, K.) (Entered: 08/25/2016)
09/16/2016	56	REPLY to Response to 44 MOTION to Dismiss *the Amended Complaint* filed by Robert Klee. (Skold, Michael) (Entered: 09/16/2016)
11/03/2016	57	NOTICE OF E-FILED CALENDAR: THIS IS THE ONLY NOTICE COUNSEL/THE PARTIES WILL RECEIVE. ALL PERSONS ENTERING THE COURTHOUSE MUST PRESENT PHOTO IDENTIFICATION. Motion Hearing as to 44 MOTION to Dismiss *the Amended Complaint* set for 12/1/2016 02:00 PM in Courtroom Two, 915 Lafayette Blvd., Bridgeport, CT before Judge Victor A. Bolden. (Chen, C.) (Entered: 11/03/2016)
11/15/2016	58	NOTICE OF E-FILED CALENDAR: THIS IS THE ONLY NOTICE COUNSEL/THE PARTIES WILL RECEIVE.ALL PERSONS ENTERING THE COURTHOUSE MUST PRESENT PHOTO IDENTIFICATION. *HEARING RESET FROM 12/1/2016 02:00 PM, please note the time change.* Motion Hearing is now set for 12/1/2016 01:00 PM in Courtroom Two, 915 Lafayette Blvd., Bridgeport, CT before Judge Victor A. Bolden as to 44 MOTION to Dismiss *the Amended Complaint*. (Chen, C.) (Entered: 11/15/2016)
12/01/2016	59	Minute Entry for proceedings held before Judge Victor A. Bolden: Motion Hearing held on 12/1/2016. Taking under advisement 44 MOTION to Dismiss *the Amended Complaint* filed by Robert Klee. 31 minutes. (Court Reporter S. Montini.) (Chen, C.) (Entered: 12/01/2016)
12/22/2016	60	ORDER granting 44 Motion to Dismiss with prejudice. The Clerk of the Court is directed to close this case. Signed by Judge Victor A. Bolden on 12/22/2016. (Chen, C.) (Entered: 12/22/2016)
12/29/2016	61	JUDGMENT entered in favor of Robert Klee against VIZIO, Inc.. For Appeal Forms please go to the following website: http://www.ctd.uscourts.gov/forms/all-forms/appeals_forms Signed by Clerk on 12/29/2016.(Perez, J.) (Entered: 12/29/2016)
12/29/2016		JUDICIAL PROCEEDINGS SURVEY: The following link to the confidential survey requires you to log into CM/ECF for SECURITY purposes. Once in CM/ECF you will be prompted for the case number. Although you are receiving this survey through CM/ECF, it is hosted on an independent website called SurveyMonkey. Once in SurveyMonkey, the survey is located in a secure account. The survey is not docketed and it is not sent directly to the judge. To ensure anonymity, completed surveys are held up to 90 days before they are sent to the judge for review. We hope you will take this opportunity to participate, please click on this link:

		https://ecf.ctd.uscourts.gov/cgi-bin/Dispatch.pl?survey (Perez, J.) (Entered: 12/29/2016)
01/04/2017	62	TRANSCRIPT of Proceedings: Type of Hearing: Oral Argument on Defendant's Motion to Dismiss. Held on 12/1/16 before Judge Victor Bolden. Court Reporter: S. Montini. **IMPORTANT NOTICE - REDACTION OF TRANSCRIPTS:** To remove personal identifier information from the transcript, a party must electronically file a Notice of Intent to Request Redaction with the Clerk's Office within seven (7) calendar days of this date. If no such Notice is filed, the court will assume redaction of personal identifiers is not necessary and the transcript will be made available through PACER without redaction 90 days from today's date. The transcript may be viewed at the court public terminal or purchased through the Court Reporter/Transcriber before the deadline for Release of Transcript Restriction. After that date it may be obtained through PACER. The policy governing the redaction of personal information is located on the court website at www.ctd.uscourts.gov. Redaction Request due 1/25/2017. Redacted Transcript Deadline set for 2/4/2017. Release of Transcript Restriction set for 4/4/2017. (Montini, S.) (Entered: 01/04/2017)
01/23/2017	63	NOTICE OF APPEAL as to 61 Judgment, 36 Order on Motion to Dismiss, 60 Order on Motion to Dismiss by VIZIO, Inc.. Filing fee $ 505, receipt number 0205-4272659. (Fahey, Patrick) (Entered: 01/23/2017)
01/24/2017	64	CLERK'S CERTIFICATE RE: INDEX AND RECORD ON APPEAL re: 63 Notice of Appeal. The attached docket sheet is hereby certified as the entire Index/Record on Appeal in this matter and electronically sent to the Court of Appeals, with the exception of any manually filed documents as noted below. Robin D. Tabora, Clerk. Documents manually filed not included in this transmission: none. (Fazekas, J.) (Entered: 01/24/2017)

PACER Service Center			
Transaction Receipt			
03/14/2017 09:11:32			
PACER Login:	nyag0054:2503192:0	**Client Code:**	AG0012.5963
Description:	Docket Report	**Search Criteria:**	3:15-cv-00929-VAB
Billable Pages:	6	**Cost:**	0.60

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

VIZIO, INC.,
Plaintiff,

v.

ROBERT KLEE, in his official capacity as the Commissioner of the State of Connecticut Department of Energy and Environmental Protection,
Defendant.

No. 3:15-cv-00929 (VAB)

RULING ON MOTION TO DISMISS [Doc. No. 21]

TABLE OF CONTENTS

I. INTRODUCTION

On June 17, 2015, VIZIO, Inc., a California-based television brand-owned seller, filed a complaint (the "Complaint") [Doc. No. 1] challenging the constitutionality of Connecticut's "E-waste Law." Plaintiff VIZIO seeks the following declaratory and injunctive relief: a declaration that the law is unconstitutional under the Commerce Clause of the United States Constitution; a declaration that the law is unconstitutional under the Takings Clause of the Fifth Amendment of the United States Constitution and under Article I, Section 11 of the Connecticut Constitution; a declaration that the law is unconstitutional under the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution and under Article I, Section 20 of the Connecticut Constitution; a declaration that the law violates VIZIO's due process rights under the Fourteenth Amendment of the United States Constitution and under Article I, Section 8 of the Connecticut Constitution; and an order enjoining Defendant from enforcing the law.

On August 20, 2015, Defendant, the Commissioner of the State of Connecticut Department of Energy and Environmental Protection, moved to dismiss under Rule 12(b)(6), arguing that VIZIO had failed to state a claim upon which relief can be granted.

For the reasons that follow, the Court GRANTS Defendant's Motion to Dismiss [Doc. No. 21]. Plaintiff's claim for violation of the Dormant Commerce Clause under an extraterritoriality theory is dismissed without prejudice. All of Plaintiff's other claims are dismissed with prejudice.

II. FACTUAL BACKGROUND[1]

Incorporated in late 2002, VIZIO entered the television market in 2003. When it entered the market, there were no laws in place requiring it to finance the recycling of other manufacturers' electronic devices or of types of electronic devices that it never produced or intended to produce or electronic devices that were the subject of transactions occurring prior to the law's implementation.

In July 2007, Connecticut enacted Public Act No. 07-189, which has been amended several times and is codified at Sections 22a-629 through 22a-640 of the Connecticut General Statutes, and the Connecticut Department of Energy and Environmental Protection ("DEEP") subsequently promulgated regulations, located at Sections 22a-630(d)-1 and 22a-638-1 of the Regulations of Connecticut State Agencies (collectively, the "E-waste Law"). DEEP is responsible for administering the E-waste Law, which applies to each manufacturer of covered electronic devices, or "CEDs." Conn. Gen. Stat. § 22a-630(a). VIZIO is considered a "manufacturer" for purposes of the statute. *See* Conn. Gen. Stat. §§ 22a-629(7), (11).

Like many electronic products, televisions contain heavy metals and other hazardous materials that pose serious environmental and public health risks. The E-waste Law creates a comprehensive regulatory scheme for the collection and recycling of CEDs, including televisions. Recycling activities are carried out by covered electronic recyclers ("CERs"), who are private entities approved and regulated by DEEP.

Under the E-waste Law, each CED manufacturer must register with DEEP and participate in the program to implement and finance the collection, transportation, and recycling

[1] All background information is taken from the Complaint, unless otherwise noted. All allegations in the Complaint are accepted as true for purposes of the motion to dismiss. *See Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974) ("it is well established that, in passing on a motion to dismiss, . . . the allegations of the complaint should be construed favorably to the pleader").

of CEDs. Manufacturer registration fees fund DEEP's administration of the E-waste program. The initial registration fee for each manufacturer is at least $5,000, and manufacturers must pay subsequent annual registration fees that are based on a sliding scale that is representative of the manufacturer's current share of sales in the national television market ("National Market Share").

There are a number of models by which states can and do assess e-waste recycling costs under "Extended Producer Responsibility" ("EPR") laws such as Connecticut's E-waste Law. Twenty-four other states regulate e-waste. Most states that have EPR laws use some form of sales data as the basis for allocating recycling obligations, but there is not uniformity in the kinds of sales data used. For example, New York uses state market share rather than National Market Share. Other states, such as New Hampshire, have chosen not to regulate e-waste at all.

The various state e-waste programs also differ in various other ways. Some state programs require use of state-sanctioned recyclers that invoice manufacturers throughout the year. Other states require manufacturers actually to collect and recycle CEDs. Some states set recycling "goals" for each manufacturer, while other states, like Connecticut, have no limits on the amount of waste that may be recycled and billed to manufacturers. Some state programs assign allocations according to sales, while others assign allocations based on television units returned for recycling. Some state laws account for the weight of the manufacturers' televisions in deriving regulatory obligations, while others do not. VIZIO expends large amounts of resources to administer the different state programs, each of which imposes a separate obligation and additional cost on VIZIO.

Connecticut has adopted two formulas for assessing costs under the E-waste Law. For CEDs other than televisions, the law uses a "Return Share" model that apportions costs on each

manufacturer based on the weight of its own products that are actually returned for recycling in a given period. For televisions, the law uses a "market share" approach, under which each manufacturer's costs are based on a percentage of the total weight of all televisions that are recycled in a given period, regardless of brand, multiplied by a specified price per pound. The percentage of the total weight of all televisions that each manufacturer is responsible for is based on its current National Market Share.

CERs directly bill manufacturers quarterly. DEEP approves recyclers to become CERs through an application process. In deciding whether to approve an applicant, DEEP considers such matters as a recycler's qualifications and experience, proposed procedures and process flow, the transporters and facilities proposed to be used, and the fees proposed to be charged. After approval, DEEP retains oversight over the CER and may revoke, suspend, or modify a CER's approval. Connecticut's oversight over e-waste recyclers allegedly has created barriers to market entry and has led to recycling costs that are higher than the national average.

As an alternative compliance mechanism, the E-waste Law permits television manufacturers to participate in a private program or arrange for the return of CEDs for third party recycling. These alternatives remain tied to the manufacturer's National Market Share.

The E-waste Law also imposes labeling requirements. "A manufacturer or retailer shall not sell or offer for sale a covered electronic device in the state unless it is labeled with the manufacturer's brand, and the label is permanently affixed and readily visible." Conn. Gen. Stat. § 22a-633.

DEEP compiles a list of manufacturers that are in compliance with the E-waste Law and requires retailers in Connecticut to consult the list prior to selling any CED; retailers are prohibited from offering a CED for sale in Connecticut unless the manufacturer of the CED

appears on that list. Conn. Gen. Stat. § 22a-634. DEEP has the power to impose cease and desist orders and to revoke registrations for any violations; courts may grant temporary and permanent injunctive relief for violations; and the state attorney general can bring a civil proceeding to enforce any violation. Conn. Gen. Stat. § 22a-637.

VIZIO has been subject to and complied with the E-waste Law since its implementation. Its customers consist predominantly of large retailers and its sales to these retailers generally take place in states where the retailers have distribution operations, such as New York. The retailers then distribute the televisions, at their discretion, to various locations throughout the country for resale to individual consumers. VIZIO does not sell to any distribution centers in Connecticut and allegedly has relatively few direct sales in the state (97 in 2012, 47 in 2013, and 46 in 2014). DEEP has determined that VIZIO's billable market share was 14.33% in 2012 and 16.088% in 2013, and proposed a market share of 17.16% for 2014. As a relatively new entrant into the television marketplace, VIZIO has never sold cathode ray tube ("CRT") televisions and has only distributed flat panel televisions. CRT televisions often weigh more than ten times as much as VIZIO's flat panel televisions.

The E-waste Law does not account for the weight of a manufacturer's products in determining National Market Share, but only considers sales data. Similarly, the law does not account for the type or amount of hazardous substances in manufacturers' televisions. For example, CRTs contain significant quantities of lead, which is expensive to recycle, but VIZIO's flat screen televisions only contain miniscule concentrations of lead in compliance with multiple state and international regulations restricting the use of hazardous materials in consumer electronics.

There is no Return Share data for Connecticut, but in a recent study of over 23,000 pounds of televisions collected for recycling in Connecticut, not a single VIZIO product was found. Return Share data does exist for Washington, where, based on two recent invoices, VIZIO's Return Share was calculated to be 0.09% and 0.16% of the total e-waste stream collected and invoiced.

The E-waste Law also provides that "No Connecticut resident giving seven or fewer covered electronic devices to a collector at any one time shall be charged any fees or costs for the collection, transportation or recycling of such covered electronic devices." Conn. Gen. Stat. § 22a-635(b). In addition, the law specifically exempts clothes washers, clothes dryers, refrigerators, freezers, microwave ovens, conventional ovens and ranges, dishwashers, air conditioners, dehumidifiers, air purifiers, telephones of any type, and handheld devices, which are types of products that often contain potentially hazardous or toxic substances.

III. STANDARD OF REVIEW

A motion to dismiss for failure to state a claim under Rule 12(b)(6) is designed "merely to assess the legal feasibility of a complaint, not to assay the weight of evidence which might be offered in support thereof." *Official Comm. of Unsecured Creditors of Color Tile, Inc. v. Coopers & Lybrand, LLP*, 322 F.3d 147, 158 (2d Cir. 2003) (citations omitted). When deciding a Rule 12(b)(6) motion to dismiss, a court must accept the material facts alleged in the complaint as true, draw all reasonable inferences in favor of the plaintiff, and decide whether it is plausible that the plaintiff has a valid claim for relief. *Ashcroft v. Iqbal*, 556 U.S. 662, 678-79 (2009); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555-56 (2007); *In re NYSE Specialists Sec. Litig.*, 503 F.3d 89, 95 (2d Cir. 2007).

A plaintiff's "[f]actual allegations must be enough to raise a right to relief above the speculative level," and assert a cause of action with enough heft to show entitlement to relief and "enough facts to state a claim to relief that is plausible on its face." *Twombly*, 550 U.S. at 555, 570. A claim is facially plausible if "the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal*, 556 U.S. at 678. Although "detailed factual allegations" are not required, a complaint must offer more than "labels and conclusions," or "a formulaic recitation of the elements of a cause of action," or "naked assertion[s]" devoid of "further factual enhancement." *Twombly*, 550 U.S. at 555, 557 (2007). Plausibility at the pleading stage is nonetheless distinct from probability, and "a well-pleaded complaint may proceed even if it strikes a savvy judge that actual proof of [the claims] is improbable, and . . . recovery is very remote and unlikely." *Id.* at 556 (internal quotation marks omitted).

Plaintiff challenges the E-waste Law both facially and as applied. A party "making a facial challenge to a statute . . . must show that no set of circumstances exists under which the [challenged statute] would be valid." *Ohio v. Akron Ctr. for Reprod. Health*, 497 U.S. 502, 514 (1990) (internal quotation marks omitted). "Facial challenges are generally disfavored." *Dickerson v. Napolitano*, 604 F.3d 732, 741 (2d Cir. 2010). "In an as-applied challenge, the question is whether the statute was unconstitutional as applied to the facts of the case." *Tsirelman v. Daines*, 19 F. Supp. 3d 438, 447-48 (E.D.N.Y. 2014) *aff'd*, 794 F.3d 310 (2d Cir. 2015). "[A] plaintiff generally cannot prevail on an *as-applied* challenge without showing that the law has in fact been (or is sufficiently likely to be) unconstitutionally *applied* to him." *McCullen v. Coakley*, 134 S. Ct. 2518, 2534 n.4 (2014).

"[T]he distinction between facial and as-applied challenges . . . goes to the breadth of the remedy employed by the Court, not what must be pleaded in a complaint." *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 331 (2010).

IV. DISCUSSION

A. THE COMMERCE CLAUSE CLAIMS

The Commerce Clause provides that "[t]he Congress shall have power . . . [t]o regulate commerce . . . among the several states." U.S. Const. art I, § 8, cl. 3. "Although the Constitution does not in terms limit the power of States to regulate commerce, [the Supreme Court has] long interpreted the Commerce Clause as an implicit restraint on state authority, even in the absence of a conflicting federal statute." *United Haulers Ass'n, Inc. v. Oneida-Herkimer Solid Waste Mgmt. Auth.*, 550 U.S. 330, 338 (2007). "This 'negative' aspect of the Commerce Clause prohibits economic protectionism—that is, regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors." *New Energy Co. of Indiana v. Limbach*, 486 U.S. 269, 273 (1988).

The dormant Commerce Clause prohibits laws that: (1) "clearly discriminate[] against interstate commerce in favor of intrastate commerce"; (2) violate the *Pike* balancing test by imposing "a burden on interstate commerce incommensurate with the local benefits secured"; or (3) "ha[ve] the practical effect of 'extraterritorial' control of commerce occurring entirely outside the boundaries of the state in question." *Freedom Holdings, Inc. v. Spitzer*, 357 F.3d 205, 216 (2d Cir. 2004) ("*Freedom Holdings I*"). In addition, for state laws that impose a "user fee," the fee must (1) be "based on some fair approximation of use of the facilities," (2) not be "excessive in relation to the benefits conferred," and (3) "not discriminate against interstate commerce." *Northwest Airlines, Inc. v. County of Kent, Mich.*, 510 U.S. 355, 369 (1994).

Plaintiff asserts that the E-waste Law is unconstitutional under each of these tests, while Defendant argues that none of them is violated on the facts alleged. The Court finds that the Complaint fails to state a plausible claim that, under the Commerce Clause, the E-waste Law is clearly discriminatory, imposes burdens on interstate commerce that outweigh the benefits secured, regulates commerce extraterritorially, or imposes user fees.

1. The General Dormant Commerce Clause Claim

Plaintiff alleges that the E-waste Law has a discriminatory effect on out-of-state manufacturers with no physical presence in Connecticut, *see* Compl. ¶ 72, that the E-waste Law's burdens on interstate commerce outweigh its local benefits to Connecticut residents, *see* Compl. ¶ 71, and that the E-waste Law has an extraterritorial reach that has the practical effect of controlling and regulating transactions beyond the boundaries of Connecticut, *see* Compl. ¶ 70.

a. Discriminatory Burdens Analysis

The E-waste Law survives the first two prongs of the dormant Commerce Clause analysis—clear discrimination and *Pike* balancing—for the same reason: Plaintiff has failed to allege facts to support a reasonable inference that the law imposes a disparate burden on interstate commerce.

The central issue in dormant Commerce Clause cases is whether the benefits of the state law outweigh its burdens on interstate commerce. The nature of the balancing test depends on whether the law discriminates against those outside of a state in favor of those within it or treats all alike regardless of residence. "[A] statute that clearly discriminates against interstate commerce in favor of intrastate commerce is virtually invalid *per se*." *Freedom Holdings I*, 357 F.3d at 216.

Absent clear discrimination, however, "[w]here the statute regulates even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits." *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970). In particular, "regulations that touch upon safety . . . are those that the [Supreme] Court has been most reluctant to invalidate. Indeed, if safety justifications are not illusory, the Court will not second-guess legislative judgment about their importance in comparison with related burdens on interstate commerce. Those who would challenge such bona fide safety regulations must overcome a strong presumption of validity." *Kassel v. Consol. Freightways Corp. of Delaware*, 450 U.S. 662, 670 (1981).

"The bottom line is . . . that, under either the 'clear discrimination' or the '*Pike*' forms of analysis, the minimum showing required is that the state statute have a disparate impact on interstate commerce." *Freedom Holdings I*, 357 F.3d at 218 (internal quotation marks and citation omitted). In this case, construing the Complaint in the light most favorable to Plaintiff, the allegations do not plausibly show that the E-waste Law has any disparate impact on interstate commerce.

"A state statute violates the 'clear discrimination' standard when it constitutes 'differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter.'" *Freedom Holdings I*, 357 F.3d at 217 (quoting *Or. Waste Sys., Inc. v. Dep't of Envtl. Quality of State of Or.*, 511 U.S. 93, 99 (1994)). "A clearly discriminatory law may operate in three ways: (1) by discriminating against interstate commerce on its face; (2) by harboring a discriminatory purpose; or (3) by discriminating in its effect." *Town of Southold v. Town of E. Hampton*, 477 F.3d 38, 48 (2d Cir. 2007) (citations omitted). The E-waste Law is

geographically neutral on its face with respect to television manufacturers—it treats all manufacturers the same regardless of where the manufacturer is located. Plaintiff does not allege or argue that there is a discriminatory purpose to the E-waste Law.[2] Therefore, the argument turns on whether there is a discriminatory effect to the E-waste Law.

Plaintiff alleges, in relevant part, that: (1) an in-state manufacturer that only sells within Connecticut would have a National Market Share commensurate with its in-state sales, and would therefore never be subject to the "regulatory burdens of conflicting states' e-waste laws," *see* Compl. ¶¶ 7, 51-52; and (2) an in-state manufacturer might have infrastructure in Connecticut that it could use to implement a private collection program, whereas out-of-state manufacturers might not, *see* Compl. ¶ 53. None of these allegations plausibly could be read to show that the E-waste Law has a disparate impact on television manufacturers based on their respective geographic locations. *See Businesses for a Better New York v. Angello*, 341 F. App'x 701, 705 (2d Cir. 2009) (holding that because a challenged law applied equally to in-state and out-of-state companies working in the state, "there is no disparate impact and no economic protectionism"). Plaintiff cites no case law supporting its position that a law violates the Commerce Clause if an in-state manufacturer might be better positioned to take advantage of one of its provisions than an out-of-state competitor, especially where the text of the law itself expresses no in-state preference.

Plaintiff contends that, even if the E-waste Law does not clearly discriminate against out-of-state manufacturers, it clearly discriminates against out-of-state consumers because they are

[2] For the first time at oral argument, Plaintiff asserted that the fact that the E-waste Law's mandatory recycling program only applies to CEDs "generated by a household in the state," Conn. Gen. Stat. § 22a-631(c), supports its discrimination theory. While it is true, as Plaintiff pointed out, that it is a violation of the dormant Commerce Clause for a state to prohibit the importation of waste from other states, *see City of Philadelphia v. New Jersey*, 437 U.S. 617 (1978), the E-waste Law merely provides that e-waste from Connecticut residents must be collected and recycled, and is silent on the recycling of e-waste generated in other states. *See* Conn. Gen. Stat. § 22a-631.

being forced to pay higher prices for Plaintiff's televisions to help finance Connecticut's recycling program. However, "a state regulation 'discriminates' against interstate commerce only if it imposes commercial barriers or discriminates against an article of commerce by reason of its origin or destination out of State." *Selevan v. New York Thruway Auth.*, 584 F.3d 82, 95 (2d Cir. 2009). The E-waste Law operates identically whether the television to be recycled was sold or manufactured in-state or out-of-state, and the alleged price impacts caused by the regulation are incurred irrespective of geography.

As Plaintiff notes, the Supreme Court indeed has observed that "[o]ur dormant Commerce Clause cases often find discrimination when a State shifts costs of regulation to other States, because when the burden of state regulation falls on the interests outside of the state, it is unlikely to be alleviated by the operation of those political restraints normally exerted when interests within the state are affected." *United Haulers*, 550 U.S. at 345. The cost of running the recycling program, however, has not been entirely shifted outside of the State because the same alleged higher product prices will result for residents of Connecticut as for those outside the State. Given such facts, courts have held "that the burden imposed by the [challenged statute] was sufficiently subjected to those political restraints normally exerted when interests within the state are affected." *Pharm. Research & Mfrs. of Am. v. Cty. of Alameda*, 768 F.3d 1037, 1042-43 (9th Cir. 2014).

Moreover, the allegations in the Complaint do not support a plausible inference that Plaintiff could not place the entire cost of the E-waste Law on its Connecticut consumers. "If companies' independent economic decisions were a sufficient basis for claims of discriminatory 'effects' or excessive 'burden,' interstate businesses would always be in a position to nullify state regulation simply by arguing that they will shift regulatory costs to another state." *Alliance*

of Auto. Mfrs., Inc. v. Currey, 984 F. Supp. 2d 32, 58 (D. Conn. 2013) ("*Alliance I*") (granting motion to dismiss dormant Commerce Clause claim) *aff'd*, 610 F. App'x 10 (2d Cir. 2015). *See also infra* Section IV.A.1.b.i.

Perhaps most importantly, Plaintiff has not alleged any facts to show that the E-waste Law is protectionist. The putative "burden" on interstate commerce is essentially that the costs imposed by the E-waste Law will have an indirect impact on Plaintiff's prices, thereby affecting its sales and profits both in-state and out-of-state. "Speculative or merely potential pricing impacts not dictated by the state's regulatory regime are not cognizable under the dormant Commerce Clause." *Id.*

Failing to allege facts that could plausibly show clear discrimination, Plaintiff must allege facts plausibly showing that "the burdens on interstate commerce [] exceed the burdens on intrastate commerce." *Automated Salvage Transp., Inc. v. Wheelabrator Envtl. Sys., Inc.*, 155 F.3d 59, 75 (2d Cir. 1998) (internal quotation marks omitted). The Second Circuit has "recognized three circumstances in which an evenhanded regulation imposes an incidental burden on interstate commerce: (1) when the regulation has a disparate impact on any non-local commercial entity; (2) when the statute regulates commercial activity that takes place wholly beyond the state's borders; and (3) when the challenged statute imposes a regulatory requirement inconsistent with those of other states." *Town of Southold*, 477 F.3d at 50 (internal quotation marks omitted). However, as previously noted, any such incidental burden must be disparate as between interstate and intrastate commerce and must outweigh the local benefits. *See also Alliance of Auto. Mfrs., Inc. v. Currey*, 610 F. App'x 10, 13 (2d Cir. 2015) (holding plaintiff could not "state an undue burden claim under *Pike*" because the challenged statute "do[es] not

impose a burden on interstate commerce that is qualitatively or quantitatively different from that imposed on intrastate commerce") (internal quotation marks omitted).

Plaintiff makes a number of conclusory allegations as to incidental burdens on interstate commerce.[3] However, all of these allegations, accepted as true, would apply equally to intrastate commerce. As described *supra*, Plaintiff's allegations, construed in the light most favorable to Plaintiff, constitute a claim that the E-waste Law, by itself and in conjunction with other states' laws, operates to increase Plaintiff's cost of doing business, and "the fact that an interstate company stands to lose money is not of constitutional significance under the dormant Commerce Clause." *Alliance I*, 984 F. Supp. 2d at 58.

Significantly, Plaintiff has not alleged that the health and safety interests that the benefits of the E-waste Law advance are illusory. As discussed *supra*, "a State's power to regulate commerce is never greater than in matters traditionally of local concern," and there is a particularly "strong presumption of validity" where a statute's "safety justifications are not illusory." *Kassel*, 450 U.S. at 670. And, while the Supreme Court has held that "the incantation of a purpose to promote the public health or safety does not insulate a state law from Commerce Clause attack" and that "a weighing of the asserted safety purpose against the degree of interference with interstate commerce" is still required, *id.*, it has much more recently held that "economic legislation passed under the auspices of the police power," and intended to address "a typical and traditional concern of local government," should not be "rigorously scrutinize[d]" by

[3] *See, e.g.*, Doc. No. 24 at 18 ("(i) disruption of interstate flow of commerce (Compl. ¶ 49); (ii) shifting the costs of the E-Waste Program from in-state manufacturers and consumers to out-of-state manufacturers and consumers (Compl. ¶¶ 47, 49, 52); [and] (iii) disparate treatment of out-of-state manufacturers as a result of, *inter alia*, disproportionately higher regulatory burdens for out-of-state sales, the lack of infrastructure to implement a recycling program, and disqualification from a *de minimis* disposal exemption (Compl. ¶¶ 52-54); (iv) creating a patchwork of overlapping state regulatory requirements in an area where national uniformity it necessary (Compl. ¶ 48); and (v) creating regulatory gridlock (Compl. ¶ 48).") (citations omitted).

the courts "under the banner of the dormant Commerce Clause." *United Haulers*, 550 U.S. at 347.

Plaintiff's allegations cannot overcome the strong presumption of validity in the face of the non-illusory health and safety interests at issue in this case. "[T]he degree of interference with interstate commerce," *Kassel*, 450 U.S. at 671, based on the allegations as discussed *supra*, is essentially non-existent. At the same time, while Plaintiff alleges, for example, that the National Market Share provision of the E-waste Law does not advance the implicated health and safety interests more effectively as compared to other methods of cost allocation would, *see* Compl. ¶ 57, and that the E-waste Law would be more effective at advancing those interests if it covered additional types of products, *see* Compl. ¶ 58, such allegations do not plausibly establish that the E-waste Law furthers its salutary purpose so marginally "as to be invalid under the Commerce Clause," *Kassel*, 450 U.S. at 670.

In sum, there are no allegations in the Complaint from which the Court could reasonably infer that the E-waste Law facially discriminates, was enacted for a discriminatory purpose, has discriminatory effects, or even disparately burdens interstate commerce. Plaintiff therefore has failed to plausibly state a dormant Commerce Clause claim under the first two prongs of the analysis.

b. Extraterritoriality

The third prong of the dormant Commerce Clause analysis—extraterritoriality—is "the most dormant doctrine in dormant commerce clause jurisprudence." *Energy & Env't Legal Inst. v. Epel*, 793 F.3d 1169, 1170 (10th Cir.) ("*EELI*") *cert. denied*, 136 S. Ct. 595 (2015); *see also IMS Health Inc. v. Mills*, 616 F.3d 7, 29 & n.27 (1st Cir. 2010) (extraterritoriality is "an infrequently applied strand of the dormant Commerce Clause" and "has been the dormant branch

of the dormant Commerce Clause") (internal quotation marks and citations omitted) *abrogated on other grounds by Sorrell v. IMS Health Inc.*, 131 S. Ct. 2653 (2011). Indeed, "a [Supreme Court] majority has used [the] extraterritoriality principle to strike down state laws only three times." *EELI*, 739 F.3d at 1173.

The Supreme Court has crystallized the extraterritoriality analysis as follows:

> First, the Commerce Clause . . . precludes the application of a state statute to commerce that takes place wholly outside of the State's borders, whether or not the commerce has effects within the State, and, specifically, a State may not adopt legislation that has the practical effect of establishing a scale of prices for use in other states. Second, a statute that directly controls commerce occurring wholly outside the boundaries of a State exceeds the inherent limits of the enacting State's authority and is invalid regardless of whether the statute's extraterritorial reach was intended by the legislature. The critical inquiry is whether the practical effect of the regulation is to control conduct beyond the boundaries of the State. Third, the practical effect of the statute must be evaluated not only by considering the consequences of the statute itself, but also by considering how the challenged statute may interact with the legitimate regulatory regimes of other States and what effect would arise if not one, but many or every, State adopted similar legislation. Generally speaking, the Commerce Clause protects against inconsistent legislation arising from the projection of one state regulatory regime into the jurisdiction of another State. And, specifically, the Commerce Clause dictates that no State may force an out-of-state merchant to seek regulatory approval in one State before undertaking a transaction in another.

Healy v. Beer Inst., Inc., 491 U.S. 324, 336-37 (1989).

i. Out-of-State Pricing

Plaintiff's first extraterritoriality argument goes to the *Healy* prohibition against state statutes that directly control "prices for use in other states." *Healy*, 491 U.S. at 336. Plaintiff argues that "the practical effect," *id.*, of the E-waste Law is to control the price of its televisions sold in other states. As *Healy* instructs, in evaluating the practical effect of a statute, the Court must not only consider the consequences of the statute itself, but also consider "how the challenged statute may interact with the legitimate regulatory regimes of other States and what effect would arise if not one, but many or every, State adopted similar legislation." *Id.*

"Generally speaking, the Commerce Clause protects against inconsistent legislation arising from the projection of one state regulatory regime into the jurisdiction of another State." *Id.* at 336-37.

In support of its position, Plaintiff points to its allegation that, "by tying manufacturers' regulatory responsibility to National Market Share, the practical effect of the E-Waste Law is to directly regulate VIZIO's out-of-state sales and to control VIZIO's conduct outside of the state's boundaries." Compl. ¶ 40. Specifically, "one practical effect of the E-Waste Law is to control prices outside of Connecticut, which in turn affects interstate pricing decisions." *Id.* Plaintiff also alleges, "The E-Waste Law, individually and collectively with other states' e-waste laws, is establishing a piecemeal pricing mechanism for interstate goods. The impact is to short circuit normal pricing decisions by effectively regulating a pricing mechanism for goods in interstate commerce." Compl. ¶ 41.

These allegations amount to no more than proposed inferences, and Plaintiff has not alleged any facts to support them. Such conclusory allegations do not provide the "factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). "Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Id.*

Plaintiff argues that these allegations are sufficient nonetheless because of the Second Circuit's decision in *Grand River Enterprises Six Nations, Ltd. v. Pryor*, 425 F.3d 158 (2d Cir. 2005) ("*Grand River I*"), in which several tobacco companies challenged a multi-state regulatory scheme governed by a master settlement agreement ("MSA") between a number of states and tobacco companies and various states' statutes known as Escrow Statutes and Contraband Laws. The scheme imposed obligations on tobacco companies for health costs incurred by the states.

Tobacco companies that were not parties to the MSA were required to either join the MSA or pay into escrow accounts.

In *Grand River I*, the Second Circuit permitted a dormant Commerce Clause claim to survive a motion to dismiss because "the Supreme Court recognized a potential problem where multiple states decide to enact 'essentially identical' statutes in the pricing-parity context," and "worried about potential regulatory 'price gridlock' or the 'short-circuiting of normal pricing decisions' that could result." *Id.* at 171 (citing *Healy*, 491 U.S. at 339).

> Accordingly, appellants have successfully stated a possible claim that the practical effect of the challenged statutes and the MSA is to control prices outside of the enacting states by tying both the [] settlement and [] escrow payments to national market share, which in turn affects interstate pricing decisions. We cannot say at this early stage of the litigation on a motion to dismiss that the Statutes' practical effect is solely intrastate, for the appellants have essentially alleged that the aggregate effect of the thirty-one states' Escrow Statutes and the MSA is to short-circuit normal pricing decisions by effectively regulating the pricing mechanism for goods in interstate commerce. While we take no position as to the ultimate viability of the dormant commerce clause claim, we believe that not dismissing this claim at the pleading stage is consistent with the district court's decision to reinstate the Sherman Act claim, which alleged that the MSA and interrelated statutes restrained trade and affected market prices.

Id. at 173 (internal quotation marks and citation omitted).

The *Grand River I* decision is distinguishable in a number of critical ways. First, the challenged policy there was motivated, in part, by concern that tobacco companies that did not have to make payments as required by the MSA would be able to charge lower prices than companies that were part of the MSA. *See id.* at 163. Thus, the regulatory scheme at issue existed "in the pricing-parity context," *id.*at 171, much like the protectionist statutes at issue in three of the four Supreme Court cases finding extraterritoriality, *see Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511 (1935); *Healy*, 491 U.S. 324; *Brown-Forman Distillers Corp. v. New York*

State Liquor Auth., 476 U.S. 573 (1986). The E-waste Law does not require manufacturers to standardize the price of televisions across state lines.

Second, the Court in *Grand River I* was concerned about the impact of "essentially identical statutes." *Grand River I*, 425 F.3d. at 171 (internal quotation marks omitted). In contrast, Plaintiff here alleges facts showing that various states' e-waste statutes differ in significant ways. *See, e.g.*, Compl. ¶ 48.

Third, far from the conclusory allegations in this case, the plaintiffs in *Grand River I* alleged enough facts for a court reasonably to infer that the law acted to directly regulate the price of cigarettes. *See* Am. and Suppl. Compl., ECF No. 195, *Grand River, et al. v. Pryor, et al.*, No. 1:02-cv-5068 (S.D.N.Y. Mar. 28, 2008) ("*Grand River* Compl."). The allegations in *Grand River I* describe a virtually-uniform regulatory scheme among forty-six states that was designed to neutralize price competition and forced smaller tobacco companies that were not parties to the MSA to raise their prices by $5.00 for every carton sold in every MSA State; unlike the allegations in this case, the *Grand River I* allegations provided a sufficient factual basis upon which a court could reasonably infer that these various states' statutes effectively and purposefully controlled the interstate pricing of the plaintiffs' product. *Compare Grand River Compl.* ¶¶ 8, 10-12, 14, 15, 70, 73-74, 83-96, 99, 112-14, 119-20, 126, 129-31, *with* Compl. ¶¶ 5, 38, 40-41, 46, 48, 52.

As a result, *Grand River I* does not stand for the proposition that the mere use of the phrase "national market share" allows a dormant Commerce Clause claim to survive a motion to dismiss.[4] Indeed, on remand, the district court explicitly noted that, even if the challenged

[4] It is significant that, as quoted *supra*, the Second Circuit observed that allowing the extraterritoriality claim to proceed was consistent with the district court's decision to allow the Sherman Act claim, "which alleged that the MSA and interrelated statutes . . . affected market prices," to proceed. The two claims were, as thus noted, predicated largely on the same theory of interstate restraints on price competition, and if the factual allegations were

statutes' "indirect reference to national market share could implicate the dormant Commerce Clause," it would not necessarily mean "that their practical effect is to control prices." *Grand River Enterprises Six Nations, Ltd. v. King*, 783 F. Supp. 2d 516, 542 (S.D.N.Y. 2011). Factual allegations that could plausibly show that the E-waste Law's use of National Market Share data somehow directly controls prices in transactions occurring wholly outside the State are still required, but Plaintiff has not provided the Court with any such facts.

At best, Plaintiff's factual allegations support an inference that the costs imposed by the E-waste Law have reduced Plaintiff's profit margins and created economic pressure to raise its prices nationwide to offset those losses.[5] Courts, however, have uniformly rejected extraterritoriality claims based on a "mere upstream pricing impact . . . even if the impact is felt out-of-state where the stream originates." *Freedom Holdings, Inc. v. Cuomo*, 624 F.3d 38, 67 (2d Cir. 2010) ("*Freedom Holdings II*") (internal quotation marks omitted); *see also Nat'l Elec. Mfrs. Ass'n v. Sorrell*, 272 F.3d 104, 111 (2d Cir. 2001) ("*NEMA*") (finding no extraterritoriality violation even though "it is axiomatic that the increased cost of complying with a regulation may drive up the sales price of the product"); *EELI*, 793 F.3d at 1173-74 ("We readily recognize that state regulations nominally concerning things other than price will often have ripple effects, including price effects, both in-state and elsewhere. . . . Still, without a regulation more blatantly regulating price and discriminating against out-of-state consumers or producers, *Baldwin* 's near

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sufficient to state a plausible claim for one, it would stand to reason that they should be sufficient to state a plausible claim for the other, as well.

[5] Plaintiff has not alleged any actual change in its prices caused by the E-waste Law. The price-related allegations in the Complaint are all theoretical or conclusory in nature. *See, e.g.*, Compl. ¶ 1 (The E-waste Law "threatens VIZIO's ability to innovate and competitively price its products for consumers."); Compl. ¶ 5 ("[T]he E-Waste Law . . . affect[s] interstate pricing decisions and lead[s] to . . . consumer price impacts."); Compl. ¶ 40 ("[O]ne practical effect of the E-Waste Law is to control prices outside of Connecticut, which in turn affects interstate pricing decisions."). This is an additional flaw with Plaintiff's extraterritoriality claim. *See, e.g., Silver v. Woolf*, 694 F.2d 8, 14 (2d Cir. 1982) ("[Plaintiff] asks us to render the legislation invalid because of 'the prospect' of an impermissible aggregate burden on commerce. Courts are not in the business of deciding legality of such 'prospects.'").

per se rule doesn't apply"). The type of direct price "control" required to state an extraterritoriality claim is not supported "simply by coincident obligations which may produce parallel price increases among the states." *Freedom Holdings II*, 624 F.3d at 67.

Fourth, the E-waste Law does nothing to prevent Plaintiff from passing along any added costs imposed by the E-waste Law directly to its Connecticut consumers instead of spreading any resulting price increase nationwide. *See, e.g., id.* at 66 (holding that "nothing prevents manufacturers from recouping increased costs imposed by New York law from New York consumers," and thus "plaintiffs cannot show that the challenged statutes violate the Commerce Clause"); *NEMA*, 272 F.3d at 110 (no dormant Commerce Clause violation where "manufacturers remain free to charge higher prices only to Vermonters without risking violation of the statute"). *See also supra* Section IV.A.1.a.

ii. Out-of-State Transactions

In addition to prohibiting direct regulation of out-of-state prices, the prong on extraterritoriality prohibits states from controlling transactions that occur in other states. In *Edgar v. MITE Corporation*, 457 U.S. 624 (1982), the Supreme Court held that an Illinois law requiring its secretary of state to adjudicate the fairness of tender offers for the purchase of corporate stock and reject the transaction under certain conditions was a "direct restraint on interstate commerce" because the state was controlling "conduct beyond the boundary of the state." 457 U.S. at 642.

Plaintiff alleges that the various states' e-waste laws impose "overlapping, inconsistent, and confusing obligations" on television manufacturers. Compl. ¶ 48. Plaintiff argues that it "has alleged many other facts supporting its extraterritoriality claim," setting forth "a number of ways in which the E-Waste Law effectively controls out-of-state transactions, two of which

highlight the extraterritorial effects of the law," specifically: (1) that "due to the statutory definition of 'manufacturer,' a company may become subject to the full burdens of the E-Waste Program even if it has never conducted any business within the state"; and (2) that "once the manufacturer is ensnarled by the regulation, DEEP determines the manufacturer's recycling burden based on national sales, thereby effectively regulating sales that did not occur within the State." Pl.'s Mem. of Law in Opp'n to Mot. to Dismiss [Doc. No. 24] at 24 (citing Compl. ¶¶ 40-50, 70).[6]

Plaintiff's first argument is essentially that, because its retail customers control where its televisions are sold to the end consumer, and because Plaintiff is subject to the E-waste Law, as long as one of its retail customers sells one of its products in Connecticut, Plaintiff is forced to register and comply with the E-waste Law in order to effectuate all of its out-of-state sales. However, that argument is nothing more than a variation of the labeling claim that Plaintiff has abandoned because it is foreclosed by *NEMA*, which applies equally to this claim.

In *NEMA*, the Second Circuit upheld a Vermont statute imposing labeling requirements on mercury-containing light bulbs against a dormant Commerce Clause challenge. 272 F.3d at 107-12. Like the labeling requirement in *NEMA*, and unlike the statute challenged in *Edgar*, 457 U.S. 624, the E-waste Law is silent about whether and how Plaintiff may sell its products outside of Connecticut, and it does not require Plaintiff to obtain regulatory approval from DEEP before selling out-of-state.

Rather, the law merely requires that, if Plaintiff's products are offered for sale in Connecticut, then Plaintiff must comply with Connecticut's regulatory scheme. If Plaintiff

[6] The Complaint also alleges that the E-waste Law's labeling requirements operate extraterritorially. *See* Compl. ¶¶ 30, 50. Defendant points out that the Second Circuit squarely rejected that exact claim in *NEMA*, 272 F.3d at 110-11. *See* Def. MTD Br., at 24. Plaintiff has not countered Defendant's point, and thus appears to have conceded it.

wishes to continue selling in other states without being subject to that regulatory scheme, it is free to withdraw from the Connecticut market by stopping its direct sales into the state and by contractually requiring that its retail customers do the same, or by otherwise changing its distribution processes to ensure that its products are not offered for sale in this state. Furthermore, even if Plaintiff were to have alleged facts to show that it would be impossible for it to change its sales practices or distribution processes, any manufacturer simply can choose not to register with DEEP, and retailers automatically would be prohibited from selling its products in Connecticut. *See* Conn. Gen. Stat. §§ 22a-630, 22a-634. In any event, these choices are Plaintiff's to make. *See NEMA*, 272 F.3d at 110-12; *Exxon Corp. v. Governor of Maryland*, 437 U.S. 117, 127 (1978) (holding that while some business "may choose to withdraw entirely from" a state's market, "interstate commerce is not subjected to an impermissible burden simply because an otherwise valid regulation causes some business to shift from one interstate supplier to another.").

While Plaintiff argues that it should be allowed to proceed to discovery on this theory, Plaintiff has failed to allege any facts that could plausibly establish the impossibility of its products not being offered for sale within Connecticut. In fact, quite to the contrary, Plaintiff explicitly alleges that it "could escape the law's reach" by "requir[ing] its retail customers to suspend sales in Connecticut." Compl. ¶¶ 49.

Plaintiff's second argument is essentially that, separate and apart from its price control theory, the E-waste Law, as applied to manufacturers whose Connecticut market shares are lower than their National Market Shares, effectively regulates[7] their out-of-state sales because the law's use of National Market Share data creates liability based on out-of-state conduct. Plaintiff

[7] *Black's Law Dictionary* defines the term "regulate" as meaning, "To control (an activity or process) esp. through the implementation of rules."

argues that the National Market Share provision of the E-waste Law directly captures out-of-state sales, which it equates to directly regulating those sales.

In support of its argument, Plaintiff analogizes this case to *American Booksellers Foundation v. Dean*, 342 F.3d 96 (2d Cir. 2003), and *North Dakota v. Heydinger*, 15 F. Supp. 3d 891 (D. Minn. 2014) *on appeal*, Nos. 14-2156, 14-2251 (8th Cir. 2014). In *American Booksellers*, a Vermont law prohibiting the dissemination of sexually explicit material to minors through Internet communications was deemed extraterritorial.

> Because the internet does not recognize geographic boundaries, it is difficult, if not impossible, for a state to regulate internet activities without projecting its legislation into other States.
>
> A person outside Vermont who posts information on a website or on an electronic discussion group cannot prevent people in Vermont from accessing the material. If someone in Connecticut posts material for the intended benefit of other people in Connecticut, that person must assume that someone from Vermont may also view the material. This means that those outside Vermont must comply with [the challenged statute] or risk prosecution by Vermont. Vermont has projected [the challenged statute] onto the rest of the nation.

Am. Booksellers, 342 F.3d at 103.

However, *American Booksellers* is inapposite on the issue of extraterritoriality. First, *American Booksellers* involved a direct regulation. Similarly to how the Illinois statute in *Edgar* empowered the State to prohibit certain out-of-state stock purchases, the Vermont statute prohibited the posting of sexually explicit material on the Internet. Second, out-of-staters could not avoid prosecution in Vermont for engaging in the proscribed conduct because of the "boundary-less nature" of the Internet. *Id*. Third, *American Booksellers* involved the regulation of an intangible product, as was the case in *Heydinger*.

Heydinger involved a Minnesota law limiting increases in statewide power sector carbon dioxide emissions. Analogizing that case to *American Booksellers*, the *Heydinger* Court held that the statute violated the extraterritoriality doctrine because, like the Internet, the electricity

grid has a "boundary-less nature," with electricity that enters the grid being "indistinguishable from the rest of the electricity in the grid."[8] 15 F. Supp. 3d at 917-18. The *Heydinger* Court, however, explicitly distinguished that case and *American Booksellers* from cases involving "tangible products." Citing several cases, including *NEMA*, the Court noted that "regulation of tangible products (sweeping compounds, light bulbs, and ethanol, respectively) that could be shipped directly from point A to point B" does

> not require out-of-state parties to transact out-of-state business according to the regulating state's terms because the manufacturers could simply avoid engaging in the prohibited conduct when transacting out-of-state business. As noted by the court in [*NEMA*], light bulb manufacturers could continue selling mercury-containing light bulbs outside of Vermont simply by modifying their production and distribution systems. Unlike those tangible products, however, electricity cannot be shipped directly from Point A to Point B.

Id. at 918. Televisions are undeniably tangible products that can be shipped directly from Point A to Point B, a fact that Plaintiff acknowledges. *See* Doc. No. 24 at 14 n.10.

To overcome the tangible product issue, Plaintiff argues that it has pled that "the interstate television market is similar to the electricity market in that the dynamics of the marketplace preclude manufacturers from exerting any control over where their products end up for sale."[9] *Id.* (citing Compl. ¶ 42). However, Paragraph 42 of the Complaint merely alleges, in relevant part, "Once VIZIO sells a television to its retail customers out-of-state, VIZIO has no

[8] "Modern regional electrical power grids and markets (such as MISO) share striking similarities to the Internet. Users in states geographically far from Minnesota are 'connected' to Minnesota in much the same way that Internet users in far-flung states and countries are connected to Vermont. Power generated in one state may be consumed by users in another state. The nature of the network means that power producers do not know and cannot control who consumes the energy that they generate, and consumers are likewise unable to know the source of the power that they consume. As Defendants themselves note, such knowledge would be impossible to prove because, in the MISO energy markets, a buyer is simply purchasing electricity from a pool of electrons in the transmission system and, as a result, does not know the source of electrons purchased." *Heydinger*, 15 F. Supp. 3d at 917 (internal quotation marks omitted).

[9] *Iqbal* and *Twombly* would seem to demand more of a factual basis for a court to reasonably infer that selling television sets is more akin to selling electricity or posting materials on a website than it is to selling light bulbs.

control over whether the televisions are then sold by the retail customer in Connecticut and/or ultimately disposed of in Connecticut."

This is too attenuated an allegation from which to infer that the "dynamics of the marketplace" make it impossible for manufacturers to "modify[] their production and distribution systems" to avoid having any of their television sets sold by their customers to retail consumers in Connecticut, and there are no allegations in the Complaint that could form the basis for a plausible inference that such is the case. As already noted *supra*, the Complaint actually supports the opposite inference by alleging, "The only way that VIZIO could escape the E-waste Law's reach would be to require its retail customers to suspend sales in Connecticut." Compl. ¶ 49. This allegation undercuts Plaintiff's argument that "[a] manufacturer cannot remove itself [from] the reach of the law by conducting its business out of state." Pl's Sur-Reply Br. in Further Opp'n to Mot. to Dismiss [Doc. No. 30] at 5 n.5.

Based on the allegations in the Complaint, construed in the light most favorable to Plaintiff, this case is like *NEMA* on this issue, in that Plaintiff can avoid the requirements of the E-waste Law by making sure its products are not sold in Connecticut. *See NEMA*, 272 F.3d at 110-12. At the same time, the E-waste Law does not dictate or restrict the manner or terms upon which Plaintiff's out-of-state sales take place. Therefore, the E-waste Law does not "regulate" those out-of-state sales. While it is true that Plaintiff's in-state and out-of-state sales influence the amount that Plaintiff must pay under the E-waste Law for recycling e-waste collected in Connecticut, the fact that Plaintiff's out-of-state sales have local impacts in Connecticut does not in any way equate to extraterritorial "regulation" of those out-of-state sales, which Plaintiff is free to make whenever and however it wants.

Plaintiff has not alleged any facts that plausibly show that the E-waste Law controls prices of Plaintiff's products in other states or directly regulates Plaintiff's out-of-state transactions in any other way. Therefore, the Court finds, as a matter of law, that the E-waste Law does not have an extraterritorial reach under the dormant Commerce Clause.

c. Conclusion

Because the E-waste Law does not clearly discriminate against interstate commerce, does not impose disproportionate burdens on interstate commerce that exceed the local benefits of the law, and does not have the practical effect of extraterritorial control of commerce occurring entirely outside the boundaries of Connecticut, Defendant's motion to dismiss is granted with respect to Count 1 of the Complaint.

The Court grants Plaintiff leave to amend its complaint to add factual allegations from which the Court could reasonably infer that the National Market Share provision of the E-waste Law has the practical effect of directly controlling the interstate prices of its televisions, consistent with the pleading requirements described in this Ruling. The Court, however, reiterates that additional factual allegations showing that the E-waste law merely affects the prices charged by Plaintiff will not suffice to state a claim for violation of the dormant Commerce Clause under an extraterritoriality theory. *See, e.g.*, *Freedom Holdings II*, 624 F.3d at 67-68.

2. User Fee Claim under the Commerce Clause

Count 2 of the Complaint alleges that the E-waste Law "charges user fees that are not a fair approximation of each manufacturer's use of Connecticut's E-Waste Program and are excessive in relation to the benefit conferred upon certain manufacturers, including VIZIO individually, thereby imposing impermissible burdens on interstate commerce" and violating the

dormant Commerce Clause. Compl. ¶¶ 78, 80. However, the facts alleged in the Complaint, viewed in the light most favorable to Plaintiff, do not support this conclusory statement.

Black's Law Dictionary defines "user fee" as "[a] charge assessed for the use of a particular item or facility." Recognizing that "[w]here a state at its own expense furnishes special facilities for the use of those engaged in commerce, interstate as well as domestic, it may exact compensation therefor," the Supreme Court has long "regard[ed] it as settled that a charge designed only to make the user of state-provided facilities pay a reasonable fee to help defray the costs of their construction and maintenance may constitutionally be imposed on interstate and domestic users alike," and that such a charge is "not a burden in the constitutional sense." *Evansville-Vanderburgh Airport Auth. Dist. v. Delta Airlines, Inc.*, 405 U.S. 707, 712-14 (1972) (internal quotation marks and citations omitted). A user fee "is reasonable under *Evansville* if it (1) is based on some fair approximation of use of the facilities, (2) is not excessive in relation to the benefits conferred, and (3) does not discriminate against interstate commerce." *Northwest Airlines*, 510 U.S. at 369 (1994) (citing *Evansville*, 405 U.S. at 716-17).

The charges for the recycling costs in this case do not even constitute "user fees," subject to the Commerce Clause. The Supreme Court has held that its user fee cases "apply only to 'charge[s] imposed by the State for the use of state-owned or state-provided transportation or other facilities and services.'" *Oregon Waste*, 511 U.S. at 103 n.6 (1994) (quoting *Commonwealth Edison Co. v. Montana*, 453 U.S. 609, 621 (1981)). Connecticut is not imposing charges for any state-owned or state-provided facilities or services furnished "at its own expense . . . for the use of those engaged in commerce." *Evansville*, 405 U.S. at 712. The E-waste Law explicitly states that all recycling activities are carried out by CERs, all of whom are private entities who use their own facilities and services. *See* Conn. Gen. Stat. § 22a-631(c). In

addition, manufacturers do not pay recycling costs to the State under the statute; rather, they pay these costs to private entities. *See* Conn. Gen. Stat § 22a-631(d). Thus, the E-waste Law's charges for recycling costs are not user fees. *See Oregon Waste*, 511 U.S. at 103 n.6 ("Because it is undisputed that . . . the landfills in question are owned by private entities, including Oregon Waste, the out-of-state surcharge is plainly not a user fee.").

As for the registration and administrative fees imposed by the E-waste Law, there are no factual allegations in the Complaint to show plausibly that such fees do not pass the *Evansville* test. There is no discrimination against interstate commerce because the registration and administrative fees imposed by the E-waste Law apply equally to all manufacturers, without respect to their geographic locations. The fees are not excessive in relation to the benefits conferred because the statute provides that "[a]ll fees charged shall be based on factors relative to the costs of administering such program," and expressly limits the fees to amounts necessary "to fully cover but not to exceed expenses incurred by the commissioner for the implementation of such program." Conn. Gen. Stat. § 22a-630(d).

Plaintiff argues that it is premature to analyze whether these fees are based on some fair approximation of each manufacturer's share of the State's costs for administering the program, but the Court cannot draw any reasonable inferences from Plaintiff's allegations that would demonstrate that these fees fail this prong of the *Evansville* test. Like the recycling costs, these fees are based on National Market Share data, but unlike the recycling costs, these fees do not take into account the weight of the products being recycled. Because nothing lasts forever, every television sold will eventually need to be recycled under the E-waste Law, *see, e.g.*, Conn. Gen. Stat. § 22a-636, and therefore, a sliding scale administrative fee based on a manufacturer's National Market Share data must roughly approximate its use of Connecticut's e-waste recycling

program over time, which is enough to satisfy the constitutional standard. *See Selevan v. New York Thruway Auth.*, 711 F.3d 253, 259 (2d Cir. 2013) ("*Selevan II*") (holding that an "imperfect estimate of a [party's] fair share is constitutionally permissible," as is "some degree of inequity," and that "it is the amount of the [fee], not its formula, that is of central concern").[10] A law that "is based on some fair approximation . . . will pass constitutional muster, even though some other formula might reflect more exactly the relative use of the state facilities by individual users." *Evansville*, 405 U.S. at 717.

The Court finds, as a matter of law, that the recycling charges imposed by the E-waste Law do not constitute user fees and that the law's registration and administrative fees are based on some fair approximation of each manufacturer's share of the State's costs for administering the program, are not excessive in relation to the benefits conferred, and do not discriminate against interstate commerce. Accordingly, Defendant's motion to dismiss with respect to Count 2 is granted.

B. TAKINGS CLAIMS

Both the United States and Connecticut constitutions protect private property rights. The Takings Clause provides that "private property [shall not] be taken for public use, without just compensation." U.S. Const. amend. V.[11] Similarly, the Connecticut Constitution provides that "[t]he property of no person shall be taken for public use, without just compensation therefor." Conn. Const. art. I, § 11. Count 3 of the Complaint alleges that Defendant's enforcement of the E-waste Law has deprived Plaintiff of its rights under these two constitutional provisions.[12]

[10] Plaintiff has not alleged the amount of the registration and administrative fees it has paid under the E-waste Law.
[11] "The takings clause of the fifth amendment is made applicable to the states through the due process clause of the fourteenth amendment." *A. Gallo & Co. v. Comm'r of Envtl. Prot.*, 309 Conn. 810, 822 n.6 (2013).
[12] The parties do not dispute that Plaintiff's takings claims should be analyzed in the same manner under the federal and State constitutions. *Cf. Bauer v. Waste Mgmt. of Connecticut, Inc.*, 234 Conn. 221, 250 n.16 (1995).

There are two general categories of takings: physical takings and regulatory takings. *See Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 321 (2002). In this case, Plaintiff alleges that the approximately $1.8 million it spent complying with the E-waste Law constitutes a regulatory taking. "The gravamen of a regulatory taking claim is that the state regulation goes too far and in essence 'effects a taking.'" *Buffalo Teachers Fed'n v. Tobe*, 464 F.3d 362, 374 (2d Cir. 2006).

"To state a claim under . . . the Takings Clause, plaintiffs were required to allege facts showing that state action deprived them of a protected property interest." *Story v. Green*, 978 F.2d 60, 62 (2d Cir. 1992) (citing *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1000-04 (1984)). The Takings Clause does not proscribe the "vast governmental power" to take private property for public use, provided that the government pays just compensation when it does. *Stop the Beach Renourishment, Inc. v. Florida Dep't of Envtl. Prot.*, 560 U.S. 702, 734 (2010) (Kennedy, J. concurring). Therefore, takings claims typically involve property interests for which the government can provide monetary compensation without the government being deprived of the property or public benefit that it seeks. *See id.* at 740-41 ("It makes perfect sense that the remedy for a Takings Clause violation is only damages, as the Clause does not proscribe the taking of property; it proscribes taking without just compensation.") (internal quotation marks omitted).

Regulatory takings claims must allege "specific and identified properties or property rights . . . to come within the regulatory takings prohibition," such that the challenged regulations are "so excessive as to destroy, or take, a specific property interest." *Eastern Enterprises v. Apfel*, 524 U.S. 498, 541, 542 (1998) (Kennedy, J. concurring in the judgment and dissenting in part) (collecting cases identifying various specific property interests). *See also id.* at 554

(Breyer, J. dissenting) ("The 'private property' upon which the [Takings] Clause traditionally has focused is a specific interest in physical or intellectual property.").

Ordinary regulatory obligations to pay money are different. "Unlike real or personal property, money is fungible." *United States v. Sperry Corp.*, 493 U.S. 52, 62 n. 9 (1989). Furthermore,

> [i]n the course of regulating commercial and other human affairs, Congress routinely creates burdens for some that directly benefit others. For example, Congress may set minimum wages, control prices, or create causes of action that did not previously exist. Given the propriety of the governmental power to regulate, it cannot be said that the Taking Clause is violated whenever legislation requires one person to use his or her assets for the benefit of another.

Connolly v. Pension Ben. Guar. Corp., 475 U.S. 211, 223 (1986).

A majority of five justices of the Supreme Court agreed in *Eastern Enterprises* that a law that simply imposes an obligation to perform an act, such as making a payment, does not take property in a constitutional sense. *See E. Enterprises*, 524 U.S. at 539-47 (Kennedy, J.); *id.* at 554-58 (Breyer, J.). "As [its] language suggests, at the heart of the [Takings] Clause lies a concern, not with preventing arbitrary or unfair government action, but with providing compensation for legitimate government action that takes 'private property' to serve the 'public' good." *Id.* at 554 (Breyer, J.). The Takings Clause is not "a substantive or absolute limit on the government's power to act. The Clause operates as a conditional limitation, permitting the government to do what it wants so long as it pays the charge. The Clause presupposes what the government intends to do is otherwise constitutional." *Id.* at 545 (Kennedy, J.).

The Supreme Court has never held that the Takings Clause applies to the creation of "an ordinary liability to pay money." *Id.* at 554 (Breyer, J.). While the Supreme Court has "made clear that the Clause can apply to monetary interest generated from a fund into which a private individual has paid money," the "monetary interest at issue there arose out of the operation of a

specific, separately identifiable fund of money." *Id.* at 555. It "is not surprising" that there is a "dearth of Takings Clause authority" where "there is no specific fund of money," but "only a general liability," because

> application of the Takings Clause here bristles with conceptual difficulties. If the Clause applies when the government simply orders A to pay B, why does it not apply when the government simply orders A to pay the government, *i.e.*, when it assesses a tax? Would that Clause apply to some or to all statutes and rules that routinely create burdens for some that directly benefit others? Regardless, could a court apply the same kind of Takings Clause analysis when violation means the law's invalidation, rather than simply the payment of compensation?

Id. at 555-56 (Breyer, J.). If the government must pay money as just compensation when it "takes" money through an otherwise permissible regulatory cost, then it would effectively have no power to impose those regulatory costs at all.

Although the Second Circuit has yet to confront the issue, other circuit courts consistently have followed "the conclusion reached by the majority of the Justices in *Eastern*—that an obligation to pay [undifferentiated, fungible] money cannot constitute a taking." *W. Virginia CWP Fund v. Stacy*, 671 F.3d 378, 386-87 (4th Cir. 2011), *as amended* (Dec. 21, 2011) (collecting cases). Furthermore, Plaintiff has not identified any case law in which a court has held to the contrary. In the absence of contrary Second Circuit authority, this Court agrees with the consensus view on the import of *Eastern Enterprises*.

Because the E-waste Law merely requires payment of fungible, undifferentiated monies, there is no cognizable Fifth Amendment property interest, and neither the Takings Clause nor the analogous provision of the Connecticut Constitution are implicated. Accordingly, Plaintiff has failed to allege facts showing that the E-waste Law effects a taking, and the Court grants Defendant's motion to dismiss with respect to Count Three of the Complaint.

C. EQUAL PROTECTION CLAIMS

The United States Constitution provides, "No state shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1. The Connecticut Constitution provides, "No person shall be denied the equal protection of the law nor be subjected to segregation or discrimination in the exercise or enjoyment of his or her civil or political rights because of religion, race, color, ancestry, national origin, sex or physical or mental disability." Conn. Const. art. I, § 20. Count 4 of the Complaint alleges that Defendant's enforcement of the E-Waste Law has deprived Plaintiff of its rights to equal protection of the laws as guaranteed by these two constitutional provisions.

As the Connecticut Supreme Court has explained,

> [t]he concept of equal protection under both the state and federal constitutions has been traditionally viewed as requiring the uniform treatment of persons standing in the same relation to the governmental action questioned or challenged. Conversely, the equal protection clause places no restrictions on the state's authority to treat dissimilar persons in a dissimilar manner. Thus, to implicate the equal protection clause it is necessary that the state statute in question, either on its face or in practice, treat persons standing in the same relation to it differently.

Kerrigan v. Comm'r of Pub. Health, 289 Conn. 135, 157-58 (2008) (internal quotation marks and citations omitted); *see also City of Cleburne, Tex. v. Cleburne Living Ctr.*, 473 U.S. 432, 439 (1985) ("The Equal Protection Clause . . . is essentially a direction that all persons similarly situated should be treated alike."). "[T]his initial inquiry is not whether persons are similarly situated for all purposes, but whether they are similarly situated for purposes of the law challenged." *Kerrigan*, 289 Conn. at 158.

Furthermore, "in accordance with the federal constitutional framework of analysis, . . . in areas of social and economic policy that neither proceed along suspect lines nor infringe fundamental constitutional rights," the equal protection clause of the Connecticut Constitution

> is satisfied as long as there is a plausible policy reason for the classification, the legislative facts on which the classification is apparently based rationally may have been considered to be true by the governmental decisionmaker, and the relationship of the classification to its goal is not so attenuated as to render the distinction arbitrary or irrational.

Kerrigan, 289 Conn. at 158-59 (internal quotation marks and citations omitted) (citing *U.S. R.R. Ret. Bd. v. Fritz*, 449 U.S. 166, 174, 179 (1980); *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 464 (1981); *City of Cleburne*, 473 U.S. at 446).

Plaintiff has alleged that the E-waste Law:

- "treats relatively new and successful electronics companies, including VIZIO individually, that currently have a large and growing National Market Share, differently than those older electronics companies that have a shrinking National Market Share," Compl. ¶ 97;
- "treats electronics companies that never manufactured or sold CRTs, including VIZIO individually, differently than those electronics companies that have manufactured or sold CRTs," Compl. ¶ 98; and
- "treats electronics companies that primarily manufacture or sell televisions, including VIZIO individually, differently than electronics companies that produce non-television CEDs or electronic devices that are not regulated by the E Waste Law," Compl. ¶ 99.

In sum, Plaintiff is alleging that there are four classifications that are being treated differently: new television manufacturers; old television manufacturers; manufacturers of other CEDs; and manufacturers of non-CEDs.

1. Television Manufacturers Versus Other CED Manufacturers

The Equal Protection Clause "simply keeps governmental decisionmakers from treating differently persons who are in all relevant respects alike." *Nordlinger v. Hahn*, 505 U.S. 1, 10 (1992). "Thus, the threshold inquiry in any equal protection analysis is whether the defendants treated the complainant differently than others who were similarly situated." *Hart v. Westchester Cty. Dep't of Soc. Servs.*, 160 F. Supp. 2d 570, 578 (S.D.N.Y. 2001). In other words, the first question that must be answered is whether the two classes being compared are similarly situated

to each other.[13] *See Kerrigan*, 289 Conn. at 158 ("initial inquiry is . . . whether [persons] are similarly situated for purposes of the law challenged").

> The initial discretion to determine what is 'different' and what is 'the same' resides in the legislatures of the States. A legislature must have substantial latitude to establish classifications that roughly approximate the nature of the problem perceived, that accommodate competing concerns both public and private, and that account for limitations on the practical ability of the State to remedy every ill.

Plyler v. Doe, 457 U.S. 202, 216 (1982).

There are a number of key differences between manufacturers of televisions and manufacturers of other CEDs. CEDs other than televisions are manufactured in industries in which manufacturers' participation in the market is sufficiently stable, and in which products' useful life is sufficiently short, such that manufacturers typically are still in business when their products enter the recycling stream, whereas televisions tend to have a longer useful life than other electronic products and television manufacturers more frequently enter and then exit the market in comparatively short periods of time. *See, e.g.*, Conn. Jt. Fav. Cmte. Rpt., S.B. 582, 2008 Reg. Sess. (March 24, 2008); H.R. Proc. Tr., April 22, 2008 Reg. Sess., pp. 91-92, remarks of Representative Widlitz; Envt. Cmte. Tr., March 7, 2008, pp. 58-59, remarks of Meggan Ehert.[14] The legislature expressed concern that these distinguishing characteristics would lead to an increased problem of "orphan" televisions being returned for recycling that were produced by a manufacturer that is no longer in business. *See id.*

Plaintiff fails to allege the existence of any countervailing factors that would tend to demonstrate that television manufacturers and other CED manufacturers are similarly situated

[13] Defendant appears to concede that manufacturers of new televisions and manufacturers of old televisions are similarly situated for purposes of the E-waste Law. Defendant does not address whether manufacturers of televisions and manufacturers of non-CEDs are similarly situated.

[14] Courts "may take judicial notice of matters of public record." *TicketNetwork, Inc. v. Darbouze*, No. 3:15-cv-237, __ F. Supp. 3d ___, 2015 WL 5595486, at *5, 2015 U.S. Dist. LEXIS 126400, at *14 (D. Conn. Sept. 22, 2015).

for purposes of the E-waste Law. Therefore, Plaintiff's equal protection claims predicated on the E-waste Law's differential treatment between television and other CED manufacturers must fail.

2. New Versus Old Television Manufacturers

In addition to being similarly situated, an equal protection claim requires that the classes being compared received differential treatment. *See City of Cleburne*, 473 U.S. at 439. The Equal Protection Clause is implicated when "the state statute in question, either on its face or in practice, treat[s] persons standing in the same relation to it differently." *Kerrigan*, 289 Conn. at 158. Plaintiff concedes that the E-waste Law, on its face, treats both old and new television manufacturers the same, but argues that, in practice, new manufacturers' "fair share of television recycling costs is over-valued as compared to other television manufacturers considering the television types and brands that are actually in Connecticut's e-waste stream."[15][16] Doc. No. 24 at 35 n.21.

In short, Plaintiff's argument is essentially that (1) the use of the weight of the recycled televisions to determine the total cost and (2) the use of National Market Share data to allocate that cost, in effect, result in newer television manufacturers being charged more per pound of their televisions that are being recycled than the older manufacturers are paying for their televisions that are being recycled. Construing the Complaint in the light most favorable to

[15] *See* Compl. ¶ 2 ("A recent study of over 23,000 pounds of televisions collected for recycling in Connecticut revealed that not a single VIZIO product was returned for recycling. However, VIZIO's National Market Share has recently been pegged by the state at over 17%, the second highest recycling obligation of any television manufacturer in the state. Accordingly, VIZIO will pay over 17% of the total costs to recycle televisions in Connecticut, almost none of which are VIZIO products. At the same time, however, there are large foreign television brands that currently have a small National Market Share, but have a huge Return Share in Connecticut's e-waste stream. Such large foreign brands pay a fraction of what VIZIO pays under the E-Waste Law, and yet it is their televisions that are being recycled—not VIZIO's."); Compl. ¶ 61 ("[T]he E-Waste Law does not account for the type or amount of hazardous substances in manufacturers' televisions. For example, CRTs contain significant quantities of lead, which is expensive to recycle, but VIZIO's flat screen televisions only contain miniscule concentrations of lead in compliance with multiple state and international regulations restricting the use of hazardous materials in consumer electronics. Under the E-Waste Law, VIZIO is subsidizing the recycling of its older competitors' heavy and toxic CRTs.").

[16] Plaintiff also argues that the law treats intrastate and interstate manufacturers differently, but that issue has already been addressed. *See supra*, Section IV.A.1.a.

Plaintiff, Plaintiff has plausibly alleged that, as applied, the E-waste Law treats new television manufacturers differently than old television manufacturers.

As already noted, however, "in areas of social and economic policy that neither proceed along suspect lines nor infringe fundamental constitutional rights, the equal protection clause is satisfied as long as there is a plausible policy reason for the classification, the legislative facts on which the classification is apparently based rationally may have been considered to be true by the governmental decisionmaker, and the relationship of the classification to its goal is not so attenuated as to render the distinction arbitrary or irrational." *Kerrigan*, 289 Conn. at 158-59. Because in this case there is no suspect or quasi-suspect class involved and no fundamental or important right at issue, the parties appear to agree that rational basis review applies. *See id.* at 157-61.[17]

The Supreme Court has emphasized that "rational-basis review in equal protection analysis is not a license for courts to judge the wisdom, fairness, or logic of legislative choices. Nor does it authorize the judiciary to sit as a superlegislature to judge the wisdom or desirability of legislative policy determinations made in areas that neither affect fundamental rights nor proceed along suspect lines." *Heller v. Doe by Doe*, 509 U.S. 312, 319 (1993) (internal quotation marks and citations omitted). Accordingly, "a classification neither involving fundamental rights nor proceeding along suspect lines is accorded a strong presumption of validity" and "cannot run afoul of the Equal Protection Clause if there is a rational relationship between the disparity of treatment and some legitimate governmental purpose." *Id.* at 319-20.

[17] *See also City of Cleburne*, 473 U.S. at 441-42 ("[W]here individuals in the group affected by a law have distinguishing characteristics relevant to interests the State has the authority to implement, the courts have been very reluctant, as they should be in our federal system and with our respect for the separation of powers, to closely scrutinize legislative choices as to whether, how, and to what extent those interests should be pursued. In such cases, the Equal Protection Clause requires only a rational means to serve a legitimate end.")

In short, rational basis review is an extremely deferential standard by which to scrutinize government action.

Plaintiff argues that rational basis scrutiny is premature at this stage. However,

> a legislature that creates these categories need not actually articulate at any time the purpose or rationale supporting its classification. Instead, a classification must be upheld against equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification.
>
> A State, moreover, has no obligation to produce evidence to sustain the rationality of a statutory classification. A legislative choice is not subject to courtroom factfinding and may be based on rational speculation unsupported by evidence or empirical data. A statute is presumed constitutional, and the burden is on the one attacking the legislative arrangement to negative every conceivable basis which might support it, whether or not the basis has a foundation in the record. Finally, courts are compelled under rational-basis review to accept a legislature's generalizations even when there is an imperfect fit between means and ends. A classification does not fail rational-basis review because it is not made with mathematical nicety or because in practice it results in some inequality. The problems of government are practical ones and may justify, if they do not require, rough accommodations—illogical, it may be, and unscientific.

Id. at 320-21 (internal quotation marks and citations omitted).

Accordingly, some courts have explained that, in order "[t]o survive a motion to dismiss, a plaintiff must allege facts sufficient to overcome the presumption of rationality that applies to government classifications. When neither the complaint nor the non-moving party's opposition negate any reasonably conceivable state of facts that could provide a rational basis for the challenged classification, a defendant's motion to dismiss an equal protection claim will be granted." *Immaculate Heart Cent. Sch. v. New York State Pub. High Sch. Athletic Ass'n*, 797 F. Supp. 2d 204, 211 (N.D.N.Y. 2011)

Defendant provides numerous "plausible reasons for [the legislature's] action," and thus "our inquiry is at an end." *Fritz*, 449 U.S. at 179. For the reasons discussed *supra*, Section IV.C.1., Connecticut's General Assembly rationally could have believed that the television

industry is different from other electronics industries, both because of the longer life span of televisions and the high-turnover nature of the participants in the industry. Similarly, the General Assembly rationally could have believed that the market share approach would address the problems that those differences created by: (1) ensuring that no manufacturer can escape its recycling responsibilities by exiting the market before its products enter the recycling stream; (2) ensuring that there is a financing mechanism in place for any orphans that may exist; and (3) reducing the costs associated with identifying and processing the larger proportion of orphan devices that the television industry generates. *See* Def.'s Mem. of Law in Supp. of Mot. to Dismiss [Doc. No. 21-1] at 35-36.

Plaintiff fails to negate any of these, or any other, conceivable rational bases for the lines drawn in the E-waste Law. Instead, Plaintiff argues, without any legal authority, that rational basis scrutiny is premature because "it is ultimately a merits question." Doc. No. 24 at 35. Plaintiff argues that it has alleged sufficient facts that show other approaches would be fairer and still address the same concerns as the approach the E-waste Law takes. However, as already noted, "equal protection is not a license for courts to judge the wisdom, fairness, or logic of legislative choices." *F.C.C. v. Beach Commc'ns, Inc.*, 508 U.S. 307, 313 (1993). "The Constitution presumes that, absent some reason to infer antipathy, even improvident decisions will eventually be rectified by the democratic process and that judicial intervention is generally unwarranted no matter how unwisely we may think a political branch has acted." *Vance v. Bradley*, 440 U.S. 93, 97 (1979).

3. Television Manufacturers Versus Non-CED Manufacturers

Neither can this Court disturb the E-waste Law based on the fact that many electronic devices are not covered, or even explicitly exempted, by the law. As the Supreme Court has explained, rational basis

> restraints on judicial review have added force where the legislature must necessarily engage in a process of line-drawing. Defining the class of persons subject to a regulatory requirement—much like classifying governmental beneficiaries—inevitably requires that some persons who have an almost equally strong claim to favored treatment be placed on different sides of the line, and the fact that the line might have been drawn differently at some points is a matter for legislative, rather than judicial, consideration.

Beach Commc'ns, 508 U.S. at 315-16 (internal quotation marks and citations omitted). The necessity of legislatures having "to draw the line somewhere . . . renders the precise coordinates of the resulting legislative judgment virtually unreviewable, since the legislature must be allowed leeway to approach a perceived problem incrementally." *Id.* at 316. *See also Williamson v. Lee Optical of Okla., Inc.*, 348 U.S. 483, 489 (1955) ("Evils in the same field may be of different dimensions and proportions, requiring different remedies. Or so the legislature may think. Or the reform may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind. The legislature may select one phase of one field and apply a remedy there, neglecting the others. The prohibition of the Equal Protection Clause goes no further than the invidious discrimination.").

4. Conclusion

The Court finds that there are no allegations that plausibly show television manufacturers and other CED manufacturers are similarly situated for purposes of the E-waste Law. The Court further finds that, with respect to new television manufacturers, old television manufacturers, and electronics manufacturers not covered by the E-waste Law, Plaintiff has not alleged any facts or made any arguments to show that there is no plausible policy reason for these classifications, or that the governmental decisionmaker could not rationally have considered the legislative facts on which it apparently based its classifications to be true, or that the relationship of the classifications to the E-waste Law's goal is so attenuated as to render the distinction arbitrary or

irrational. Accordingly, Plaintiff's equal protection claims under the Fourteenth Amendment and the Connecticut Constitution shall be dismissed for failure to state a claim.

D. SUBSTANTIVE DUE PROCESS CLAIMS

The United States Constitution provides, "[N]or shall any state deprive any person of life, liberty, or property, without due process of law." U.S. Const. amdt. XIV, § 1. The Connecticut Constitution similarly provides, "No person shall be . . . deprived of life, liberty or property without due process of law," and "All courts shall be open, and every person, for an injury done to him in his person, property or reputation, shall have remedy by due course of law, and right and justice administered without sale, denial or delay." Conn. Const. art. I, §§ 8, 10. These provisions "guarantee more than fair process, and [] cover a substantive sphere as well, barring certain government actions regardless of the fairness of the procedures used to implement them." *County of Sacramento v. Lewis*, 523 U.S. 833, 840 (1998) (internal quotation marks and citations omitted). Count 5 of the Complaint alleges that Defendant's enforcement of the E-Waste Law has deprived Plaintiff of its rights to substantive due process as guaranteed by the federal and State constitutions.

Under federal substantive due process analysis, the Court must "review laws adjusting the benefits and burdens of economic life for arbitrariness and irrationality." *In re Chateaugay Corp.*, 53 F.3d 478, 486 (2d Cir. 1995). If a law burdens no fundamental rights, it "is a classic example of an economic regulation and is subject only to the minimum scrutiny rational basis test. Substantive due process requires only that economic legislation be supported by a legitimate legislative purpose furthered by a rational means." *Id.* at 486-87. The approach under the Connecticut Constitution is the same.

> Like the federal constitution, substantive due process analysis under the state constitution provides for varying levels of judicial review to determine whether a

> state statute or regulation passes constitutional muster in terms of substantive due process. . . . Constitutional challenges to ordinary economic or social welfare legislation require us to employ a rational basis test to ascertain whether the legislature has acted arbitrarily or irrationally.

Doe v. Hartford Roman Catholic Diocesan Corp., 317 Conn. 357, 408 (2015).

As in the equal protection context, rational basis review for substantive due process claims is very deferential. "It is by now well established that legislative Acts adjusting the burdens and benefits of economic life come to the Court with a presumption of constitutionality, and that the burden is on one complaining of a due process violation to establish that the legislature has acted in an arbitrary and irrational way." *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 15 (1976).

With respect to its due process claims, Plaintiff alleges:

- "The E-Waste Law has deprived and continues to deprive VIZIO of liberty and property without substantive due process of law." Compl. ¶ 108.
- "There is no rational relation between the financial burden imposed upon VIZIO by the E-Waste Law and VIZIO's actual contribution to the e-waste stream in Connecticut." Compl. ¶ 109.
- "The obligation imposed on VIZIO to fund in-state CED recycling in Connecticut in proportion to its National Market Share is arbitrary, irrational, and lacks any plausible rational basis." Compl. ¶ 110.
- "The E-Waste Law is retroactive in that it imposes new liability on manufacturers, including VIZIO individually, for past transactions. The mandate to fund the recycling of CEDs purchased prior to the enactment of the E-Waste Law is arbitrary, irrational, and lacks any plausible rational basis." Compl. ¶ 111.

Because Plaintiff has alleged that the E-waste Law has both retroactive and prospective provisions that violate its due process rights, the Court must conduct two distinct reviews. *See Usery*, 428 U.S. at 17 ("The retrospective aspects of legislation, as well as the prospective aspects, must meet the test of due process, and the justifications for the latter may not suffice for the former."); *Rojas-Reyes v. I.N.S.*, 235 F.3d 115, 122-23 (2d Cir. 2000) ("The test therefore is

one of rationality as applied independently to the prospective and retrospective aspects of the law.").[18]

1. Existence of Retroactive Provisions

In addressing whether the E-waste Law's retroactive provisions violate Plaintiff's due process rights, the Court first must determine whether the law has any retroactive provisions. "[D]eciding when a statute operates 'retroactively' is not always a simple or mechanical task." *Landgraf v. USI Film Products*, 511 U.S. 244, 268 (1994).

> A statute does not operate 'retrospectively' merely because it is applied in a case arising from conduct antedating the statute's enactment, or upsets expectations based in prior law. Rather, the court must ask whether the new provision attaches new legal consequences to events completed before its enactment. The conclusion that a particular rule operates 'retroactively' comes at the end of a process of judgment concerning the nature and extent of the change in the law and the degree of connection between the operation of the new rule and a relevant past event. Any test of retroactivity will leave room for disagreement in hard cases, and is unlikely to classify the enormous variety of legal changes with perfect philosophical clarity. However, retroactivity is a matter on which judges tend to have sound instincts, and familiar considerations of fair notice, reasonable reliance, and settled expectations offer sound guidance.

Id. at 269-70 (internal quotation marks and citations omitted).

Plaintiff argues that the E-waste Law attaches a new legal consequence, *i.e.*, a requirement to pay for recycling of television sets, to an event completed before the law's

[18] In addition, for the first time at oral argument, Plaintiff raised a substantive due process argument predicated on the "unitary business rule" described in *Allied-Signal, Inc. v. Director, Division of Taxation*, 504 U.S. 768 (1992). Because this argument was not raised in any of Plaintiff's briefs, Defendant had no occasion or opportunity to respond to it. Accordingly, "[t]his Court need not consider an argument raised for the first time at oral argument." *Harris v. Wu-Tang Prods., Inc.*, No. 05-cv-3157, 2006 WL 1677127, at *3, 2006 U.S. Dist. LEXIS 40527, at *10 (S.D.N.Y. June 16, 2006); *cf. Schiavone v. Ne. Utilities Serv. Co.*, No. 3:08-cv-429, 2009 WL 801744, at *2 n.2, 2009 U.S. Dist. LEXIS 24517, at *4 n.2 (D. Conn. Mar. 25, 2009) (observing that "[c]ourts generally disregard arguments raised" for the first time in a reply brief). The Court notes, however, that the unitary business rule, which deals with restrictions on a state's ability to tax the income of businesses, does not appear, in any way, to support the finding of a substantive due process violation in this case. The recycling charges assessed to television manufacturers under the E-waste Law certainly are not a tax on their incomes. Neither are they a tax assessed on the sales of their products, whether sold in Connecticut or out of state. Rather, the E-waste Law requires manufacturers to pay for the actual cost of the televisions being recycled in Connecticut. There being no income taxation involved in this case, *Allied-Signal* would appear to be inapposite. Therefore, even if it were properly before this Court, this theory would not save Plaintiff's substantive due process claims.

enactment, *i.e.*, past manufacturing of televisions. The degree of connection between these two, however, is very weak. The requirement to pay for the recycling of television sets in the present is not a consequence of manufacturing television sets in the past. Rather, this requirement is a direct consequence of two types of events occurring after the enactment of the E-waste Law: (1) the current recycling of e-waste; and (2) the current sales of newly-manufactured televisions. None of the liability is directly tied to events occurring in the past, and all television manufacturers have fair notice that their share of the recycling costs in Connecticut will be tied to their sales of televisions being manufactured now and in the future.

Accordingly, the Court concludes that there is no plausible basis to conclude that the E-waste Law has a retrospective aspect. In addition, even if it did have a retrospective aspect, the E-waste Law would survive rational basis review of that aspect, for the reasons discussed *infra*, Section IV.D.2.

2. Rational Basis Review

Plaintiff does not dispute that the State has a legitimate legislative purpose behind the E-waste Law. *See, e.g.*, Compl. ¶ 1 (". . . VIZIO is a firm believer in electronic waste ('e-waste') recycling and supports a law requiring television brand-owned sellers to pay for the recycling of televisions . . . ."). Rather, Plaintiff argues that the legitimate purpose is not furthered by a rational means, such that the legislature has acted arbitrarily or irrationally in enacting the E-waste Law. *See* Compl. ¶¶ 109-11.

In terms of the prospective aspects of the E-waste Law, Plaintiff argues that it is premature to engage in rational basis review, and that Plaintiff must be afforded discovery so that it could demonstrate that the costs imposed by the E-waste Law are unrelated to the health and

safety interests asserted by the State. Doc. No. 24 at 31-32. This misapprehends the rational basis standard. Under rational basis review, a court

> will not strike down a law as irrational simply because it may not succeed in bringing about the result it seeks to accomplish, because the problem could have been better addressed in some other way, or because the statute's classifications lack razor-sharp precision. Nor will a statute be overturned on the basis that no empirical evidence supports the assumptions underlying the legislative choice. To succeed on a claim such as this, those challenging the legislative judgment must convince the court that the legislative facts on which the classification is apparently based could not reasonably be conceived to be true by the governmental decisionmaker.

Beatie v. City of New York, 123 F.3d 707, 712 (2d Cir. 1997).

Defendant presents a number of conceivable bases supporting the use of National Market Share and the total weight of the televisions returned for recycling for determining the cost allocations. *See* Doc. No. 21-1 at 5, 37-40. For example, current market share arguably ties each television manufacturer's costs directly to the number of its televisions currently entering the Connecticut market, and because the E-waste Law requires that all of those televisions must be recycled when they eventually are discarded, Plaintiff's costs under the E-waste Law arguably will be directly related to its own contribution to the e-waste problem in the long run. *See id.* at 5, 37. Plaintiff argues that the Court should deny the motion to dismiss the due process claims because the E-waste Law's formula for allocating recycling costs (1) does not correlate to the number of VIZIO televisions entering the Connecticut market because VIZIO's market share in Connecticut is less than its National Market Share; (2) is not indicative of the amount of VIZIO televisions being recycled in Connecticut; and (3) will not "balance out" recycling costs over time because VIZIO's flat-screen televisions weigh less and cost less to recycle than the CRT televisions currently being recycled. *See* Doc. No. 24 at 31-32.

Rational basis scrutiny is a "deferential standard of review," under which "a plaintiff must overcome the strong presumption of rationality that attaches to a statute." *Alliance I*, 984 F. Supp. 2d at 60. A court is "required to uphold" a challenged statutory provision "if there is any reasonably conceivable state of facts that could provide a rational basis" for it. *Sensational Smiles, LLC v. Mullen*, 793 F.3d 281, 284 (2d Cir. 2015) (internal quotation marks omitted). On the other hand, in order to prevail, a plaintiff "must negative every conceivable basis which might support" the provision. *Id.* (internal quotation marks omitted). Thus, even if Plaintiff provides evidence demonstrating clearly that the costs imposed on it are, in practice, completely unrelated to the health and safety interests asserted by Connecticut, and even if Plaintiff's "[d]iscovery and expert opinion will clearly demonstrate that the State's E-Waste Program for televisions has been dominated by CRTs and that recycling of CRTs has produced disastrous results that undercut the putative benefits of the program," Doc. No. 30 at 10, it would be of no constitutional significance, as none of these facts would go to demonstrating that the purported bases supporting the challenged provisions of the E-waste Law could not reasonably have been conceived to be true by the State, but only that they turned out not to be true.[19]

In short, Plaintiff's due process claims must fail because it has not alleged facts or advanced arguments that could plausibly demonstrate that the State's justifications are inconceivable.

> [I]t is well settled that the Government has no duty to produce evidence to sustain a validly enacted statute's rationality. Indeed, absent suspect classifications or impingement on fundamental rights, state legislative decisionmaking is not subject to a federal court's factfinding. In the area of economics or social welfare, legislation need not be effective or even logically consistent, in every respect,

[19] Plaintiff cites three cases in which courts found a statute had failed rational basis review, but they are distinguishable from this case. The plaintiffs in those cases alleged facts that could plausibly be construed to demonstrate that the respective governmental decisionmakers had no conceivable basis for their challenged laws. *See Dias v. City & County of Denver*, 567 F.3d 1169, 1183-84 (10th Cir. 2009); *Dwen v. Barry*, 483 F.2d 1126, 1130-31 (2d Cir. 1973), *Bass Plating Co. v. Town of Windsor*, 639 F. Supp. 873, 879-80 (D. Conn. 1986).

> with its articulated aims in order to survive federal due process review. It is enough that there is an evil at hand for correction, and that it might be thought that the particular legislative measure was a rational way to correct it.

Alliance I, 984 F. Supp. 2d at 61.[20]

The same is true for any arguably "retroactive" aspects of the E-waste Law. "[T]he legislative purpose can be the same for a law's prospective and retrospective aspects; the purpose need only be rational in both applications to be constitutional." *Rojas-Reyes*, 235 F.3d at 122. Furthermore, "the strong deference accorded [economic] legislation . . . is no less applicable when that legislation is applied retroactively. Provided that the retroactive application of a statute is supported by a legitimate legislative purpose furthered by rational means, judgments about the wisdom of such legislation remain within the exclusive province of the legislative and executive branches[.]" *Pension Ben. Guar. Corp. v. R.A. Gray & Co.*, 467 U.S. 717, 729 (1984).

As with the rational basis review of the prospective aspects of the E-waste Law, Plaintiff has failed to point to any allegations or arguments that would show that there are no reasonably conceivable bases for the "retroactive" provisions. Given the relatively lengthy life span of televisions and the relatively high turnover of industry participants, it was conceivable that some portion of the televisions being recycled today will have been manufactured by companies no longer in existence and therefore no longer available to pay for the cost. It was also conceivable that televisions being discarded in the future may have been manufactured and sold today by companies that will no longer be in existence by that time. Because it thus was conceivable that it would reflect roughly each manufacturer's contribution to the e-waste problem over time,

[20] *See also Martinez v. Mullen*, 11 F. Supp. 3d 149, 160 (D. Conn. 2014) ("It is not enough for the challenger to show that the government was actually mistaken in its factual assumptions or reasoning, that the restriction at issue was supported by 'rational speculation' rather than empirical evidence, that the 'rational basis' for the restriction or classification was not the rationale the legislature had in mind, or that the restriction adopted is over-inclusive or underinclusive. A statute suffering from all of these flaws may still survive rational basis scrutiny. In short, while a few courts have stated that rational basis review is not meant to be toothless, the teeth are dull and the bite rare.") (internal quotation marks and citations omitted).

while addressing the problem of recycling televisions for manufacturers no longer in existence, there was a rational basis to use current National Market Share data to allocate the current recycling costs. In addition, it was conceivable that it would be costly and complicated for CERs to separate and track televisions turned in for recycling by brand, and conceivable that including such a requirement in the E-waste Law would reduce its effectiveness at achieving its health and safety purposes.

As noted above, Plaintiff argues that the costs will not "balance out" over time because televisions being manufactured today are lighter than the older ones that are being recycled now, but does not allege any facts or advance any arguments that could plausibly show that such a balancing out would be inconceivable. Plaintiff also argues that the "retroactive" aspects of the E-waste Law were not foreseeable at the time Plaintiff was formed, that it is inequitable to impose on Plaintiff the cost of recycling old competitors' products, and that the liability is disproportionate to the amount of Plaintiff's products that will ever be part of Connecticut's waste stream. *See* Doc. No. 24 at 29-31. However, "the potential unfairness of retroactive civil legislation is not a sufficient reason for a court to fail to give a statute its intended scope. Retroactivity provisions often serve entirely benign and legitimate purposes." *Landgraf*, 511 U.S. at 267-68.

Therefore, while the Court concludes that the E-waste Law does not contain any retroactive provisions, it holds that, even if it did, those provisions would survive rational basis review.

3. Conclusion

The Court finds that there are no allegations to show plausibly that the E-waste Law is retroactive. The Court further finds that Plaintiff has not alleged any facts or made any

arguments to show plausibly that the State could not rationally have considered the legislative facts on which it based the E-waste Law to be true, or that the challenged provisions are arbitrary or irrational. Accordingly, Plaintiff's due process claims under the Fourteenth Amendment and the Connecticut Constitution shall be dismissed for failure to state a claim.

V. CONCLUSION

For the foregoing reasons, the Complaint is dismissed in its entirety. The dormant Commerce Clause claim based on an extraterritoriality theory is dismissed without prejudice, and Plaintiff may replead it consistent with the holdings of this Ruling. Any amended complaint shall be filed within thirty days of this Ruling.

All of the other constitutional claims are dismissed with prejudice because amendment of the Complaint would be futile. *See, e.g.*, *Ruffolo v. Oppenheimer & Co.*, 987 F.2d 129, 131 (2d Cir. 1993) (affirming dismissal with prejudice because, "[w]here it appears that granting leave to amend is unlikely to be productive, . . . it is not an abuse of [the district court's] discretion to deny leave to amend"); *Abu Dhabi Commercial Bank v. Morgan Stanley & Co. Inc.*, No. 08-cv-7508, 2009 WL 3346674, at *2, 2009 U.S. Dist. LEXIS 96114, at *5 (S.D.N.Y. Oct. 15, 2009) ("A court has discretion to dismiss with prejudice if it believes that amendment would be futile or would unnecessarily expend judicial resources.") (internal quotation marks omitted).

SO ORDERED at Bridgeport, Connecticut, this 31st day of March, 2016.

/s/ Victor A. Bolden
Victor A. Bolden
United States District Judge

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

VIZIO, INC.,
Plaintiff,

v.

ROBERT KLEE, in his official capacity as the Commissioner of THE STATE OF CONNECTICUT DEPARTMENT OF ENERGY AND ENVIRONMENTAL PROTECTION,
Defendant.

No. 15-cv-929 (VAB)

ORDER ON MOTION TO DISMISS

Plaintiff, VIZIO, Inc. ("VIZIO"), brought this action against Defendant, the Commissioner of the State of Connecticut Department of Energy and Environmental Protection, challenging the constitutionality of Connecticut's E-Waste Law. ECF No. 1.

Defendant previously filed a motion to dismiss under Rule 12(b)(6), arguing that VIZIO had failed to state a claim upon which relief could be granted. ECF No. 21. The Court granted the motion to dismiss the Complaint in its entirety, dismissing all of VIZIO's claims with prejudice, except for a Dormant Commerce Clause claim based on an extraterritoriality theory. ECF No. 36. The Court gave Plaintiff leave to amend its Complaint, but only to the extent of adding factual allegations supporting a claim that the E-Waste Law directly controls Plaintiff's interstate prices. *Vizio, Inc. v. Klee*, No. 3:15-CV-00929 (VAB), 2016 WL 1305116, at *15 (D. Conn. Mar. 31, 2016).

VIZIO then amended its complaint. ECF No. 41. Defendant now moves to dismiss the Amended Complaint under Rule 12(b)(6), arguing that VIZIO has failed to plead that the E-

Waste law directly controls interstate prices and therefore has failed to state a claim upon which relief could be granted. ECF No. 44.

For the reasons that follow, the Court **GRANTS** Defendant's renewed motion to dismiss because Plaintiff has failed to plead factual allegations that the E-Waste Law directly controls Plaintiff's interstate prices.

I. FACTUAL ALLEGATIONS

The factual background of this case is described in greater detail in the Court's prior order granting Defendant's first motion to dismiss. *See Vizio*, 2016 WL 1305116, at *2-4. In the interests of clarity, the Court also summarizes the relevant background of the case below.

VIZIO is an American company that manufactures television sets. Amend. Compl. ¶ 1, ECF No. 41. VIZIO was incorporated in late 2002, and first entered the television market in 2003. *Id.* ¶ 32. As a result of its relatively recent incorporation, VIZIO has only distributed flat panel televisions, not the bulkier cathode ray tube ("CRT") or rear projection televisions that were common several decades ago. *Id.* ¶ 3.

In July 2007, Connecticut enacted Public Act No. 07-189, which has been amended several times and is codified at Conn. Gen. Stat. Ann. §§ 22a-629 through 22a-640. The Connecticut Department of Energy and Environmental Protection ("DEEP") subsequently promulgated regulations, located at Conn. Agencies Regs. Sections 22-a-630(d)-1 and 22-a-638-1 (collectively, the "E-Waste Law"). DEEP is responsible for administering the E-Waste Law, which applies to each manufacturer of covered electronic devices ("CEDs"). Conn. Gen. Stat. § 22a-630(a). VIZIO is considered a "manufacturer" under this statute. *See* Conn. Gen. Stat. §§ 22a-629(7), (11).

Under the E-Waste Law, each manufacturer must register with DEEP and participate in the program to implement and finance the collection, transportation, and recycling of CEDs. The administration of the E-Waste program is funded by registration fees. The initial registration fee for every manufacturer is at least $5,000. Television manufacturers, such as VIZIO, must then pay subsequent annual registration fees that are based on a sliding scale that is representative of the manufacturer's current share of sales in the national television market ("National Market Share").

The E-Waste Law uses a "market share" approach to calculate each television manufacturer's costs under the E-Waste program. Under this approach, the manufacturer's costs are based on a percentage of the total weight of all televisions that are recycled in a given period, regardless of brand, multiplied by a specified price per pound. The percentage of the total weight of all televisions that each manufacturer is responsible for is based on its current National Market Share ("National Market Share provision").

According to DEEP, VIZIO's billable national market share is currently 17.16%. Amend. Compl. ¶ 34. DEEP previously determined VIZIO's billable market share to be 14.33% in 2013, 14.52% in 2014, and 16.088% in 2015. *Id.* VIZIO was, therefore, charged $414,823.54 in 2013, $585,669.23 in 2014, and $647,141.72 in 2015 under the E-Waste Law. As of December 31, 2015, VIZIO has spent over $2.5 million to comply with Connecticut's E-Waste program. *Id.*

Almost all of VIZIO's sales are to large retailers, and these sales generally take place in states where the retailers have distribution operations, such as New York. Amend. Compl. ¶ 33. After the retailers purchase the televisions, they distribute them, at their own discretion, to

various locations throughout the country for resale to individual customers. *Id.* VIZIO claims that it does not sell to any distribution centers in Connecticut. *Id.* ¶ 34.

A. E-Waste Law and Interstate Television Prices

Plaintiff's Amended Complaint brings the following new factual allegations that it claims will support the dormant commerce clause extraterritoriality claim and the allegation that the National Market Share provision of the E-Waste law directly "has controlled and will continue to control interstate television prices." Amend. Compl. ¶ 47.

First, Plaintiff alleges that the E-Waste Law imposes substantial and disproportionate costs on low average-cost television producers, like VIZIO, because the National Market Share provision "most severely penalizes manufacturers that have the highest National Market Shares." Amend. Compl. ¶ 49. Plaintiff alleges that the E-Waste law directly forces low average-cost producers to raise their television prices, using the theory described below. *Id.*

According to VIZIO, the television industry is a highly competitive market. Amend. Compl. ¶ 50. The largest competitors in that market, therefore, must be able to "implement and sustain aggressive pricing strategies." *Id.* VIZIO alleges that, in this competitive market, "low average cost producers drive down and establish minimum prices" because such producers "can produce their products at the lowest cost given competitive advantages such as economies of scale or technological capabilities. *Id.* ¶ 51. Low-average cost producers' prices allegedly are "directly correlated to the minimum of their average costs." *Id.* ¶ 52.

VIZIO then advances certain economic theories, arguing that "[t]here will always be at least one low average-cost producer in a competitive market that drives the overall minimum market price" because "[o]ther firms with higher average costs cannot consistently undercut the low average-cost producers' prices" without incurring losses and risking going out of business.

Amend. Compl. ¶ 53. Firms with higher average costs generally choose to charge higher prices "to avoid losses and stay in business," which "inevitably" allows a low average-cost producer to set the overall minimum market price. *Id.*

VIZIO further alleges that, because of their "competitive advantages," i.e. low costs of production and therefore low price, low average-cost producers will have the highest National Market Shares. Amend. Compl. ¶ 54. When a large manufacturer, like VIZIO, increases their prices, their National Market Share declines. *Id.* According to VIZIO, this means that there is a "direct relationship between National Market Share and price." *Id.*

By setting each manufacturer's costs based on its National Market Share, the National Market Share provision allegedly puts a "grossly disproportionate" share of the Connecticut E-Waste program's costs on to low-average cost producers, like VIZIO, because of the large National Market Shares they obtain through their low prices. Amend. Compl. ¶ 55. Because the costs imposed on television manufacturers are based on National Market Share, the E-Waste law may impose costs that are disproportionate to a manufacturer's in-state market share. *Id.* ¶ 56. VIZIO's National Market Share in 2013 was, for instance, 25% to 50% higher than it's Connecticut state market share. *Id.*

VIZIO alleges that the E-Waste Law's imposition of disproportionate costs on low-average cost producers – producers with a high national market share because of low prices due to having low-average costs – is the mechanism by which the E-Waste Law "has controlled" VIZIO's pricing in the national marketplace. Amend. Compl. ¶¶ 56-57. VIZIO then argues that when low-average cost producers raise their prices, the "minimum price floor for televisions nationwide" is then driven up because when low-average cost producers have increased their prices, other manufacturers have followed suit. *Id.* ¶ 57.

Connecticut is, allegedly, one of at least 11 states that have enacted a National Market Share-based approach for allocating e-waste recycling costs. Amend. Compl. ¶ 58.

B. Connecticut Legislature and the Alleged Control of Interstate Television Prices

Plaintiff further alleges that the legislative history behind the E-Waste Law shows that the Connecticut General Assembly "intended to control national television prices to maintain pricing parity with neighboring states," and intended to "shift the costs of the E-Waste Law to out-of-state consumers." Amend. Compl. ¶ 59.

According to VIZIO, when Connecticut legislators were debating the E-Waste Law, some allegedly expressed concern that manufacturers could pass on the costs of the E-Waste Law to Connecticut consumers by charging higher prices. Amend. Compl. ¶¶ 59-60. As some legislators noted, if manufacturers passed on the costs to Connecticut consumers, customers would go to other states, such as Massachusetts, to purchase electronics. *Id.* ¶ 60. Thus, some legislators noted that one main goal of the e-waste recycling program was to have it be "free of cost" to Connecticut consumers. *Id.* ¶ 61. VIZIO alleges that when the legislature enacted the E-Waste Law, they did so knowing that there would be "costs somewhere" that "someone will pay." *Id.* ¶ 62.

VIZIO's Amended Complaint does not state exactly how the E-Waste Law was intended to accomplish any of the above goals, whether to (a) prevent manufacturers from passing on the costs to Connecticut consumers specifically, (b) ensure that the program was actually free of costs to Connecticut consumers, or (c) pass the costs "somewhere" to "someone." The Amended Complaint instead points to two theories of how the E-Waste Law may accomplish these goals. Amend. Compl. ¶¶ 63-64.

First, VIZIO claims that the Connecticut legislature "attempted to minimize price increases in Connecticut by restricting access to the E-Waste Program to in-state residents." Amend. Comp. ¶ 63. The program only covers the costs when Connecticut residents recycle their old electronics. *Id.*

Second, VIZIO claims that the Connecticut legislature "intended for the E-Waste Law to be part of a 'compact' among New England states that would enact similar statutory schemes for recycling e-waste." Amend. Compl. ¶ 64. VIZIO further claims that the legislature "intended to participate in this regional 'compact' in order to control interstate television prices by ensuring that television prices would be uniform across New England" so that Connecticut retailers would not be harmed by consumers traveling out of state to purchase televisions. *Id.* The Amended Complaint offers no further explanation of whether other states enacted identical or substantially similar National Market Share provisions. It also does not explain how the statutes at issue actually controlled prices across the different states.

C. Factors Allegedly Magnifying Extraterritorial Price Control Effect of E-Waste Law

Plaintiff also argues that, because the National Market Share provision ties the costs that DEEP charges the television manufacturer to the manufacturer's National Market Share, the E-Waste Law allocates costs in an "unequal, disproportionate, and arbitrary manner." Amend. Compl. ¶ 65. Plaintiff claims that this "unequal" and "inefficient" system "exacerbates the E-Waste Law's extraterritorial control on television prices," basing this claim on the following three theories. *Id.* ¶ 66.

First, VIZIO claims that, because manufacturers are charged E-Waste program costs based on National Market Share rather than the quantity of the manufacturer's products that are recycled in Connecticut, the E-Waste Law forces certain manufacturers to "pay the costs of

recycling other manufacturers' televisions." Amend. Compl. ¶ 67. This apparently "prevents manufacturers from establishing their own wholesale prices based on the cost of recycling their own products." *Id.* VIZIO alleges that the National Market Share provision is, therefore, a mechanism of "out-of-state pricing impacts and control," but does not explain why. *Id.*

As a manufacturer that has only made flat-screen televisions, VIZIO implies that it will bear particularly disproportionate E-Waste program costs because approximately 77 million of the bulkier, older model CRT televisions remain in use in this country and will "continue to enter state waste streams for at least the next 15 years. Amend. Compl. ¶ 67. Both because of the quantity of CRT televisions remaining, as well as their being "heavier, more difficult to disassemble, and contain[ing] more hazardous substances" than newer televisions, VIZIO contends that the cost of recycling CRT televisions, which they have never manufactured, "represent the dominant share of e-waste recycling costs." *Id.*

Second, VIZIO alleges that the E-Waste Law is "fail[ing] to further any health or safety interest" because it is resulting in the "stockpiling," rather than the actual recycling of old electronics. Amend. Compl. ¶ 68. According to VIZIO, the entities responsible for actually recycling the old electronics are failing to do so in accordance with state and federal laws. *Id.* Instead, VIZIO alleges that electronics brought in for recycling are either being stockpiled in warehouses or sent overseas, where they may "not be[] handled and processed in accordance with U.S. and international laws." *Id.* VIZIO does not, however, attempt to connect this allegation to price controls on VIZIO.

Third, VIZIO alleges that the "interstate price control impacts" of the National Market Share provision are "magnified by numerous other aspects of the E-Waste laws that impose costs on manufacturers" and allegedly do so disproportionately heavily to low average-cost producers

like VIZIO. Amend. Compl. ¶ 70. VIZIO lists a few alleged impacts of the E-Waste Law, most of which are also alleged in earlier parts of the complaint. *Id.* The new allegations are that the E-Waste Law "favors in-state commercial interests" and "imposes a surcharge on out of state sales." *Id.* This paragraph does not include any additional explanation of which specific provisions of the E-Waste Law cause these effects, or how the E-Waste Law causes these effects.

D. The Alleged Unavoidability of E-Waste Law Price Control Impacts

Finally, Plaintiff also alleges that, to the extent that the above allegations "demonstrate that the E-Waste Law had the practical effect of controlling interstate prices," manufacturers are unable to avoid those effects. Amend. Compl. ¶ 70. Television manufacturers covered by the National Market Share provision cannot avoid Connecticut's E-Waste Law "absent a complete withdrawal of the manufacturer and its products from the recycling stream," which VIZIO alleges is "impossible." *Id.* VIZIO therefore argues that television manufacturers have no way of complying "with the law in a manner that would avoid its extraterritorial reach" because the costs that a manufacturer must pay to Connecticut's E-Waste Program is necessarily tied to National Market Share. *Id.*

According to VIZIO, it and other low average-cost producers' "cannot avoid raising prices for televisions by absorbing the costs of the E-Waste Law." Amend. Compl. ¶ 71. This is allegedly because the low average cost producers' revenue margins, in the competitive television market, are too narrow to absorb the costs of the E-Waste Law. *Id.*

VIZIO further alleges that it would be "impossible" for it and other low average-cost producers' to "avoid higher national prices" and pass on the costs only to Connecticut consumers. Amend. Compl. ¶ 72. VIZIO provides four reasons to support this point.

First, VIZIO claims that even if it raised prices only for Connecticut consumers, its National Market Share would remain high, even if its in-state Connecticut market share decreased, resulting in VIZIO and other low average-cost producers "recover[ing] a lower amount of their E-Waste Program costs directly from Connecticut consumers and a higher amount" of the costs "from non-Connecticut consumers." Amend. Compl. ¶ 72. According to VIZIO, any price increase that a manufacturer applied only to Connecticut consumers would result in Connecticut consumers purchasing fewer of that manufacturer's televisions. *Id.* VIZIO also argues that the Connecticut state legislature correctly predicted that some in-state consumers could react to higher prices in Connecticut by simply going to neighboring states to purchase the same television. *Id.* Thus, the manufacturer's increased Connecticut prices would have a negligible impact on a low average-cost producer's National Market Share because of "the small size of the Connecticut market." *Id.* VIZIO therefore argues that, regardless of whether it passes on costs to Connecticut customers, it would still be forced to pay high E-Waste Program costs based on its high National Market Shares, which allegedly requires "increased shifting of costs out-of-state." *Id.*

Second, VIZIO argues that if it or other low average-cost television producers raised prices only for Connecticut customers, the "inevitable result would be a 'death spiral' in which the low average-cost producers sell increasingly fewer televisions in Connecticut and pass on increasingly higher E-Waste Program costs per [in-state] sale." Amend. Compl. ¶ 73. This is allegedly because the producer's National Market Share would likely hold steady, as would the producer's E-Waste Program costs, because Connecticut is a small market and its consumers could go to a neighboring state to purchase the television, while the number of customers purchasing the producer's televisions in Connecticut would decrease due to the passed-on cost.

Id. ¶ 72. Over time, VIZIO alleges, the prices for customers buying in Connecticut would "escalate to a point at which no sale could be consummated" in Connecticut. *Id.* ¶ 73. VIZIO concludes that this proves that "the only way for low average-cost producers to recover their E-Waste Program costs is to raise their national television prices" because the "costs cannot be recovered solely from in-state sales." *Id.*

Third, VIZIO claims that it is impossible for television manufacturers to pass on E-Waste program costs only to Connecticut customers or transactions or to prevent products from being sold in Connecticut. Amend. Compl. ¶ 74. "As a practical matter" distributors do not enter into agreements with television manufacturers that "force the distributor to sell a manufacturer's televisions at a minimum price." *Id.* Additionally, VIZIO claims that television manufacturers cannot "preclude sales (or resales) of VIZIO televisions in Connecticut by contract" or otherwise dictate where distributors sell manufacturers; products." *Id.* VIZIO does not explain these points further, but concludes that it means that manufacturers cannot avoid Connecticut E-Waste Program costs because of the National Market Share provision. *Id.*

Fourth, VIZIO concludes by adding an additional allegation that, even if VIZIO could cause there to be a "significant barrier" to VIZIO products being sold in Connecticut, it would "represent a total disruption of the flow of goods in interstate commerce" and "result in a form of economic balkanization." Amend. Compl. ¶ 75. VIZIO alleges that this would, "itself create a separate dormant Commerce Clause violation." *Id.*

II. THE COURT'S PREVIOUS ORDER

This case concerns Plaintiff's challenge to the constitutionality of Connecticut's E-Waste law. Plaintiff originally challenged Connecticut's E-Waste law as being unconstitutional under the Commerce Clause of the United States Constitution; the Takings Clause of the Fifth

Amendment of the United States Constitution and under Article I, Section 11 of the Connecticut Constitution; the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution and under Article I, Section 20 of the Connecticut Constitution; and under the due process rights component of the Fourteenth Amendment of the United States Constitution and under Article I, Section 8 of the Connecticut Constitution. *See Vizio*, 2016 WL 1305116, at *1. The Court granted Defendant's motion to dismiss the Complaint on all counts, dismissing all counts with prejudice, save for "Plaintiff's claim for violation of the Dormant Commerce Clause under an extraterritoriality theory," which was dismissed without prejudice. *Id.*

As the Court's previous order explains, the extraterritoriality prong of the dormant Commerce Clause jurisprudence prohibits laws that "ha[ve] the practical effect of 'extraterritorial' control of commerce occurring entirely outside the boundaries of the state in question." *Vizio*, 2016 WL 1305116, at *5 (quoting *Freedom Holdings, Inc. v. Spitzer*, 357 F.3d 205, 216 (2d Cir. 2004) ("*Freedom Holdings I*")). The Court dismissed Plaintiff's claim under the extraterritoriality prong of the dormant Commerce Clause, as it did all of the Plaintiff's other claims. The Court, however, allowed Plaintiff leave to re-plead facts supporting one specific theory of the E-Waste Law's alleged unconstitutionality under the extraterritoriality theory of the dormant Commerce Clause, namely, that the National Market Share provision operates to directly control the interstate prices of VIZIO's televisions. *See id.* at *15. In allowing Plaintiff to re-plead this claim, the Court noted that Plaintiff would need "to add factual allegations from which the Court could reasonably infer that the National Market Share provision of the E-waste Law has the practical effect of directly controlling the interstate prices of its televisions." *Id.*

The Court also cautioned that "additional factual allegations showing that the E-waste law merely affects the prices charged by Plaintiff will not suffice to state a claim for violation of

the dormant Commerce Clause under an extraterritoriality theory" that is sufficient to survive Defendant's renewed motion to dismiss. *Vizio*, 2016 WL 1305116, at *15. This is because "mere upstream pricing impact is not a violation of the dormant Commerce Clause." *Freedom Holdings, Inc. v. Cuomo*, 624 F.3d 38, 67 (2d Cir. 2010) ("*Freedom Holdings II*") (internal quotation marks omitted).

III. STANDARD OF REVIEW

A motion to dismiss for failure to state a claim under Rule 12(b)(6) is designed "merely to assess the legal feasibility of a complaint, not to assay the weight of evidence which might be offered in support thereof." *Official Comm. of Unsecured Creditors of Color Tile, Inc. v. Coopers & Lybrand, LLP*, 322 F.3d 147, 158 (2d Cir. 2003) (internal citations omitted). When deciding a Rule 12(b)(6) motion to dismiss, a court must accept the material facts alleged in the complaint as true, draw all reasonable inferences in favor of the plaintiff, and decide whether it is plausible that the plaintiff has a valid claim for relief. *Ashcroft v. Iqbal,* 556 U.S. 662, 678-79 (2009); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555-56 (2007); *In re NYSE Specialists Sec. Litig.*, 503 F.3d 89, 95 (2d Cir. 2007).

A plaintiff's "[f]actual allegations must be enough to raise a right to relief above the speculative level," and assert a cause of action with enough heft to show entitlement to relief and "enough facts to state a claim to relief that is plausible on its face." *Twombly*, 550 U.S. at 555, 570. A claim is facially plausible if "the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal*, 556 U.S. at 678. Although "detailed factual allegations" are not required, a complaint must offer more than "labels and conclusions," or "a formulaic recitation of the elements of a cause of action," or "naked assertion[s]" devoid of "further factual enhancement." *Twombly,* 550 U.S. at

555, 557 (2007). Plausibility at the pleading stage is nonetheless distinct from probability, and "a well-pleaded complaint may proceed even if it strikes a savvy judge that actual proof of [the claims] is improbable, and . . . recovery is very remote and unlikely." *Id.* at 556 (internal quotation marks omitted).

IV. DISCUSSION

In the Court's previous order granting Defendants' previous motion to dismiss, the Court permitted Plaintiff to bring an amended complaint raising a dormant Commerce Clause claim based on the extraterritoriality theory and with factual allegations sufficient to show that the National Market Share provision of the E-Waste Law has the practical effect of directly controlling the interstate prices of its televisions." *Vizio*, 2016 WL 1305116, at *15.

Plaintiff brings an Amended Complaint containing this claim, which seeks a declaratory judgment and preliminary injunctive relief on the basis that the E-Waste law violates the Dormant Commerce Clause because it "has an extraterritorial reach that has the practical effect of controlling manufacturers' conduct and regulating goods in commerce beyond the boundaries of the state." Amend. Compl. ¶¶ 79-83. Defendant now moves, under Fed. R. Civ. P. 12(b)(6) to dismiss the Amended Complaint for failure to state a claim. ECF No. 44. Specifically, Defendants argue that the Amended Complaint fails to allege facts adequate to show that the E-Waste Law directly controls interstate prices. Def. Br. At 1, ECF No. 44-1.

The law applicable to the dormant Commerce Clause extraterritoriality claim based on a theory that the E-Waste law controls interstate prices was summarized in the Court's previous order granting Defendant's previous motion to dismiss. *See Vizio*, 2016 WL 1305116, at *9-12. The law relevant to this claim is also discussed below.

The extraterritoriality theory is "the most dormant doctrine in dormant commerce clause jurisprudence." *Energy & Env't Legal Inst. v. Epel*, 793 F.3d 1169, 1170 (10th Cir.), *cert. denied*, 136 S. Ct. 595 (2015) ("*EELI*"). Indeed, a Supreme Court "majority has used its extraterritoriality principle to strike down state laws only three times." *Id.* at 1173; *see also Healy v. Beer Inst., Inc.*, 491 U.S. 324 (1989); *Brown-Forman Distillers Corp. v. N.Y. State Liquor Auth.*, 476 U.S. 573 (1986); *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511 (1935).

In *Healy v. Beer Inst., Inc.*, 491 U.S. 324 (1989), the most recent in this line of cases, the Supreme Court held that "a State may not adopt legislation that has the practical effect of establishing a scale of prices for use in other states." *Healy*, 491 U.S. at 336 (internal quotation marks omitted). The *Healy* Court also recognized that the practical effects of a challenged state statute "must be evaluated not only by considering the consequences of the statute itself, but also by considering how the challenged statute may interact with the legitimate regulatory regimes of other States and what effect would arise if not one, but many or every, State adopted similar legislation." *Id.* at 336.

Following *Healy*, the Second Circuit concluded, in *Grand River Enterprises Six Nations, Ltd. v. Pryor*, 425 F.3d 158 (2d Cir. 2005) ("*Grand River*"), that the plaintiff's dormant Commerce Clause claim should have survived a motion to dismiss. *Grand River*, 425 F.3d at 173. In *Grand River*, the Second Circuit noted that *Healy* "recognized a potential problem where multiple states decide to enact 'essentially identical' statutes in the pricing-parity context," and "worried about potential regulatory 'price gridlock' or the 'short-circuiting of normal pricing decisions' that could result." *Id.* at 171 (quoting *Healy*, 491 U.S. at 339-40).

If Plaintiff's claim is to survive this motion to dismiss, the facts that Plaintiff alleges must be sufficient to show that, like the statutes the *Grand River* plaintiffs challenged, the Connecticut

E-Waste Law has the effect of directly controlling interstate prices. *Vizio*, 2016 WL 1305116, at *15. Facts "showing that the E-waste law merely affects the prices charged by Plaintiff will not suffice." *Id.* For the reasons discussed below, the Court finds that Plaintiff's Amended Complaint contains factual allegations that support only the theory that the E-Waste Law merely affects rather than directly controls VIZIO's interstate prices. Accordingly, the Defendant's motion to dismiss is **GRANTED**.

A. The Alleged Direct Control of Interstate Pricing

As the Court's ruling on the previous motion to dismiss noted, VIZIO has leave to amend its complaint only to the extent of "add[ing] factual allegations from which the Court could reasonably infer that the National Market Share provision of the E-waste law has the practical effect of directly controlling the interstate prices of its televisions" to make out a claim under the extraterritoriality theory of the dormant Commerce Clause. *Vizio*, 2016 WL 1305116, at *15. "[A]llegations showing that the E-waste law merely affects that prices charged by Plaintiff will not suffice" to make out such a claim. *Id.* The Court also noted that *Grand River* "does not stand for the proposition that the mere use of the phrase 'national market share' allows a dormant Commerce Clause claim to survive a motion to dismiss." *Id.* at *10.

VIZIO, therefore, must plead factual allegations plausibly showing "that the E-waste Law's use of National Market Share data somehow directly controls prices in transactions occurring wholly outside" Connecticut. *Vizio*, 2016 WL 1305116, at *11. Because VIZIO fails to allege facts that plausibly support the claim that the E-Waste Law directly controls interstate prices, the Amended Complaint fails to state a claim for violation of the dormant Commerce Clause under the extraterritoriality theory.

Many allegations raised in Plaintiff's Amended Complaint do not relate to the E-Waste Law's alleged direct control on interstate prices. The Court's previous order only allowed VIZIO to plead factual allegations supporting the argument that the E-Waste law directly controls interstate prices under the extraterritoriality theory of the dormant Commerce Clause. *Vizio*, 2016 WL 1305116, at *15. Certain allegations in the Amended Complaint are irrelevant to this theory. For example, VIZIO alleges that the Connecticut E-Waste program is "fail[ing] to further any health or safety interest" because the electronics brought in for recycling are stockpiled rather than recycled. Amend. Compl. ¶ 68. To the extent that certain allegations in the Amended Complaint do not support the theory that the E-Waste Law directly controls VIZIO's interstate prices, the Court does not consider them. *See Johnson v. Holder*, 564 F.3d 95, 99 (2d Cir. 2009) ("The law of the case doctrine commands that when a court has ruled on an issue, that decision should generally be adhered to by that court in subsequent stages in the same case." (internal quotation marks omitted)); *Ritani, LLC v. Aghjayan*, 970 F. Supp. 2d 232, 263 (S.D.N.Y. 2013) ("The law of the case mandates that a decision on an issue of law made at one stage of a case becomes binding precedent to be followed in subsequent stages of the same litigation." (internal quotation marks omitted)).

As Plaintiffs argue in their opposition to Defendant's renewed motion to dismiss, the Amended Complaint's primary theory alleging that the E-Waste Law's National Market Share provision directly controls VIZIO's interstate pricing is a simple one: if VIZIO lowers interstate prices, the resulting increase in its National Market Share will increase its costs under Connecticut's E-Waste Program, forcing VIZIO to bear a larger proportion of the costs of recycling televisions in Connecticut. See Pl. Br. at 4-6, ECF No. 53; *see also* Amend. Compl. ¶¶ 54-57, 67, 70-74. Specifically, VIZIO alleges that, as a low average-cost producer whose low

costs allow it to set low prices for its televisions in the highly competitive television market, it and other low average-cost producers "inevitably" set the overall minimum market price for televisions. Amend. Compl. ¶¶ 51-53. Because a television producer's costs under the E-Waste Law are based on its national market share, those costs allegedly put a "grossly disproportionate" burden on low average-cost producers that have substantial National Market Share due to low prices. *Id.* ¶¶ 55-57. By causing low-average cost producers' costs to increase, the National Market Share provision allegedly forces such producers to increase their prices. *Id.*

Plaintiff's new allegations, however, merely "support an inference that the costs imposed by the E-waste Law have reduced Plaintiff's profit margins and created economic pressure to raise its prices nationwide to offset those losses." *Vizio*, 2016 WL 1305116, at *11. As this Court previously noted, such allegations describe "mere upstream pricing impact," which courts uniformly reject as a basis for dormant Commerce Clause extraterritoriality claims, "even if the impact is felt out-of-state where the stream originates." *Freedom Holdings II*, 624 F.3d at 67*; see also Nat'l Elec. Mfrs. Ass'n v. Sorrell*, 272 F.3d 104, 111 (2d Cir. 2001) ("*NEMA*") (finding no Commerce Clause violation though "it is axiomatic that the increased cost of complying with a regulation may drive up the sales price of the product"); *EELI*, 793 F.3d at 1173-74 ("We readily recognize that state regulations nominally concerning things other than price will often have ripple effects, including price effects, both in-state and elsewhere. . . . Still, without a regulation more blatantly regulating price and discriminating against out-of-state consumers or producers, *Baldwin* 's near *per se* rule doesn't apply.").

At oral argument, Plaintiff argued that the *Healy* line of cases should be read as prohibiting more than just statutes that directly regulate prices based on pricing in other states. Specifically VIZIO argues that *Healy* "stand[s] at a minimum for . . . propositions" that are

broader than the simple prohibition, under the dormant Commerce Clause, on statutes that directly regulate prices in state based on out of state pricing. *See* Pl.'s Br. at 8 (quoting *Healy*, 491 U.S. at 336). The relevant portion of *Healy*, however, also reads that "a State may not adopt legislation that has the practical effect of establishing a scale of prices for use in other states" and that the "critical inquiry is whether the practical effect of the regulation is to control conduct beyond the boundaries of the State." *Healy*, 491 U.S. at 336 (internal quotation marks omitted). This language emphasizes that, in order for a statute to actually violate the dormant Commerce Clause under the extraterritoriality theory, it must directly control interstate prices.

Furthermore, the Supreme Court has noted that *Healy* and *Baldwin* do not prohibit statutes that "do[] not regulate the price of any out-of-state transaction, either by its express terms or by its inevitable effect." *Pharm. Research & Mfrs. of Am. v. Walsh*, 538 U.S. 644, 669 (2003). *Healy* therefore did not apply to prohibit a statute that "does not insist that manufacturers sell their [product] . . . for a certain price" or "t[ie] the price of its in-state products to out-of-state prices." *Id.* (discussing state statute providing that if a prescription drug manufacturer does not enter into a rebate agreement with the state then its Medicaid sales would be subject to prior authorization from state agencies). Courts recognize that "the mere fact that state action may have repercussions beyond state lines is of no judicial significance so long as the action is not within that domain which the Constitution forbids." *Freedom Holdings II*, 624 F.3d at 67 (citing *Osborn v. Ozlin*, 310 U.S. 53, 62 (1940)).

VIZIO's Amended Complaint raises other allegations, such as the allegation that the Connecticut E-Waste Law was intended to be "part of a 'compact' among New England states" that would enact similar statutory schemes "in order to control interstate television prices" and "ensur[e] that television prices would be uniform across New England," but does not specifically

allege which other states have enacted similar statute or which provisions of these statutes "control" interstate prices and how they do so. Amend. Compl. ¶ 64. As discussed below in relation to how this case can be distinguished from *Grand River*, these allegations are also insufficient to support a theory that the E-Waste Law directly controls Plaintiff's interstate prices.

B. Distinguishing *Grand River*

The Second Circuit's holding in *Grand River*, controlling precedent on this Court, recognized that it could be possible to state a Dormant Commerce Clause extraterritoriality claim capable of surviving a motion to dismiss when challenging a statute that did not directly use interstate prices to regulate in-state pricing. *See Grand River*, 425 F.3d at 173 ("Accordingly, appellants have successfully stated a possible claim that the practical effect of the challenged statutes and the MSA is to control prices outside of the enacting states by tying both the SPM settlement and NPM escrow payments to national market share, which in turn affects interstate pricing decisions. We cannot say at this early stage of the litigation on a motion to dismiss that the Statutes' practical effect is solely intrastate.").

As the Court's prior order explained, *Grand River* could be distinguished from this case, as pled in the original complaint, in four ways. *Vizio*, 2016 WL 1305116, at *10-12. VIZIO's amended complaint would need to address these four concerns and plead facts from which the Court could infer that the E-Waste Law's National Market Share provision "has the practical effect of directly controlling the interstate prices of its televisions." *Id.* at *15.

The challenged policy in Grand River was part of a multi-state regulatory scheme governed by a master settlement agreement ("MSA"), between forty-six states and several major tobacco companies, and various states' statutes, known as Escrow Statutes and Contraband

Laws. *See Grand River*, 425 F.3d at 163-64 ("It is undisputed that the Escrow Statutes are an integral part of the nationwide settlement effected by the MSA. In order to facilitate passage of these Escrow Statutes, the majors and the states specifically negotiated in New York model escrow legislation that was ultimately included in the MSA's appendix. Each of the defendants' states independently enacted Escrow Statutes that are substantially identical to that suggested in the MSA."). The MSA required tobacco companies that were original participating manufacturers ("OPMs") at the inception of the agreement, or subsequent participating manufacturers ("SPMs") that joined the agreement at a later date, to pay the states agreed-upon amounts for health costs incurred by the states to treat smoking-related illnesses. *See id.* Tobacco companies that were non-participating manufacturers ("NPMs") or non-parties to the MSA were required to either join the MSA or pay into escrow accounts. *See id.*

Under the Escrow Statutes, NPMs that did not join the MSA were obligated to "establish and fund an escrow or reserve account" with a "per-cigarette amount" that was "roughly equal to what an OPM or SPM would pay under the MSA." *Grand River* 425 F.3d at 163. The Contraband Statutes, which were also enacted after the various states' enactment of the Escrow Statutes, required all non-OPM tobacco companies to certify annually that they were either SPMs or "making escrow deposits as an NPM," with non-compliance penalized "by denying a tax stamp," "thereby prohibiting the sale of cigarettes in that state" by any non-complying manufacturer. *Id.* at 64.

1. The Regulatory Scheme And the Pricing-Parity Context

The *Grand River* holding was premised partially on the recognition that the state statutes at issue had been enacted in the "pricing-parity context." *Grand River*, 425 F.3d at 171. The *Grand River* plaintiffs had alleged that the Escrow Statutes and Contraband Statutes, enacted

across the various states, "together establish an interdependent and interconnecting system of regulation, the practical effect of which is to set uniform (higher) prices nationwide." *Id.* As the Court noted when discussing the previous motion to dismiss in this case, the *Grand River* statutes were specifically intended to prevent NPMs from charging lower prices than companies that were participants of the MSA.

As the Defendant argues in the current motion to dismiss, the Plaintiff's Amended Complaint does not allege that the E-Waste Law was intended to, or has the effect of, causing certain television manufacturers to raise their prices to be more in line with the prices of other manufacturers nor to standardize prices nationwide. Def. Br. at 15. Instead, with respect to the alleged pricing parity purpose of the E-Waste Law, the Amended Complaint alleges only that Connecticut legislators hoped to prevent manufacturers from passing on the costs of the E-Waste Law to Connecticut consumers, have the E-Waste program be free of cost to Connecticut consumers, and that there may be "costs somewhere" that "someone [else] will pay. Amend. Compl. ¶¶ 59-62.

Plaintiff also alleges that it and similar low average-cost producers may be forced to raise their prices, which will set a new "minimum price floor" that causes other, higher-cost television manufacturers to also raise their prices. Amend. Compl. ¶ 57. Even accepting these allegations as true and drawing all inferences in favor of Plaintiff, *Ashcroft*, 556 U.S. at 678-79, these allegations fall short of alleging that the E-Waste Law was designed to standardize prices nationwide or to force certain manufacturers to standardize their prices relative to other manufacturers. *See Grand River*, 425 F.3d at 171. Plaintiff therefore does not allege that the Connecticut E-Waste Law was enacted in the pricing parity context, and *Grand River* is inapplicable.

2. The Absence of Essentially Identical Statues in Other States

Grand River also involved a situation where a large number of states had enacted "essentially identical" statutes. *Grand River*, 425 F.3d at 171. As the *Grand River* court noted, the plaintiff had alleged that "the aggregate effect of the thirty-one states' Escrow Statutes," combined with the MSA, was to "short-circuit normal pricing decisions by effectively regulating the pricing mechanism for goods in interstate commerce." *Id.* at 172 (internal quotation marks omitted). The underlying MSA and statutory scheme in Grand River involved forty-six states that were party to the MSA. *See Grand River*, 425 F.3d at 163-64. In this case, there are no allegations that nearly as many states have enacted identical statutes.

The allegations in the Amended Complaint do not remotely resemble the allegations in *Grand River*, where at least thirty-one states had enacted essentially identical statutes. In terms of allegations regarding other states' E-Waste laws, the Amended Complaint states only the following. First, Connecticut is allegedly "one of eleven states that have enacted" a provision similar to the National Market Share provision. Amend. Compl. ¶ 58. This allegation falls short of stating that the other states have identical or essentially identical E-Waste laws. Second, VIZIO alleges that the Connecticut legislature intended the E-Waste law to be "part of a 'compact' among New England states that would enact similar statutory schemes." *Id.* ¶ 64; *see also id.* ¶¶ 29-30. VIZIO does not, however, provide specific allegations as to how many states participate in this compact or to the extent these states' statutes are identical or essentially identical to Connecticut's. Thus, the Amended Complaint does not support the inference that the E-Waste Law is part of a multi-state regime involving "essentially identical" statutes that have an aggregate effect of controlling interstate prices. *Grand River*, 425 F.3d at 171.

Furthermore, the Amended Complaint recognizes that many states, in fact, have enacted substantially different e-waste laws, and that many states do not measure manufacturers' obligations using a provision similar to Connecticut's National Market Share provision. The Amended Complaint explains that twenty-four other states "regulate e-waste and most use some form of sales data as the basis for allocating recycling obligations," but that these different states' e-waste laws differ in their "use of sales data." Amend. Compl. ¶ 41. Some states, such as New Hampshire, have "chosen not to regulate e-waste." Id. ¶ 42. Finally, different states' e-waste programs "conflict in various other ways" and impose "inconsistent" obligations, and design their e-waste programs differently, with some states "assign[ing] allocations based on television units returned for recycling rather than sales." *Id.* ¶ 43.

3. Facts Allegedly Showing Challenged Statute Directly Regulates Price

Additionally, the complaint in *Grand River* alleged enough facts for that court to reasonably infer that the challenged laws acted to regulate the price of cigarettes directly. *See Grand River*, 425 F.3d at 171-72; *see also* Compl., ECF No. 1, *Grand River, et al. v. Pryor, et al.*, No. 1:02-cv-5068 (S.D.N.Y. Jul. 1, 2002) ("Grand River Compl."). VIZIO does not allege facts analogous to the key facts in the *Grand River* complaint. *See Vizio*, 2016 WL 1305116, at *11 (listing relevant paragraphs of the *Grand River* complaint).

Among other factual allegations, the *Grand River* plaintiffs alleged that "the purpose of the Escrow Statutes (and their Contraband Law counterparts), as described in the MSA, was and is to effectively and fully neutralize the cost disadvantages that the MSA's [OPMs] experience vis-à-vis [NPMs]," in other words, to limit price competition that OPMs "would otherwise face from NPMs when the [OPMs] raised their prices to fund their settlement payments to the States under the MSA." Grand River Compl. ¶ 5. Because the OPMs allegedly raised the concern

regarding losing market share during the negotiation of the MSA, the MSA and the surrounding statutory scheme allegedly took into account the goal of protecting the OPMs' market share. *Id.* ¶ 71, 84, 90. The Grand River plaintiffs also alleged that the OPMs had not lost significant market share, having gone from "98% of sales in the domestic cigarette market" in 1999 to "a combined market share of 93.6%" for the first six months of 2001, despite having increased their prices by 60% since the MSA. *Id.* ¶ 108. As discussed above, with respect to the Connecticut E-Waste Law not having been enacted in the pricing parity context, VIZIO does not allege facts sufficient to show that the E-Waste Law has the effect of setting uniform prices nationwide.

The *Grand River* plaintiffs further alleged that the Escrow Statutes operated to base NPM escrow payments directly on the amount that a NPM would pay as settlement payments were they an OPM or SPM, which forced an increase in price for the NPM's cigarettes equivalent to the price increase that would have resulted from making such settlement payments. *See* Grand River Compl. ¶¶ 5, 8, 70, 73-74, 87, 99, 115. An OPM or SPM's settlement payments were also based, in part, on the OPM or SPM's national market share, thus an NPM's escrow payments were also tied to the NPM's national market share. *See id.* ¶¶ 70, 73, 99-101, 128. NPMs were, under the Escrow Statues, allegedly obligated to make escrow payments of "more than $3.00 per carton" for the current year and similar payments for prior years' sales, which exceeded the *Grand River* plaintiffs' net profits per carton. *Id.* ¶ 115. The plaintiffs therefore alleged that the challenged statutes would either put them out of business or force an increase in prices on their products that "would destroy their ability to compete" against OPMs and SPMs. *Id.* As discussed below with respect to how VIZIO's allegations relate to upstream pricing impacts that merely affect, rather than directly control, the prices VIZIO may charge, VIZIO fails to allege facts analogous to those in the *Grand River* complaint.

4. Statute Allegedly Preventing Plaintiffs from Passing Costs to In-State Consumers

Finally, as the Court noted in its order on the previous motion to dismiss, the E-Waste Law does nothing to prevent VIZIO from imposing the costs of the E-Waste Law directly on its Connecticut consumers instead of extending price increases nationwide. *See Vizio*, 2016 WL 1305116, at *12; *see also Freedom Holdings II*, 624 F.3d at 66 (affirming judgment that there was no Commerce Clause violation because "nothing prevents manufacturers from recouping increased costs imposed by New York law from New York consumers."); *NEMA*, 272 F.3d at 110 (finding no dormant Commerce Cause violation where "the manufacturers remain free to charge higher prices only to Vermonters without risking violation of the statute"). While VIZIO alleges that it cannot, in practical terms, impose the costs of the E-Waste law solely on Connecticut customers, the statute does not prohibit it.

As Defendant argues in his current motion to dismiss, based on the allegations in the Amended Complaint, nothing in the text of Connecticut's E-Waste law prevents VIZIO from imposing the costs directly on to its Connecticut customers. Def. Br. At 16. The Amended Complaint alleges that VIZIO cannot impose the costs of the E-Waste Law solely on Connecticut in-state consumers for the following reasons. First, VIZIO alleges that if it begins raising prices solely for Connecticut consumers, its sales to Connecticut consumers would decrease while the National Market Share-based costs of the E-Waste Program would remain high because Connecticut is too small a market to impact VIZIO's National Market Share significantly, necessitating the continuing increase of Connecticut prices until no sales to Connecticut in-state customers would be possible. Amend. Compl. ¶¶ 72-73. Second, VIZIO alleges that, as a practical matter, its buyers would not enter into sales contracts with VIZIO that either (a) force

the buyer to sell the televisions at a minimum price or (b) restricts or blocks the sale of VIZIO televisions in Connecticut. *Id.* ¶ 74.

The Second Circuit rejected this argument in *NEMA*, noting that even if "the increased cost of complying with a regulation may drive up the sales price of the product and thus erode demand . . . such that production becomes unprofitable," the "decision to abandon the [regulating] state's market rests entirely with individual manufacturers based on the opportunity cost of capital, their individual production costs, and what the demand in the state will bear." *NEMA*, 272 F.3d at 111. As the larger market variables that VIZIO points to are not "controlled by the state," the Court "cannot say that the choice to stay or leave has been made for manufacturers by the state legislature." *Id.*

The E-Waste Law, therefore, is unlike the statutes the Supreme Court invalidated in the *Healy* line of cases, which explicitly required that the price of a product in a state be no higher than the price for that product in other states and necessarily prevented manufacturers from imposing the costs on customers in the state that passes such a statute. *See Healy*, 491 U.S. at 339; *Freedom Holdings II*, 624 at 66 (distinguishing statute from *Healy*). Thus, the allegations in the Amended Complaint do not support an inference that the E-Waste Law prevents VIZIO from imposing costs directly on Connecticut consumers, which, in turn, undermines the allegation that the E-Waste Law controls interstate pricing.

V. CONCLUSION

For the foregoing reasons, the Court **GRANTS** Defendant's renewed motion to dismiss, ECF No. 44, and dismisses Plaintiff's Amended Complaint, ECF No. 41, with prejudice.

Consistent with the analysis above, the Court finds that, even if given the opportunity to amend the complaint further, Plaintiff will not be able to allege facts showing that the E-Waste

Law directly controls Plaintiff's interstate prices, which is required for Plaintiff to be able to state a claim. Thus, dismissal with prejudice is appropriate. *See Coulter v. Morgan Stanley & Co. Inc.*, 753 F.3d 361, 368 (2d Cir. 2014) ("Finally, Plaintiffs contend that the district court abused its discretion in dismissing their claims with prejudice. We disagree. Plaintiffs have identified no facts that, if alleged, would establish a valid claim. The district court therefore did not abuse its discretion because any amendment . . . would be futile." (internal citations omitted)).

The Clerk of the Court is directed to close this case.

SO ORDERED at Bridgeport, Connecticut, this 22nd day of December, 2016.

/s/ Victor A. Bolden
Victor A. Bolden
United States District Judge

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

VIZIO, INC.,

Plaintiff,

v. : Civil Number 3:15cv0929 (VAB)

ROBERT KLEE

Defendant.

JUDGMENT

This matter came on for consideration of defendant's Motion to Dismiss before the Honorable Victor A. Bolden, United States District Judge.

The Court has reviewed all of the papers filed in conjunction with the motion and on December 22, 2016, an order entered granting the relief.

It is therefore, ORDERED, ADJUDGED and DECREED that the judgment is entered for the defendant and the complaint is dismissed.

Dated at Bridgeport, Connecticut this 29th day of December, 2016.

ROBIN D. TABORA, CLERK
By:
/s/ Jazmin Perez
Deputy Clerk

EOD: 12/29/2016

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

VIZIO, INC.,	:	**CIVIL ACTION NO.**
	:	
Plaintiff,	:	
	:	
v.	:	
	:	
ROBERT KLEE, in his official capacity as the Commissioner of THE STATE OF CONNECTICUT DEPARTMENT OF ENERGY AND ENVIRONMENTAL PROTECTION,	:	
	:	
Defendant.	:	**JUNE 17, 2015**

COMPLAINT FOR
DECLARATORY AND INJUNCTIVE RELIEF

I. INTRODUCTION

1. VIZIO, Inc. ("VIZIO"), an American company headquartered in Irvine, California, prides itself on delivering high performance products at a significant value, which it passes along to its customers. As it has risen to success, VIZIO has spearheaded a number of environmental initiatives, won numerous energy efficiency awards for its products, and developed policies and practices that comply with environmental laws and regulations. In line with its forward-looking environmental policies, VIZIO is a firm believer in electronic waste ("e-waste") recycling and supports a law requiring television brand-owned sellers[1] to pay for the recycling of televisions in the same manner that manufacturers of other types of electronic products are regulated in Connecticut. The Connecticut e-waste recycling program (the "E-Waste Law") for televisions, however, is so deeply flawed and unfair that it threatens VIZIO's ability to innovate and competitively price its products for consumers.

[1] As set forth in paragraph 18 hereof, under Connecticut's E-Waste Law, a brand-owned "seller" like VIZIO is considered to be a "manufacturer" by definition. Accordingly, the terms shall be used interchangeably to describe VIZIO herein.

2. The foundational problem with the E-Waste Law is that it requires television brand-owned sellers like VIZIO to fund the state's television recycling based on their most recent share of nationwide television sales (their "National Market Share"), rather than the sellers' televisions that have actually been disposed of and are in the e-waste recycling stream (their "Return Share"). For a company like VIZIO, the difference is staggering. A recent study of over 23,000 pounds of televisions collected for recycling in Connecticut revealed that not a single VIZIO product was returned for recycling. However, VIZIO's National Market Share has recently been pegged by the state at over 17%, the second highest recycling obligation of any television manufacturer in the state. Accordingly, VIZIO will pay over 17% of the total costs to recycle televisions in Connecticut, almost none of which are VIZIO products. At the same time, however, there are large foreign television brands that currently have a small National Market Share, but have a huge Return Share in Connecticut's e-waste stream. Such large foreign brands pay a fraction of what VIZIO pays under the E-Waste Law, and yet it is their televisions that are being recycled – not VIZIO's.

3. As a further matter, because each company must pay for its percentage-based National Market Share of the total weight of the televisions recycled by the state, and because the National Market Share assigned to each manufacturer does not account for the weight of manufacturers' actual televisions, the E-Waste Law penalizes companies that sell lighter, more innovative products. For a company like VIZIO, the impact is substantial. For example, today's e-waste stream is principally made up of the bulky cathode ray tube ("CRT") and/or rear projection televisions that other well-known international brands produced decades ago. As a relatively new entrant into the television marketplace, VIZIO has never sold CRT televisions and has only ever distributed flat panel televisions. CRT televisions often weigh more than 10 times as much as VIZIO's flat panel televisions. Under the E-Waste Law, VIZIO must pay its National Market Share

percentage allocation of the total aggregated weight of recycled televisions, including CRTs.

4. While the E-Waste Law subjects television manufacturers to arbitrary e-waste regulation based on national sales, sellers of all other types of electronic devices that are recycled in Connecticut, such as computer manufacturers, are only required to pay to recycle their actual Return Share under the E-Waste Law. There is no supportable basis to treat television manufacturers differently than other electronic device manufacturers and to require television manufacturers to pay to recycle their competitors' products.

5. The methodology used by Connecticut to regulate television e-waste suffers from numerous constitutional infirmities. For example, by tying regulatory fees to National Market Share, the E-Waste Law has an extraterritorial reach that regulates sales in other states and controls manufacturers' conduct beyond state borders, something patently forbidden by the U.S. Constitution. VIZIO, for example, has a large National Market Share, but sells only a nominal share of its products in Connecticut. Despite VIZIO's negligible direct sales into Connecticut, the E-Waste Law broadly impacts VIZIO on a national level, affecting interstate pricing decisions and leading to additional transactional costs, lost profits, lost market share, and consumer price impacts.

6. Connecticut's E-Waste Law also subjects VIZIO to double penalties and inconsistent state obligations. For example, because almost all of VIZIO's sales are to retailers with distribution centers outside of Connecticut, VIZIO is frequently charged an e-waste compliance cost in the state of initial sale and then again in Connecticut under the National Market Share allocation. This is merely one example of the Connecticut E-Waste Law's incompatibility with the other state e-waste programs that exist in a disparate patchwork throughout the country.

7. Further, the E-Waste Law favors in-state commercial activities over out-of-state commercial activities by offering intrastate companies a cost allocation

proportionately tied to their Connecticut sales while holding interstate companies liable for costs disproportionate to their Connecticut sales. In this manner, the E-Waste Law discriminates against and imposes a surcharge on out-of-state sales, especially when those sales are already subject to e-waste fees in another state.

8. The burdens of the E-Waste Law on interstate commerce, which include inefficient state control over the state-licensed recyclers as further described herein, substantially outweigh any local benefits to Connecticut, and there are certainly less burdensome means for Connecticut to accomplish the same end, such as using a Return Share allocation method – the very method that Connecticut uses to regulate every covered electronic device other than televisions under the E-Waste Law, or using an advanced recovery fee method – the very method that Connecticut uses to regulate the recycling of mattresses in the state.

9. As an additional matter, the fees compelled by the E-Waste Law amount to unconstitutional "user fees." The fees collected under the law pay for the administration of the e-waste recycling program and directly fund the state's television recycling. Yet, the fees charged to VIZIO are not even close to a fair approximation of VIZIO's use of the program or of the state resources expended on VIZIO.

10. In short, by arbitrarily regulating television sellers, regulating beyond state borders, discriminating against out-of-state companies, unduly burdening interstate commerce, charging grossly excessive user fees, and causing other impacts as described herein, the E-Waste Law runs afoul of a number of sacrosanct provisions of the U.S. Constitution and the Constitution of the State of Connecticut.

II. JURISDICTION AND VENUE

11. This Court has subject matter jurisdiction over this action pursuant to 28 U.S.C. § 1331 (federal question) and 28 U.S.C. § 1343 (Section 1983 jurisdiction).

Jurisdiction also lies pursuant to 28 U.S.C. § 1332 because there is complete diversity between the parties and the value of the amount in controversy exceeds $75,000.00.

12. The Court is empowered to grant declaratory relief under 28 U.S.C. §§ 2201 and 2202 and Rule 57 of the Federal Rules of Civil Procedure. The Court is empowered to grant preliminary and permanent injunctive relief under, *inter alia*, 28 U.S.C. § 2202 and Rule 65 of the Federal Rules of Civil Procedure.

13. This Court has supplemental jurisdiction over Plaintiff's state law claims pursuant to 28 U.S.C. § 1367 because they are so related to the claims within this Court's original jurisdiction that they form part of the same case and controversy.

14. This Court has personal jurisdiction over Defendant Klee because he conducts a substantial portion of his duties as Commissioner of the DEEP in the District of Connecticut. The Commissioner and the DEEP's main office is located in Hartford, Connecticut. Venue is proper in this District under 28 U.S.C. § 1391(b) because a substantial part of the events giving rise to this action occurred in the District of Connecticut.

III. THE PARTIES

15. Plaintiff VIZIO is a California corporation with a principal place of business in Irvine, California. VIZIO is and has been registered and regulated by the E-Waste Law.

16. Defendant Klee is the Commissioner of the Connecticut DEEP and is sued in his official capacity. Defendant Klee, acting through the DEEP, was and is charged, pursuant to the provisions of Connecticut General Statute 22a-637 and 22a-638, with enforcing and administering the E-Waste Law challenged in this case.

IV. OVERVIEW OF THE E-WASTE LAW

17. In July 2007, the State of Connecticut enacted Public Act No. 07-189 ("E-Waste Statute"). The E-Waste Statute has been amended several times and is codified into

Sections 22a-629 through 22a-640 of the Connecticut General Statutes. The DEEP promulgated regulations that implemented the E-Waste Law, which became effective in June 2010, were amended in 2012 ("the E-Waste Regulations"), and are located at Sections 22a-630(d)-1 and 22a-638-1 of the Regulations of Connecticut State Agencies. The E-Waste Statute and E-Waste Regulations are collectively referred to herein as the "E-Waste Law" or "E-Waste Program."

18. The E-Waste Statute applies to each "manufacturer" of "covered electronic devices" (or "CEDs"). Conn. Gen. Stat. Ann. § 22-a-630(b). CEDs only include "desktop or personal computers, computer monitors, portable computers, CRT-based televisions and non-CRT-based televisions or any other similar or peripheral electronic device among other electronics." Conn. Gen. Stat. Ann. § 22-a-629. "Manufacturers" include:

> any person who: (A) Manufactures or manufactured covered electronic devices under a brand that it licenses, owns or owned, for sale in this state; (B) manufactures or manufactured covered electronic devices without affixing a brand, for sale in this state; (C) resells or has resold in this state under its own brand or label a covered electronic device produced by other suppliers, including retail establishments that sell covered electronic devices under their own brand names; (D) imports or imported into the United States or exports from the United States covered electronic devices for sale in this state; (E) sells at retail a covered electronic device acquired from an importer that is the manufacturer as described in subparagraph (D) of this subdivision, and elects to register in lieu of the importer as the manufacturer for those products; or (F) manufactures or manufactured covered electronic devices, supplies them to any person or persons within a distribution network that includes wholesalers or retailers in this state, and benefits from the sale in this state of those covered electronic devices through such distribution network.

Id. The E-Waste Statute defines "sell" or "sale" as "any transfer of title for consideration, including, but not limited to, transactions conducted through sales outlets, catalogs or the Internet, or any other similar electronic means, and excluding leases." *Id.* The broad definition of "manufacturer," which includes "any person who manufactures [CEDs] for sale in this state" and any manufacturer who "supplies [CEDs] to any person or persons

within a distribution network that includes . . . retailers in this state, and benefits from the sale in this state," encompasses commercial activities that take place outside of Connecticut.

19. Under the central provisions of the E-Waste Law, each manufacturer must register with the DEEP and participate in the program to implement and finance the collection, transportation, and recycling of CEDs. The registration fees and the allocation of costs for television manufacturers under the E-Waste Program are based on a manufacturer's National Market Share.

20. The DEEP assigns National Market Share allocations based on national sales data for each CED category from the previous year. The E-Waste Statute defines "market share" as "a manufacturer's national sales of a particular product category of CEDs expressed as a percentage of the total of all manufacturers' national sales for such product category of CEDs." Conn. Gen. Stat. Ann. § 22a-629. The statute instructs that "Market share information shall be based upon available national market share data." Conn. Gen. Stat. Ann. § 22a-631(a). The E-Waste Regulations require the DEEP Commissioner to "determine a manufacturer's market share each year." Conn. Agencies Regs. § 22a-638-1(g)(1). The regulations further provide that for each type of CED, the market share determination must be "based on an amount that approximates the total number of units sold by all manufacturers for the previous year and approximates the number of units sold that are attributable to each manufacturer." Conn. Agencies Regs. § 22a-638-1(g)(2). The E-Waste Regulations further provide that "[t]his determination shall be based upon nationally available market share data, including, but not limited to, the number of units shipped, retail sales data, consumer surveys, information provided by the manufacturers, or other nationally available market share data." *Id.* There is no process set forth in the E-Waste Law for disputing the DEEP's market share determination with data other than alternate nationally available data. Conn. Agencies Regs. § 22a-638-

1(g)(3).

21. Manufacturer registration fees fund the DEEP's administration of the E-Waste Program. The initial registration fee for each manufacturer is at least $5,000, and manufacturers must pay subsequent annual registration fees that are "based on a sliding scale that is representative of the manufacturer's market share of covered electronic devices in the state. Market share information shall be based on available national market share data." Conn. Gen. Stat. Ann. §§ 22-a-630(c), (d). The "market share determination shall: . . . for all manufacturers, be used to determine a manufacturer's annual registration renewal fee." Conn. Agencies Regs. § 22a-638-1(g)(1)(A). Accordingly, all CED manufacturers pay registration fees for the administration of the E-Waste Program that are based on their national sales of CEDs.

22. The collection and recycling components of the state-run E-Waste Program for televisions are also financed by the manufacturers based on National Market Share. The E-Waste Law directs DEEP-approved Covered Electronics Recyclers ("CERs") to invoice each manufacturer for e-waste recycling according to the National Market Share percentages assigned by the DEEP. There are limited or no audit rights of these bills, and there are no caps on the total amount that may be recycled and then billed to manufacturers.

23. The collection and recycling obligations of other regulated CEDs are based on Return Share, not National Market Share. Specifically, the DEEP-mandated allocation formula for computers, monitors, and printers only requires those manufacturers to pay for their Return Share of waste by actual weight, plus a portion of the total weight of unidentifiable orphan waste (which portion is based on the manufacturer's National Market Share for orphan waste of the same type), all multiplied by the DEEP-approved price per pound. Conn. Agencies Regs. §§ 22a-638-1(g)(1)(C) and (j)(3). In contrast, television manufacturers' invoices are expressly calculated by multiplying the manufacturer's

National Market Share by the total weight of all televisions recycled (including orphan brands) and the DEEP-approved price per pound. Conn. Agencies Regs. § 22a-638-1(j)(6). The "market share determination shall: . . . for manufacturers of televisions, be used for billing by a CER." Conn. Agencies Regs. § 22a-638-1(g)(1)(B).

24. With respect to computers, monitors, and printers, the CERs must "maintain a written log that identifies responsible manufacturers by recording the brand and weight of each CED delivered to a covered electronic recycler and identified upon receipt as generated by a household in the state." Conn. Gen. Stat. Ann. § 22a-631(c). With respect to televisions, CERs need only "maintain a written log of the total weight of such televisions delivered each month to a covered electronic recycler and identified upon receipt as generated by a household in the state." *Id.*

25. The CERs "invoice manufacturers quarterly for the reasonable costs of transporting and recycling that the manufacturer is responsible for under this section, with such costs calculated for [television manufacturers] on a sliding scale basis that is representative of the manufacturer's market share of such televisions in the state multiplied by the total pounds recycled [and] for [manufacturers of computers, monitors, and printers] on a per pound basis . . . ." *Id.*

26. CERs, which carry out the e-waste recycling and directly bill the manufacturers, are central to the E-Waste Program. The DEEP approves recyclers to become CERs through an application process. Conn. Agencies Regs. §§ 22-a-638-1(b)(2)-(5). During the application process, the DEEP considers such matters as the recycler's qualifications and experience for managing and recycling electronic waste, the recycler's proposed procedures and process flow, and the transporters and recycling and disposal facilities the applicant proposes to use. *Id.* The DEEP also considers and approves the recycling charges proposed by the applicant. *Id.* "In deciding whether or not to approve an application, the commissioner shall consider . . . the fees proposed by an applicant . . .

which may provide a basis for denying an application." Conn. Agencies Regs. § 22a-638-1(b)(5).

27. Once approved, the DEEP retains oversight over a CER. A CER must notify the DEEP of certain modifications to information contained in its application, and the DEEP has discretion to revoke, suspend, or modify a CER's approval based on certain conditions. Conn. Agencies Regs. §§ 22a-638-1(b)(7)(B), (8)(A). A CER must comply with specific E-Waste Regulations such as CED separation requirements, recordkeeping and reporting requirements, specific standards for the recycling of CEDs and the disposal of recycling-generated waste, and requirements to ensure transporter and recycling and disposal facility permit compliance. Conn. Agencies Regs. §§ 22a-638-1(c)-(e).

28. As an alternative compliance mechanism, the E-Waste Law permits television manufacturers to participate in a private program or arrange for the return of CEDs for third party recycling. However, the E-Waste Law still ties each of these alternatives to a manufacturer's National Market Share. Indeed, these alternatives would be more expensive for VIZIO to implement than participating in the standard e-waste recycling program.

29. The E-Waste Law provides that "No Connecticut resident giving seven or fewer covered electronic devices to a collector at any one time shall be charged any fees or costs for the collection, transportation or recycling of such covered electronic devices." Conn. Gen. Stat. Ann. § 22a-635(b). There is no similar exemption for non-residents.

30. The E-Waste Law imposes state-specific labeling requirements. "A manufacturer or retailer shall not sell or offer for sale a covered electronic device in the state unless it is labeled with the manufacturer's brand, and the label is permanently affixed and readily visible." Conn. Gen. Stat. Ann. § 22a-633.

31. The DEEP compiles a list of manufacturers that are in compliance with the E-Waste Law and requires retailers in Connecticut to consult the list prior to selling any

CED. Retailers are prohibited from offering a CED for sale in Connecticut unless the manufacturer of the CED appears on that list. Conn. Gen. Stat. Ann. § 22a-634.

32. The E-Waste Statute gives the DEEP the power to impose cease and desist orders and to revoke registrations for any violations. Conn. Gen. Stat. Ann. § 22a-637. The E-Waste Law also empowers courts to grant temporary and permanent injunctive relief for violations, and empowers the state attorney general to bring a civil proceeding to enforce any violation. *Id.*

V. LEGISLATIVE HISTORY OF THE E-WASTE LAW

33. From the outset, the E-Waste Law was intended to have an interstate reach. When the law was being debated, various speakers at legislative hearings revealed the law's interstate impacts and effects.

34. The legislative history reveals that the law was intended to be one piece of a "uniform compact for New England." Among other comments, Senator Finch emphasized the law's "regional approach" during a debate of House Bill 7249, stating that the law would impose responsibility on manufacturers with the eventual goal of creating a regional regulation system throughout New England.

35. The legislative history also reveals that participants questioned the legality of the E-Waste Law. For example, Representative Sawyer expressed discomfort at the fact that the proposed law regulated e-waste state-by-state, commenting that the electronics industry is international while Connecticut represents just a "tiny speck." Senator Kissel asked how Connecticut would obtain jurisdiction to enforce the E-Waste Law when so many consumer electronics manufacturers are located abroad. During the debate regarding amendments to the original E-Waste Law, when the National Market Share approach for televisions was being considered, at least one speaker noted the danger of Commerce Clause challenges.

VI. VIZIO'S COMPLIANCE HISTORY

36. VIZIO was incorporated in late 2002, and entered the television market by 2003. By industry standards, VIZIO is a new market entrant. As an American consumer electronics company, VIZIO competes in sharp contrast with large foreign conglomerates that have existed for decades and whose products are saturating the recycling waste stream. VIZIO has been remarkably successful in the consumer electronics industry by producing higher quality products that conform to higher design standards, are more attuned to market demands, and are competitively priced. VIZIO has been subject to and complied with the E-Waste Law since its implementation, paying all fees and invoices assessed since that time.

37. VIZIO's customers almost exclusively consist of large retailers. VIZIO's sales to these retailers generally take place in the states where the retailers have distribution operations, such as New York. After the retailers purchase the televisions from VIZIO, they distribute them, at their discretion, to various locations throughout the country for resale to individual consumers.

38. VIZIO does not sell to any distribution centers in Connecticut. VIZIO's direct television sales in the state of Connecticut are negligible. For example, VIZIO's accounting data shows 97 sales in 2012, 47 sales in 2013, and 46 sales in 2014. Despite VIZIO's insignificant economic activity in Connecticut, it pays an exorbitant amount to comply with the Connecticut E-Waste Law. The DEEP has determined that VIZIO's television billable market share was 14.33% in 2012 and 16.088% in 2013, and VIZIO spent $518,147.42 in 2012 and $341,734.24 in 2013 to comply with the E-Waste Law. Comparing the amount of televisions that VIZIO directly sold in Connecticut in 2012 and 2013 with VIZIO's fees paid under the E-Waste Law during those years, VIZIO was charged approximately $5,971.40 for each of those televisions sold directly in Connecticut. VIZIO spent $565,417.05 to comply with the E-Waste Law in 2014, which equates to

$12,291.68 for each television sold directly in Connecticut. VIZIO has spent over $1.8 million to comply with the Connecticut E-Waste Program to date.

39. Based on 2014 national sales data, the DEEP has recently proposed VIZIO's market share to be 17.16%.

VII. SOME OF THE EFFECTS OF THE E-WASTE LAW

40. By tying manufacturers' regulatory responsibility to National Market Share, the practical effect of the E-Waste Law is to directly regulate VIZIO's out-of-state sales and to control VIZIO's conduct outside of the state's boundaries. By way of example only, one practical effect of the E-Waste Law is to control prices outside of Connecticut, which in turn affects interstate pricing decisions. In addition to direct compliance costs, the E-Waste Law impacts VIZIO's national budget, business model, pricing, and brand value, and leads to lost profits, opportunity costs, transactional costs, administrative costs, and/or market share loss. In the television market, pricing is extremely competitive, and as a result of the E-Waste Law, alone and together with similar state e-waste programs, VIZIO's competitiveness suffers. In short, the E-Waste Law stifles competition by reducing the narrow revenue margins that VIZIO can capitalize upon to price and compete.

41. The E-Waste Law, individually and collectively with other states' e-waste laws, is establishing a piecemeal pricing mechanism for interstate goods. The impact is to short circuit normal pricing decisions by effectively regulating a pricing mechanism for goods in interstate commerce.

42. Due to the broad definition of "manufacturer," manufacturers cannot escape the reach of the E-Waste Law by conducting their activities out-of-state. A manufacturer is required to comply with the E-Waste Law regardless of where its sale takes place. Once VIZIO sells a television to its retail customers out-of-state, VIZIO has no control over whether the televisions are then sold by the retail customer in Connecticut and/or ultimately disposed of in Connecticut. VIZIO cannot seek to lessen its regulatory burden

by attempting to influence the political process in the state in which it makes the retail customer sale because that state is not imposing the regulatory burden of the Connecticut E-Waste Law.

43. Similarly, a manufacturer such as VIZIO that almost exclusively sells to out-of-state retail customers that then distribute VIZIO's televisions into Connecticut retail stores for resale, cannot lessen its compliance obligation by merely adjusting its sales activities within Connecticut's borders. The only way a manufacturer such as VIZIO may lessen its regulatory burden in Connecticut is by selling fewer products out-of-state so as to lower its National Market Share.

44. The E-Waste Law also controls conduct beyond Connecticut's borders by regulating electronics that are not destined for sale or disposal in Connecticut. On information and belief, many or most of the products being counted to formulate VIZIO's National Market Share are not being sold or disposed of by any person within Connecticut's borders.

45. The E-Waste Law makes manufacturers responsible for waste generated in Connecticut regardless of where the product was sold. As long as a recycler represents that a Connecticut household disposes of the product, it becomes part of the waste stream upon which CERs invoice manufacturers.

46. The E-Waste Law subjects VIZIO to double charges and double regulation on a single sale given its interplay with e-waste laws in other states. Twenty-four (24) other states regulate e-waste and most use some form of sales data as the basis for allocating recycling obligations. However, these e-waste laws' differing use of sales data subjects manufacturers to inaccurate allocations, double regulation, and double-counting. For example, when VIZIO makes a television sale to a wholesale customer in New York, which primarily uses a state market share approach, VIZIO must pay a recycling fee in New York. Under the E-Waste Law, even if the product remains in New York, that same

sale is factored into VIZIO's National Market Share in Connecticut. As a further matter, if there is an actual subsequent sale in Connecticut, the same television results in multiple e-waste fees. As an illustration, if the wholesale customer in New York distributes the VIZIO television to a retailer in Connecticut, which sells the television to a consumer in Connecticut, VIZIO pays a second recycling fee in Connecticut on that same television, resulting in double regulation and a double charge on the same television. In essence, VIZIO is paying to recycle that same television twice in two different states.

47. VIZIO's sales in states that do not have an e-waste law or program, such as New Hampshire, are also counted towards VIZIO's National Market Share and are thus incorporated into VIZIO's recycling allocation under the E-Waste Law. For instance, despite the fact that New Hampshire has chosen not to regulate e-waste, the E-Waste Law places a Connecticut e-waste cost on a VIZIO transaction that occurs wholly outside of Connecticut's boundaries, thereby projecting Connecticut's regulatory program into another state.

48. The state e-waste programs conflict in various other ways, resulting in the imposition of overlapping, inconsistent, and confusing obligations on VIZIO and other manufacturers. Some state programs require use of state-sanctioned recyclers that invoice manufacturers throughout the year. Other states require manufacturers to actually collect and recycle CEDs. Some states set recycling "goals" for each manufacturer, while other states, like Connecticut, have no limits on the amount of waste that may be recycled and billed to manufacturers. Some state programs assign allocations according to sales, while others assign allocations based on television units returned for recycling. In determining regulatory obligations, some state programs look to state sales data while others look to national sales data. Some state laws account for the weight of the manufacturers' televisions in deriving regulatory obligations, while others do not. VIZIO expends large amounts of resources to administer the different state programs, each of which imposes a

separate obligation and additional cost on VIZIO. Among other conflicts, the interplay of these state programs often result in multiple e-waste fees for the same product or sale.

49. Because the E-Waste Law imposes a cost on VIZIO's transactions that occur wholly outside of the State, the only way that VIZIO could escape the law's reach would be to require its retail customers to suspend sales in Connecticut so that VIZIO would not fall subject to the E-Waste Law. Such a result would inhibit the free flow of interstate commerce, which is exactly what the Dormant Commerce Clause was intended to avoid.

50. In addition, Connecticut's CED labeling requirements operate extraterritorially because they apply to any product that may end up in Connecticut. Thus, manufacturers are forced to adhere to these labeling requirements on all of their products, regardless of where they are manufactured or initially sold.

51. The E-Waste Law also discriminates against out-of-state commercial activities and favors in-state activities. For instance, an in-state manufacturer's National Market Share is necessarily commensurate with its in-state sales, and thus the E-Waste Law offers such a manufacturer a cost allocation proportionally tied to its in-state sales. In contrast, an out-of-state manufacturer's National Market Share cost allocation does not correspond to its actual in-state sales, and the manufacturer is prohibited from using in-state sales data to formulate its recycling obligation.

52. Moreover, because out-of-state sales will often result in a second regulatory obligation outside of Connecticut, the E-Waste Law imposes a discriminatory surcharge on out-of-state sales. Companies with intrastate operations will never be subject to such a surcharge. In-state companies are not subjected to the regulatory burdens of conflicting states' e-waste laws, thereby giving them a cost advantage in comparison with VIZIO and other interstate companies that must take on the cost of the conflicting state laws.

53. The E-Waste Law favors in-state manufacturers with infrastructure

necessary to implement a private collection program. In order to utilize the private program alternative, out-of-state manufacturers have to rely solely on expensive third party arrangements to comply with the law, whereas in-state manufacturers have the option to commit, at lower cost, their own local personnel and resources to the effort. The E-Waste Law gives local manufacturers with a physical presence in Connecticut a competitive advantage and drives up the costs for out-of-state manufacturers to sell their products to consumers.

54. Further, the E-Waste Law does not treat out-of-state residents the same as in-state residents. While residents generating less than seven CEDs are exempt from fees and costs, non-residents are not exempt.

55. The recycling aspects of the E-Waste Law are also disruptive of interstate commerce. The E-Waste Law interferes with national and even international markets relating to e-waste by prohibiting any party from collecting and recycling e-waste except those parties licensed by the state under a program that dictates many of the terms upon which the recyclers may conduct their business, including the very terms of service between the recyclers, manufacturers, and consumers. Onerous and unreasonable state control over the recyclers has created barriers to market entry and has led to recycling costs that are higher than the national average. For instance, under the E-Waste Program, the DEEP controls prices that recyclers may charge.

56. Any alleged public benefits of the E-Waste Law are outweighed by the burdens it imposes on regulated companies and interstate commercial activities. Furthermore, there are alternative methods that can be employed to accomplish e-waste recycling that are far less burdensome on interstate commerce. For example, a less burdensome regulatory program for television e-waste is one that relies on Return Share, the same type of program that Connecticut uses to regulate all CEDs other than televisions.

VIII. SOME OF THE ARBITRARY ASPECTS OF THE E-WASTE LAW

57. The E-Waste Law arbitrarily singles out television manufacturers to pay for the recycling of televisions they never manufactured, while manufacturers of other types of electronic products either pay based on the actual e-waste for which they bear responsibility or have no obligation whatsoever because they are excluded from regulation. Singling out television manufacturers for differential treatment bears no rational relationship to any putative purpose of the E-Waste Law such as increased recycling. National Market Share, for example, does not result in higher recycling rates.

58. Another oft-referred to purpose of e-waste recycling is safe handling of chemicals that are commonly used in electronics, such as mercury, lead, cadmium, and polychlorinated biphenyls ("PCBs"). Yet, consumer products, like appliances and telephones, that contain hazardous substances are not targeted by the E-Waste Law. Indeed, the E-Waste Law specifically exempts clothes washers, clothes dryers, refrigerators, freezers, microwave ovens, conventional ovens and ranges, dishwashers, air conditioners, dehumidifiers, air purifiers, telephones of any type, and handheld devices. These types of products often contain potentially hazardous or toxic materials such as heavy metals (*e.g.*, lead, hexavalent chromium, mercury, and cadmium), brominated flame retardants, and PCBs. There is no rational basis for exempting certain electronic devices from regulation, especially when many of the unregulated electronic devices constitute a larger (and growing) percentage of the waste stream.

59. Under the E-Waste Law, manufacturers of computers, monitors, and printers are regulated based on their Return Share, which means their regulatory responsibility is determined based on products they actually manufactured that are returned for recycling. The E-Waste Law's treatment of television manufacturers is diametrically opposite. A television manufacturer's regulatory responsibility is tied purely to recent television sales, regardless of the number of that manufacturer's products that are being

disposed of (or even sold) inside the state, which means the manufacturer must pay to recycle televisions it never manufactured.

60. If VIZIO were regulated based on its Return Share in Connecticut, it would be responsible for negligible e-waste fees, if any at all. As indicated above, based on a recent study of over 23,000 pounds of televisions collected for recycling in Connecticut, not a single VIZIO product was found. Moreover, Return Share data from other states shows that the number of VIZIO televisions being collected for recycling is a trivial fraction of the total number of televisions being recycled. In Washington, based on two recent invoices, VIZIO's return share was calculated to be 0.09% and 0.16% of the total waste stream collected and invoiced. There is no rational basis for distinguishing between the responsibility of television manufacturers and the responsibility of manufacturers of other electronic products.

61. Because the E-Waste Law applies each manufacturer's National Market Share to the total weight of television e-waste recycled by the CERs, each manufacturer's compliance burden is further divorced from its actual contribution to the e-waste stream. The E-Waste Law fails to counteract this imbalance because it does not account for the weight of a manufacturer's products in determining National Market Share, but only considers sales data. There is no rational basis to exclude consideration of the weight of the manufacturers' products. Similarly, the E-Waste Law does not account for the type or amount of hazardous substances in manufacturers' televisions. For example, CRTs contain significant quantities of lead, which is expensive to recycle, but VIZIO's flat screen televisions only contain miniscule concentrations of lead in compliance with multiple state and international regulations restricting the use of hazardous materials in consumer electronics. Under the E-Waste Law, VIZIO is subsidizing the recycling of its older competitors' heavy and toxic CRTs. There is no basis to treat all television manufacturers the same when only some of those manufacturers bear responsibility for the hazardous

substances that constitute the bulk of the television recycling costs.

62. There is no rational basis to impose retroactive liability on VIZIO. VIZIO has invested significant resources in the electronic products that it sells under its brand. When VIZIO entered the market, it was unforeseeable that it would be held responsible for recycling other manufacturers' electronic devices or for recycling types of electronic devices that it never produced or intended to produce. The E-Waste Law imposes new liability on all manufacturers, including VIZIO, to finance the recycling of electronics that were the subject of transactions occurring prior to the law's implementation.

IX. USER FEES

63. The regulatory payments compelled by the E-Waste Law are "user fees" that are used to pay for the DEEP's costs of administering the E-Waste Program and to directly fund CED recycling. If a manufacturer wants to allow for the sale of its products in Connecticut, whether by the manufacturer or by a reseller, then it must pay the fees assessed by the E-Waste Law.

64. The fees that each manufacturer pays to CERs directly fund the CED recycling mandated by the E-Waste Law. The fee rate and the formula by which each invoiced fee amount is calculated is controlled by the DEEP, as are the activities of the CERs. CERs must adhere to stringent licensure requirements and the DEEP controls the terms by which the CERs operate. The CERs are under state control.

65. As set forth above, the amount of the user fees collected under the E-Waste Law is determined by the DEEP on the basis of each manufacturer's National Market Share. Each manufacturer's annual fee is based on its National Market Share of CED sales. Television manufacturers are also charged user fees to fund the state-controlled CER recycling based purely on National Market Share. Manufacturers of other CED types are also charged orphan share fees that are based on National Market Share. The E-Waste Law allocates user fees without regard to a manufacturer's in-state sales, the type or weight

of the materials used in a manufacturer's CEDs, or the manufacturer's CEDs that are actually recycled.

66. VIZIO's user fees under the E-Waste Law are not a fair approximation of its use of Connecticut's E-Waste Program and are excessive in relation to VIZIO's contribution to Connecticut's e-waste disposal and recycling costs.

X. CLAIMS FOR RELIEF

COUNT 1

VIOLATION OF THE DORMANT COMMERCE CLAUSE OF THE U.S. CONSTITUTION

67. Plaintiff repeats and realleges the allegations in Paragraphs 1 to 66 of the Complaint, as if fully set forth herein.

68. The Commerce Clause of the United States Constitution provides that only "(t)he Congress shall have the Power. . . (t)o regulate Commerce. . . among the several States. . . ." Art. I, § 8, cl.3. Likewise, the Commerce Clause bars states from unjustifiably discriminating against or burdening the interstate flow of articles of commerce.

69. Televisions and CEDs are articles in commerce that are subject to the sole power of Congress to regulate commerce among the several states under the Commerce Clause of the United States Constitution.

70. The E-Waste Law exceeds the authority of the State of Connecticut or the DEEP to regulate or burden interstate commerce. The E-Waste Law has an extraterritorial reach that has the practical effect of controlling manufacturers' conduct and regulating goods in commerce beyond the boundaries of the state.

71. The burdens imposed on interstate commerce as a result of the E-Waste Law outweigh the local benefits to Connecticut residents.

72. The E-Waste Law also violates the Commerce Clause due to its discriminatory effect on out-of-state manufacturers that have no physical presence in

Connecticut and to the differential treatment that the law gives to out-of-state and in-state persons, products, and activities.

73. At all times, Defendant acted under color of state law.

74. Defendant's enforcement of the E-Waste Law deprived Plaintiff of its rights under the Commerce Clause of the United States Constitution, in violation of 42 U.S.C. § 1983.

75. Any applicable state administrative procedures were exhausted and/or are futile and inadequate and do not provide for the relief sought hereby.

76. Plaintiff will suffer immediate and irreparable harm if Defendant is permitted to enforce the E-Waste Law.

COUNT 2

UNCONSTITUTIONAL USER FEE UNDER THE U.S. CONSTITUTION

77. VIZIO repeats and realleges the allegations in Paragraphs 1 to 76 of the Complaint, as if fully set forth herein.

78. The E-Waste Law charges user fees that are not a fair approximation of each manufacturer's use of Connecticut's E-Waste Program and are excessive in relation to the benefit conferred upon certain manufacturers, including VIZIO individually, thereby imposing impermissible burdens on interstate commerce.

79. At all times, Defendant acted under color of state law.

80. Defendant's enforcement of the E-Waste Law has deprived Plaintiff of its constitutional rights under the Commerce Clause as guaranteed by the United States Constitution, in violation of 42 U.S.C. § 1983.

81. Any applicable state administrative procedures were exhausted and/or are futile and inadequate and do not provide for the relief sought hereby.

82. Plaintiff will suffer immediate and irreparable harm if Defendant is permitted to enforce the E-Waste Law.

COUNT 3

REGULATORY TAKING UNDER THE U.S. CONSTITUTION AND CONNECTICUT CONSTITUTION

83. Plaintiff repeats and realleges the allegations in Paragraphs 1 to 82 of the Complaint, as if fully set forth herein.

84. The Takings Clause of the Fifth Amendment of the United States Constitution provides: "Nor shall private property be taken for public use, without just compensation."

85. Article I, Section 11 of the Constitution of the State of Connecticut similarly provides: "The property of no person shall be taken for public use, without just compensation therefor."

86. The property interest of which VIZIO is deprived is significant, as VIZIO has been required to spend over $1.8 million to comply with the E-Waste Law thus far.

87. VIZIO had reasonable investment-backed expectations that it would not be responsible for the recycling of other manufacturers' CEDs, including CRTs, that VIZIO never manufactured or sold.

88. As a manufacturer that never manufactured or sold CRTs, the E-Waste Law singles out VIZIO to bear a substantial burden based on other manufacturers' past conduct of manufacturing or selling CRTs, which conduct is unrelated to any harm caused by VIZIO.

89. The E-Waste Law applies retroactive liability on all manufacturers by requiring manufacturers to fund the recycling of CEDs manufactured prior to the enactment of the law, as well as CEDs manufactured by competitors and orphan waste.

90. The E-Waste Law applies retroactive liability on VIZIO by requiring VIZIO to fund the recycling of CRTs and CEDs manufactured prior to VIZIO's entry into the electronics market, an obligation that VIZIO could not have anticipated and which is

entirely disproportionate to VIZIO's participation in the market at the time such CRTs and CEDs were manufactured or sold.

91. The E-Waste Law imposes an unforeseen and substantial financial burden on all manufacturers, including VIZIO individually.

92. At all times, Defendant acted under color of state law.

93. Defendant's enforcement of the E-Waste Law has deprived the Plaintiff of its rights under the Takings Clause of the Fifth Amendment of the United States Constitution, in violation of 42 U.S.C. § 1983, and under Article I, Section 11 of the Constitution of the State of Connecticut.

94. Any applicable state administrative procedures were exhausted and/or are futile and inadequate and do not provide for the relief sought hereby.

95. Plaintiff will suffer immediate and irreparable harm if Defendant is permitted to enforce the E-Waste Law.

COUNT 4

EQUAL PROTECTION VIOLATION OF THE U.S. CONSTITUTION AND CONNECTICUT CONSTITUTION

96. VIZIO repeats and realleges the allegations in Paragraphs 1 to 95 of the Complaint, as if fully set forth herein.

97. The E-Waste Law treats relatively new and successful electronics companies, including VIZIO individually, that currently have a large and growing National Market Share, differently than those older electronics companies that have a shrinking National Market Share, thereby discriminating against relatively new and successful electronics companies, including VIZIO individually.

98. The E-Waste Law treats electronics companies that never manufactured or sold CRTs, including VIZIO individually, differently than those electronics companies that have manufactured or sold CRTs, thereby discriminating against the manufacturers that

never manufactured or sold CRTs, including VIZIO individually.

99. The E-Waste Law treats electronics companies that primarily manufacture or sell televisions, including VIZIO individually, differently than electronics companies that produce non-television CEDs or electronic devices that are not regulated by the E-Waste Law, thereby discriminating against manufacturers that primarily manufacture or sell televisions, including VIZIO individually.

100. The E-Waste Law treats interstate manufacturers, including VIZIO individually, differently than intrastate manufacturers, thereby discriminating against interstate manufacturers, including VIZIO individually.

101. The amount VIZIO is required to pay under the E-Waste Law is arbitrary. There is no rational connection between VIZIO's in-state sales of televisions and the costs of the E-Waste Program that VIZIO is required to pay. There is no rational connection between the CEDs attributable to VIZIO that are actually recycled under the E-Waste Program and the amount VIZIO is obligated to pay under the E-Waste Law.

102. The amount each manufacturer is required to pay under the E-Waste Law is arbitrary. There is no rational connection between each manufacturer's in-state sales of CEDs and the amount each manufacturer is obligated to pay under the E-Waste Law. There is no rational connection between the CEDs attributable to each manufacturer that are actually recycled under the E-Waste Program and the amount each manufacturer is obligated to pay under the E-Waste Law.

103. At all times, Defendant acted under color of state law.

104. Defendant's enforcement of the E-Waste Law has deprived Plaintiff of its rights to equal protection of the laws as guaranteed by the Fourteenth Amendment of the United States Constitution, in violation of 42 U.S.C. § 1983, and as guaranteed by Article I, Section 20 of the Constitution of the State of Connecticut.

105. Any applicable state administrative procedures were exhausted and/or are

futile and inadequate and do not provide for the relief sought hereby.

106. Plaintiff will suffer immediate and irreparable harm if Defendant is permitted to enforce the E-Waste Law.

COUNT 5

SUBSTANTIVE DUE PROCESS UNDER THE U.S. CONSTITUTION AND UNDER THE CONNECTICUT CONSTITUTION

107. VIZIO repeats and realleges the allegations in Paragraphs 1 to 106 of the Complaint, as if fully set forth herein.

108. The E-Waste Law has deprived and continues to deprive VIZIO of liberty and property without substantive due process of law.

109. There is no rational relation between the financial burden imposed upon VIZIO by the E-Waste Law and VIZIO's actual contribution to the e-waste stream in Connecticut.

110. The obligation imposed on VIZIO to fund in-state CED recycling in Connecticut in proportion to its National Market Share is arbitrary, irrational, and lacks any plausible rational basis.

111. The E-Waste Law is retroactive in that it imposes new liability on manufacturers, including VIZIO individually, for past transactions. The mandate to fund the recycling of CEDs purchased prior to the enactment of the E-Waste Law is arbitrary, irrational, and lacks any plausible rational basis.

112. At all times, Defendant acted under color of state law.

113. Defendant's enforcement of the E-Waste Law has deprived Plaintiff of its rights to due process as guaranteed by the Fourteenth Amendment of the United States Constitution, in violation of 42 U.S.C. § 1983 and as guaranteed by Article I, Section 8 of the Constitution of the State of Connecticut.

114. Any applicable state administrative procedures were exhausted and/or are

futile and inadequate and do not provide for the relief sought hereby.

115. Plaintiff will suffer immediate and irreparable harm if Defendant is permitted to enforce the E-Waste Law.

PRAYER FOR RELIEF

WHEREFORE, VIZIO respectfully requests a judgment against Defendant as follows:

(1) Declaring that the E-Waste Law (Sections 22a-629 through 22a-640 of the Connecticut General Statutes and Sections 22a-630(d)-1 and 22a-638-1 of the Regulations of Connecticut State Agencies) is unconstitutional under the Commerce Clause.

(2) Declaring that the E-Waste Law (Sections 22a-629 through 22a-640 of the Connecticut General Statutes and Sections 22a-630(d)-1 and 22a-638-1 of the Regulations of Connecticut State Agencies) is unconstitutional under the Takings Clause of the Fifth Amendment of the United States Constitution and under Article I, Section 11 of the Constitution of the State of Connecticut.

(3) Declaring that the E-Waste Law (Sections 22a-629 through 22a-640 of the Connecticut General Statutes and Sections 22a-630(d)-1 and 22a-638-1 of the Regulations of Connecticut State Agencies) is unconstitutional under the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution and under Article I, Section 20 of the Constitution of the State of Connecticut;

(4) Declaring that the E-Waste Law (Sections 22a-629 through 22a-640 of the Connecticut General Statutes and Sections 22a-630(d)-1 and 22a-638-1 of the Regulations of Connecticut State Agencies) violate Plaintiff's due process rights under the Fourteenth Amendment of the United States Constitution and under Article I, Section 8 of the Constitution of the State of Connecticut;

(5) Preliminarily and permanently enjoining Defendant from enforcing the E-Waste Law (Sections 22a-629 through 22a-640 of the Connecticut General Statutes and

Sections 22a-630(d)-1 and 22a-638-1 of the Regulations of Connecticut State Agencies);

(6) Awarding Plaintiff costs and attorneys' fees pursuant to 42 U.S.C. § 1988 and any other applicable laws; and

(7) Granting Plaintiff such other and further relief as the Court deems just and proper.

JURY DEMAND

Plaintiff demands a trial by jury.

PLAINTIFF,
VIZIO, INC.,

By: /s/ Patrick M. Fahey

Terry D. Avchen (*pro hac vice* pending)
Noah Perch-Ahern (*pro hac vice* pending)
Clare M. Bienvenu (*pro hac vice* pending)
GLASER WEIL FINK HOWARD
AVCHEN & SHAPIRO LLP
10250 Constellation Boulevard, 19th Floor
Los Angeles, CA 90067

Patrick M. Fahey (ct13862)
For SHIPMAN & GOODWIN LLP
One Constitution Plaza
Hartford, CT 06103
Telephone: 860-251-5000
Facsimile: 860-251-5219
Email: pfahey@goodwin.com

Its Attorneys

UNITED STATES DISTRICT COURT

DISTRICT OF CONNECTICUT

VIZIO, INC.	:	Case No 15CV929(VAB)
Plaintiff,	:	
vs.	:	
ROBERT KLEE, in his capacity as the Commissioner of the State of Connecticut Department of Energy and Environmental Protection	:	915 Lafayette Blvd Bridgeport, CT March 24, 2016
Defendant.	:	

TRANSCRIPT OF ORAL ARGUMENT ON DEFENDANT'S MOTION TO DISMISS

BEFORE: THE HONORABLE VICTOR A. BOLDEN, U.S.D.J.

APPEARANCES:

FOR THE PLAINTIFF:
TERRY AVCHEN, ESQ.
NOAH PERCH-AHERN, ESQ.
GLASER, WEIL, FINK, HOWARD, AVCHEN & SHAPIRO
10250 Constellation Blvd
Los Angeles, CA 90067

PATRICK FAHEY, ESQ.
Shipman & Goodwin
One Constitution Plaza
Hartford, CT 06103

FOR THE DEFENDANT:
MICHAEL SKOLD, ESQ.
Office of the Attorney General
55 Elm Street
Hartford, CT 06106

Sharon Montini, RMR, FCRR
Official Court Reporter

THE COURT: Please be seated. All right, we're here in VIZIO v. Klee. Will counsel, please, state their appearances for the record.

MR. FAHEY: Good morning, your Honor. Pat Fahey of Shipman & Goodwin for the plaintiff.

THE COURT: Good morning, Mr. Fahey.

MR. AVCHEN: Terry Avchen, A-v-c-h-e-n, of Glaser Weil for the plaintiff.

THE COURT: Good morning, Mr. Avchen.

MR. PERCH-AHERN: Noah Perch-Ahern, also from Glaser Weil, for the plaintiff VIZIO.

THE COURT: Okay, good.

MR. SKOLD: Assistant Attorney General Michael Skold on behalf of the defendant, your Honor.

THE COURT: All right. Good morning, Mr. Skold. How are you?

We're here on this motion to dismiss that's been filed on behalf of the State, the defendant. I sent out an order yesterday just sort of providing some structure. It seems like there are a lot of arguments here.

So, Mr. Skold, are you ready to proceed?

MR. SKOLD: Absolutely, your Honor.

THE COURT: All right. Go ahead, sir.

MR. SKOLD: Your Honor asked in the order to address briefly the benefits of the law, and I think there are two ways to look at the benefits of the law; one is to the law generally and then one is to the market share approach that the law takes.

THE COURT: I will admit, I put in the order five minutes possible. I'll be flexible. I don't have a clock or a time, but I did want to sort of focus people.

MR. SKOLD: Sure.

THE COURT: Because I've learned in my short term on the bench that if I say ten minutes, lawyers will take 20. So if I say five, I may be lucky to get away with 10.

MR. SKOLD: I'll try to be brief. With regard to the law generally, your Honor, it's an extended producer responsibility law that is similar to many laws across the state. It basically recognizes that televisions and other electronic products have toxic materials, hazardous materials that pose a risk to the environment and to the public health and safety, and they fill up landfills. So the purpose of the law is to create a regulatory -- mandatory statewide regulatory

framework for the collection and recycling of those products to keep them out of the environment and our landfills.

The program sets up I think a very comprehensive way for the Department of Energy and Environmental Protection, which I'll refer to as DEEP, to monitor and regulate how that is done: To make sure that the recyclers are licensed and appropriately certified to be doing the recycling; that it's done in the proper way; it creates an enforcement mechanism for the department to enforce the requirements of the program; and, most relevant here, it creates a financing mechanism to finance the recycling by placing the costs of recycling onto the manufacturers who produce these products and profit from them.

These, your Honor, I think are the same benefits that the Supreme Court identified in the *United Haulers* case that we talk about in our briefs. I don't think they are in dispute. I think in paragraph 1 of the complaint the plaintiff acknowledges very candidly that it's a firm believer in these types of laws, requiring manufacturers to pay for the recycling. So that's not in dispute.

I think what may be in dispute is the

benefits of the national market share approach. Essentially, there are several ways that states can do these types of recycling programs. One is a return share and one is a national market share approach.

The return share basically says that manufacturers don't pay their recycling costs for any of the products until their own products are actually returned for recycling.

THE COURT: What I understand, it is that the return share is the process that you all use for other items, computers, printers and so forth, but decided to use national market share with respect to televisions.

MR. SKOLD: That's the way it's currently set up, your Honor, and I can explain why. I will explain why.

THE COURT: Sure.

MR. SKOLD: There is some difference between the two, but the return share essentially means that manufacturers pay to recycle the cost of their own products when they are actually returned. There are several drawbacks to that approach. One is it's very costly because it requires the recyclers to manually sort out each television that

is returned, specify which manufacturer manufactured it, and the administrative costs are much higher.

THE COURT: But I was under the impression that with respect to computers and printers, what they do is there is some kind of a log that is maintained that would keep information on manufacturers. And they would keep a similar log obviously with respect to televisions. So -- although they don't actually record the manufacturers. So certainly the state could have actually set up that same log system with respect to televisions.

MR. SKOLD: They could, your Honor, but that, again, increases the cost of the program because the recyclers now have to manually sort out each television that is returned and to specify which manufacturer it goes to. The costs are higher.

But I think, more importantly, the problem with the return share is that the manufacturer doesn't actually pay to recycle the products until they're returned. So that creates a problem. When the manufacturer sells its product on day one, and then it is probably not going to be returned until day 50 or year 50, whatever it

happens to be, that manufacturer may have gone out of business by then, in which case it's not around to pay the recycling costs when its own products come back into the recycling stream.

And this -- I think the legislature determined -- we cited some legislative history in the brief that this is a particular problem in the television industry. The reason for that is that televisions have a much longer lifespan, typically, than a lot of other electronic products, which means that when a manufacturer sells it, instead of it coming backing in year 10, it comes back in year 25, just hypothetically. That leads to what the legislature was concerned about, the risk of more television manufacturers not being around to pay their recycling costs under the return share model.

And the other facts specific to the television industry is I think the legislature was concerned that the television industry in particular is an easy in, easy out industry. Manufacturers are able to come in, sell their products very quickly at Christmastime cheaply, and then exit the market before they have to pay their recycling costs.

THE COURT: So with respect to those products that you actually use the return share, the

computers and printers, their lifespan is generally not as long as a television, so, therefore, that same issue of not being able to actually capture at the time of return those who actually put out the product, that risk is considerably less with those products than it is with televisions.

MR. SKOLD: Not to say it doesn't exist. There are orphans. An orphan is basically a television that comes back when the manufacturer is no longer in business. That problem does exist in other industries. But yes, I think the legislature was concerned that the problem would be much bigger in the television industry because of the lifespan of televisions and because of the easy in, easy out nature of the industry.

So to address that, that's why they -- for that particular industry, they have currently gone to the market share. There is lots of states that have gone to the national market share approach. We're not the only one.

The benefits of that particular approach is, first, it reduces recycling costs because recyclers just take the whole poundage of what's returned, and the state has an assigned market value for market share for each manufacturer, the recycler

can just look at that, do the calculation, be done with it.

But, more importantly, it reduces the risk of this free rider problem and -- the increased free rider problem in the television industry.

I think those are really the benefits of -- I mean summary.

THE COURT: All right. But the free rider problem may actually sort of exist in both ends, meaning that there could be a manufacturer who was in existence at the time of -- obviously at the time of the sale, but doesn't exist at the time of the return or the recycling point, but there could also be manufacturers that only came onto the scene -- which I assume is part of what VIZIO's argument is, that came onto the scene after certain products had already been recycled or not yet been accommodated in the market. Meaning that there are two aspects to the free rider problem. There is the free rider problem created by the orphans and perhaps there is a free rider problem created by -- well, there's the other problem in terms of other institutions that weren't there at the time, but now have to take up a certain slack with respect to the recycling fees.

MR. SKOLD: But I don't think that's really a free rider problem, your Honor, because when, for example, VIZIO --

THE COURT: What should I call it? One is free rider. What's the other?

MR. SKOLD: Well, VIZIO, for example, they've come into the market earlier, and when they're being charged now, that's a recognition that what they are selling now is going to come back 20 years from now. And they may not be in existence 20 years from now, they may have a much smaller market share, in which case they won't be paying 20 years from now what the recycling costs are for the products that they're selling. So essentially it's a pay-forward type system. And if they are -- let's say they have 20 percent now and they have 20 percent 10 years from now, well, that's just a recognition that in 10 years from now they're still selling that many products that are going to be returned even further in the future. So it's not a free rider problem on that other end.

THE COURT: Fair enough. Okay. Thank you very much.

MR. SKOLD: Thank you.

THE COURT: All right. Who is going to

speak for VIZIO? You are, sir. Go ahead.

MR. PERCH-AHERN: Good morning, your Honor. Mr. Perch-Ahern.

THE COURT: Yes.

MR. PERCH-AHERN: As a threshold matter, contrary to Mr. Skold's statement, VIZIO disputes that the E-waste law advances any of the state's alleged purposes or its putative health and safety interests. For example, VIZIO has alleged that the E-waste law does not result in greater recycling rates than would otherwise occur, and it fails to provide for the safe recycling of not only the myriad of products it exempts, but also the very products it seeks to regulate.

VIZIO intends to show the E-waste law actually causes health and safety problems. For example, given the scarcity of recycling facilities and recycling applications for CRT televisions, CRTs are being stockpiled and improperly stored. This has led some states, including California, to allow landfilling of CRTs or their component parts.

VIZIO intends to show, among other things, that Connecticut's ban on such landfilling and the requirement for CRT recycling is causing CRTs to remain idle, posing risks related to

inadequate storage and the release of hazardous and toxic substances from the CRTs.

So we do not concede that health and safety benefits are advanced by the law, your Honor.

THE COURT: Okay.

MR. PERCH-AHERN: We also do not believe that the legislature had a rational basis for believing that the TV industry was any different than any other electronics industry when they enacted the E-waste law, your Honor. If anything, it would be plausible to believe that other electronic devices pose a greater threat given their proliferation in the waste stream and the large number of new competitors.

Finally, we sort of agree with your characterization that there is a free rider problem at the beginning. And the effects will never even out as to a company like VIZIO. It will always have an obligation, and yet, until its products reach the recycling stream, it will have paid unfairly for products it simply never produced.

So at the outset, I just wanted to address a few of Mr. Skold's statements.

THE COURT: Let me ask you this, Mr. Perch-Ahern: I assume basically a lot of the issues

that VIZIO raises disappears if the state had used the return share method for how it was imposing recycling fees. Isn't that correct? In essence, that all of your constitutional issues sort of evaporate. They may evaporate anyway, but I'm just saying that that certainly -- the only reason that, you know, there is something before us to struggle with is because of the state's decision to use return share as a means of recouping the cost rather than -- using national market share rather than return share.

MR. PERCH-AHERN: Correct. I mean, I think there is other alternatives.

THE COURT: I understand there may the be other alternatives, but, in essence, if they had not used the national market share -- and I guess the notion -- we are going to get to the constitutional arguments in a minute, but I thought it was helpful to make sure I had a clear understanding of how everything functions. At the end of the day it's the national market share that really changes matters, because if they had the return share, obviously it doesn't seem like any of the other constitutional issues you have you'd be able to address.

MR. PERCH-AHERN: I think it's safe to say, you know, without having consulted with my client, we wouldn't be here today had they used return share for televisions in Connecticut, your Honor.

THE COURT: Okay. I'm sorry. Proceed.

MR. PERCH-AHERN: In my brief opening remarks -- I'll try to keep it to five minutes. I appreciate the flexibility. I won't we able to identify all of the burdens that the E-waste law imposes on VIZIO, but I would like to take an opportunity to focus on a few of the most significant burdens. In order to do that, I want to point out that the E-waste law is not an ordinary state statute. It's not a typical extended producer responsibility statute. In several key ways the law goes beyond the typical operation of a state law by regulating conduct and persons in other states and by imposing liabilities upon companies without a connection to the company's activities within the state. The operation of the statute in this manner makes the law particularly troubling, and I think those concerns inform all of our claims.

The first burden I would like to point out is that the E-waste law deprives out-of-state

residents access to the state's recycling program. This point was not expressly made in briefing, your Honor, and I'd like to take the opportunity to explain how the E-waste law discriminates on its face with respect to this issue. Specifically, Section 22a-631 provides that, "The only products eligible for recycling under the state program are those products generated by a household in the state." On its face the program is limited to products generated by a household in the state.

Confirming the statutory intent of the statute to exclude out-of-state products from the program, Section 22a-635(b) provides an exemption for collection fees to only Connecticut residents. So we pointed out --

THE COURT: But how do any of those things actually affect VIZIO itself? How would VIZIO have standing? It seems like certainly -- yes, I don't really see how that really affects VIZIO as a business. Obviously there could be some benefit to some Connecticut resident.

MR. PERCH-AHERN: Sure. Well, the Supreme Court itself has recognized that any burden on the consumer impacts the manufacturer and vice-versa. So by shifting costs out-of-state and

depriving VIZIO of resources -- I'm sorry, depriving out-of-state residents access to the program -- just by example, your Honor, the program interferes with the flow of televisions in recycling which leads to higher cost, and, because the costs are shifted out of state to consumers, that impacts VIZIO's pricing as well.

And, you know, there are several -- we can get into it with respect to dormant commerce clause later on in today's discussion or we can address it now, but we think it's pretty clear that VIZIO is allowed to allege those impacts.

The second --

THE COURT: But just -- I guess what I'm struggling with is that what we have is a recycling program, and obviously the State of Connecticut is concerned about recycling products in the state of Connecticut. So presumably they'd be concern about what Connecticut residents are doing. Why would a resident in California have any interest in what recycling is going on in the state of Connecticut?

MR. PERCH-AHERN: Well, by not being able -- for example, a resident of New York would not be able to utilize the Connecticut recycling program.

THE COURT: Okay.

MR. PERCH-AHERN: So it would not have the same opportunities to -- and by limiting access that interferes with interstate commerce, the flow of goods in commerce are restricted, prices raised, and that ultimately impacts the manufacturers because they're liable for the costs.

THE COURT: But why would a New York resident need to recycle something in Connecticut?

MR. PERCH-AHERN: Well, for example, we are pretty close to Connecticut. There might be a recycling center and a New York resident -- it might be more -- it might be closer to the resident's home. It might be more -- the Connecticut -- the New York resident might want to take advantage of the state's program that imposes liabilities on manufacturers so that it wouldn't have to pay for the recycling. So in New York it might be paying for the recycling itself versus in Connecticut it would be essentially, at least at the point of collection, free to the consumer.

THE COURT: Okay. All right.

MR. PERCH-AHERN: So that burden -- the second burden I'd like to point out acts as a sort of one-two punch against the out-of-state consumer;

namely, by imposing liabilities based on national market share, the E-waste law shifts the cost of the E-waste program to out-of-state consumers. The cost-shifting occurs in two manners. First, the E-waste law regulates based on national sales, subjecting those out-of-state sales to a risk of multiple E-waste regulatory burdens. Analogous case law makes it clear that a state's taxation of out-of-state sales is forbidden, not only as an extraterritorial regulation, but also because of the mere risk that the sale would be subjected to multiple state tax burdens.

Cost shifting also occurs out of state when a manufacturer's state market share is less than its national market share. In such instance, out-of-state residents are paying proportionally more than in-state residents, which makes the law like a surcharge on out-of-state sales, another discriminatory burden forbidden by the dormant commerce clause.

THE COURT: I'm struggling with that because I'm trying to figure out exactly how out-of-state residents are paying more for VIZIO televisions because of Connecticut's -- the structure of Connecticut's recycling program.

MR. PERCH-AHERN: So because the law -- there is two ways. Because the law counts national sales, essentially the law is counting sales in other states, those same sales in other states might also be counted. The mere risk of double counting is something that is forbidden by the dormant commerce clause; the mere risk, your Honor, if you look at the analogous tax cases.

The second way is in practice or in effect, and that's when the Connecticut market share is lower than the national market share. In that instance a disproportionate amount of national sales are being counted to calculate the state liabilities. In that instance there is also a disproportionate impact on the out-of-state consumer.

So summing up the first two burdens I have discussed, out-of-state residents are not only deprived of access to the state recycling program, but they have to disproportionately pay for it. This is essentially subsidizing the in-state program and underscores that the statute is designed to protect local interests. That, your Honor, is sort of the hallmark of a discriminatory statute that has been invalidated time and again under Supreme

Court case law.

Another significant burden imposed by the E-waste law is the impact it causes on out-of-state transactions, namely the burdens caused by the extraterritorial impact of the law. And in this instance we've pointed to several extraterritorial aspects of the law.

First is that VIZIO contends that the E-waste law applies directly to VIZIO's national sales, which means that the law is importing a direct cost onto national sales. Second, once the E-waste law is triggered, something that can occur based on a single annual retail sale of a VIZIO television in Connecticut, the E-waste law invariably bleeds into the manufacturer's transactions with retailers outside of the state regardless of the manufacturer's nexus to activities within the state. For VIZIO, this is significant because it conducts almost no business directly in the state of Connecticut.

And the third extraterritorial impact is the one that was potentially the subject of the most briefing, which is the fact that the regulation has a practical effect of controlling out of prices. By dint of the national market share provision, the

direct tying of in-state liabilities to national market share has the practical effect of controlling prices, and as recognized by the Second Circuit, that's a recognized burden and forbidden by the dormant commerce clause.

The last -- in summing these up, your Honor, the extraterritorial burdens, I'd like to point out that VIZIO has little recourse with the political branches in Connecticut because VIZIO is an out-of-state manufacturer and its impacts are being felt out of state where other state lawmakers have no jurisdiction.

But the last burden is the one I think that sort of rings the most in anyone's ears when you describe this case to them, your Honor. The most fundamental burden alleged by VIZIO is the fact that the E-waste law requires VIZIO to recycle products it never produced. So we disagree with the characterization that this is an extended producer responsibility statute. It's a national market share statute, something subject to particular constitutional scrutiny, and something that is unlike the model used by, you know, your typical state statute.

The E-waste law assigns responsibility

for discarded products based on nothing more than current national sales. This leads to an absence of justice for VIZIO and similarly situated companies. Indeed, VIZIO's products, as we've alleged, are virtually absent from the waste stream, and the bulk of the recycling stream in Connecticut is comprised of cathode ray tube televisions, the big, old boxy TVs that we had that are sitting around and are saturating the waste stream today.

VIZIO never produced those types of televisions. It's literally a product VIZIO never produced, but is now being required to pay for. I can think of no other statute that imposes that kind of liability. Indeed, many of the CRTs that VIZIO is liable for were manufactured not only prior to the date of the E-waste law, but prior to VIZIO's incorporation. Now VIZIO is competing with the companies who produced those products. There is a direct market share impact.

This fairness issue is essential to VIZIO's claims, and it goes to show not only the arbitrariness of the law, but also that VIZIO is being regulated without an adequate connection to VIZIO's activities within the state.

So, your Honor, the foregoing, the

burdens that I've discussed are not exclusive of all of the burdens that VIZIO has alleged, but they're the most significant ones and the ones that I wanted to discuss in my opening remarks.

THE COURT: Great. Thank you very much.

Let me just shift to the equal protection clause. Actually, while you are up, Mr. Perch-Ahern, having looked at all of the burdens that you all are talking about, and focussing on the equal protection clause, as I understand it from your papers, effectively you are conceding that the appropriate test that the Court has to apply is rational basis. Is that right?

MR. PERCH-AHERN: That's correct.

THE COURT: So the challenge I see is that I'm not aware of any case where the Supreme Court or the Second Circuit or some court has found that under the rational basis standard the Court would strike down something like this. I mean there isn't -- I mean what the court has done routinely is obviously upheld government actions under the rational basis standard with very limited exceptions, and those limited exceptions have been essentially when they've applied what one might call a heightened rational basis and it's been because of

-- in sort of in very unique circumstances that I would say aren't here; say in *Romer v. Evans* where they looked at what the state of Colorado did in terms of its impact on the legislation that was intended to sort of limit advocacy related to gay and lesbian rights.

So what's the case that sort provides a basis for me saying that you would prevail under the rational basis standard?

MR. PERCH-AHERN: Sure, your Honor. It's *City of Cleburne*. In *City of Cleburne* the city zoning ordinance required a special use permit for a home for mentally disabled persons, and that was -- there was no protected class, subject to a rational basis test, and ultimately the plaintiff was able to show that the targeted class would not threaten the state's legitimate interests in ways other than those presented by other permitted uses, such as hospitals or boarding houses or halfway houses. And ultimately in that case the plaintiff prevailed.

So we would like the opportunity to -- and we agree with your Honor that it's a deferential standard, but we also have alleged that there was no rational basis, that it was utterly arbitrary to treat television manufacturers differently.

And we allege several other classifications, your Honor. We believe that we should be entitled to move forward with the litigation to demonstrate to a fact-finder that there was no conceivably plausible basis to single out television manufacturers when other electronics products not only are saturating the waste stream, but pose equally, if not more, concern given the ease of barrier to entry and ease of access to the market. So that's how I would address your Honor's question.

THE COURT: I guess the challenge I have is that I think even *Cleburne* I think sort of recognized -- I think being somewhat differential to the individuals in that circumstance, as you mentioned they were mentally disabled, but I guess in this context, whether one likes the reason -- and the court is not actually supposed to engage in whether they like the reason or not, but at the end of the day the State is effectively saying, as Mr. Skold said, they have made distinctions that they treated televisions differently from these other products given what they believe to be the lifespan of the televisions vis-a-vis these other products. So they needed to figure out -- in order for this

recycling program to be successful, they needed to figure out a way to sort of treat the products appropriately, and treating televisions differently and -- treating televisions differently in a way that allows them to capture and address the economic costs associated with recycling televisions, lead to the difference. Is it the best reason? I don't know, but at the end of the day isn't that a sufficient reason for the Court to uphold it under rational basis?

MR. PERCH-AHERN: No. We don't believe so, your Honor, because we don't think that that was conceivably plausible. We intend to show that there literally is no information that would indicate that that was plausible. And to the extent -- and we also dispute that that's why the legislature enacted the law. It looks like it was a politically motivated decision. It did not look like it was supported by rational basis whatsoever.

THE COURT: But even if it was a politically motivated decision, the question in terms of -- and also the other problem is the class then basically television manufacturers vis-a-vis nontelevision manufacturers? And so the question is whether or not that rational basis is intended to

sort of worry about such distinctions. But I get your point. Let me hear from Mr. Skold. I'm sorry. Go ahead.

MR. PERCH-AHERN: If I could raise one more issue, your Honor. It's with respect to another classification. Another rational basis, or another equal protection theory that's raised in our complaint, is that TV manufacturers who never made or sold CRTs are essentially treated differently by being lumped together with the CRT producers. And I believe the *Allegheny* decision is supportive of our ability to proceed with the claim. A uniform property tax law in that case was ultimately determined to have an irrational burden on new property purchasers versus old homeowners. And I would just -- so I wanted to make sure I raised that point.

THE COURT: I appreciate it. Part of what the Court struggles with is that obviously making a decision in this case has implications in other cases, and the question is that legislatures are going to do things for a variety of reasons, and the question, at least with respect to this equal protection issue, is whether or not this Court should be scrutinizing the reasons so carefully, and

slicing and dicing it that way is one of the challenges. Okay. Thank you.

Mr. Skold, just on equal protection. I find it easier to sort of deal with some of these things point by point.

MR. SKOLD: Sure. I think I've briefed this issue pretty comprehensively, your Honor. I think everything that you were saying to opposing counsel is basically what the argument is. I think the threshold is that television manufacturers just aren't similarly situated to any other manufacturers of electronic devices. They have different products, they have different internal components, different lifespans. That's why they can be treated differently and equal protection just doesn't even apply.

Even if you get beyond that -- I don't want to belabor that point because the classification is eminently rational. The legislature in the legislative history that we cited has cited the reasons why they did it. Those are certainly plausible. The plaintiff may dispute them, may think that there are facts that disprove that, but that's not what the Court does under rational basis. There doesn't have to be any

evidence. The legislature is entitled to engage in rational speculation. I think that that -- and factual development is inappropriate. Not only is it not necessary, it's inappropriate for the Court to engage in a judicial fact-finding on these types of things under rational basis.

THE COURT: When you say that, you sort of mean in this context the only fact-finding would be what? I guess deposing the legislators, deposing members of the general assembly, I guess.

MR. SKOLD: What I'm trying to say is that the Court --

THE COURT: No, I understand. But in terms of your point about we don't need to go to the discovery stage to sort of flesh out this claim, the question is what more are we going to learn other than what we have with respect to the legislative record. It would be then looking into the minds of the actual legislators?

MR. SKOLD: Absolutely. What the legislators said in the record is eminently plausible and rational. And I really don't have much to add.

THE COURT: That's fine.

Mr. Perch-Ahern, I just wondered, were

there any other points you had on the equal protection argument?

MR. PERCH-AHERN: I don't think so. I think those are our main points, your Honor.

THE COURT: So while I have you, it seems to me that the same sort of analysis with respect to needing some sort of fundamental right is at play in trying to suggest that there is a violation of the substantive due process clause. Am I right?

MR. PERCH-AHERN: We -- I think substantive due process is different.

THE COURT: Okay.

MR. PERCH-AHERN: Let me explain that. Before I do, let me just go back quickly to equal protection. Your Honor raised a valid point, which is the impact the case would have on other cases. We're not asking your Honor to weigh any balancing here. And the Court -- the state might ultimately prove that there was a rational basis, and that might be decided even before trial, but we think that we should have the opportunity to move forward in litigation and develop evidence of the arbitrary nature of the law.

So moving on to substance due process, I

don't think -- it's confusing, and I'll profess that at the beginning of -- you know, when we first got the case, I myself was asking the question how is substantive due process different from equal protection. Rational basis test is somehow incorporated into both claims. But I think that the nature of VIZIO's claim is different, I think the legal orientation is different, and let me try to explain my reasoning.

VIZIO's primary argument concerning its substantive due process right is that the E-waste law violates its rights. And I think that's one of the central points of distinction, that the primary focus is focussing on VIZIO's rights as opposed to, say, a different class treatment of a group of persons. The central argument is that VIZIO is being subject to regulatory burdens that is simply -- for products to which it simply has no connection. And given that fact pattern, and given the interplay with the national market share provision, the substantive due process claim is different. And I'd like to call the Court's attention to a line of cases dealing with the unitary tax treatment. There is a case called -- and I want to give you have the case cite here.

There is just a lot of cases, so --

THE COURT: Sure. Take your time. I'm in no rush.

MR. PERCH-AHERN: There is a case called *Allied Signal, Inc v Director, Division of Taxation*, 504 U.S. 768. It's a 1992 Supreme Court decision. There are several other similar decisions. There is a line of cases dealing with unitary tax law, which are laws that treat a corporation and its subsidiaries as a single unit and then tax state income that ends up really being income or related to activities that are occurring outside of the state. Those laws have been analyzed not only under extraterritoriality, the commerce clause, your Honor, but they've been analyzed under substantive due process because the state in those instances where it's essentially taxing things that are not occurring in the state does not have a sufficient nexus or sufficient connection to the taxpayer's activities within the state.

THE COURT: Meaning your basic point about because of using the market share, and given the numbers you sort of cited in the complaint, what you have is this dissidence between VIZIO's own products and the recycling that VIZIO is actually

paying for. In essence, that VIZIO is paying for the recycling of others products other than VIZIO televisions.

MR. PERCH-AHERN: Correct. And because of the national market share provision, VIZIO is essentially being taxed de facto based on sales that are occurring in other states, bringing the E-waste law directly in line with those cases based on the analogy. So I think the national market -- beside the CRT issue, the national market share sort of provides life to our substantive due process claim.

Now, that *Allied* decision and its -- and the cases upon which it's based, as I mentioned, they stand for the proposition that a state cannot, consistent with due process, charge a company for liability based on conduct that's not occurring within the state. And because VIZIO has no connection to the recycling stream in Connecticut, that decision also provides support for a substantive due process claim.

I want to make sure that that's pointed out, that the lack of connection to the waste stream and the lack of a connection to things that are happening in the state, because of national market share, are both supported by the Allied decision.

Now, the other -- another distinguishing factor of a substantive due process claim is that the rational basis test applies differentially and applies separately to both the retroactive and prospective applications of the law. And with respect to the retroactive applications of the law -- and in this instance we clearly believe there is retroactive application of the law because it applies to televisions that were manufactured prior to the date of the law -- because it's retroactive, the analysis is different.

I think, your Honor, if you look at the case law -- for example, let me point to something Justice Kennedy wrote in the *Eastern Enterprises* decision. That was a concurring opinion, but I think it provides some insight into the difference for the substantive due process, retroactivity.

THE COURT: To some extent it's really relevant in the context of the regulatory taking issue. Right?

MR. PERCH-AHERN: It is, but this was with respect to due process and retroactivity. He said, "The Court has given careful consideration to due process challenges to legislation with retroactive effects." And then he says "and views

such laws with distrust."

So there is a judicial distrust of retroactive liability. And I think that informs the analysis. When you review the cases, what you see is more scrutiny being applied to the retroactive applications of the law. And here -- and I don't think we need to get into -- I mean ultimately it's a rational basis test, we concede that, but the Supreme Court has not said that courts cannot consider other factors, and I think courts do consider other factors.

So some of the other factors are the regulated party's connection to what is being regulated, notice of the statute, and other equitable factors that we think here are met for VIZIO because of VIZIO's lack of connection to the CRTs and the recycling stream.

THE COURT: All right.

MR. PERCH-AHERN: With respect to prospective application of the law, the test -- again, I think the difference is the nature of VIZIO's theory, which is more of a VIZIO-based -- based on its lack of connection to what's being regulated ultimately. So I think that when you look at it that way there is a greater fairness issue at

stake with respect to VIZIO's rights, your Honor.

THE COURT: Okay. Thank you.

Mr. Skold, on this, I guess one point I would point to, I guess the point Mr. Perch-Ahern makes -- Mr. Shin was nice enough to send me the *Allied Signal* case and I'm sort of looking at it. I guess it does suggest perhaps the due process issue in the context of taxing. Whether it also applies in this context is another question, but I guess the general point is that you have this ability to take advantage of one's proportionate share rather than making sort of a global proposition. But I take it you don't really think that that sort of amounts to a substantive due process challenge.

MR. SKOLD: I don't, your Honor. I think this is the second time today they've raised cases and claims they haven't briefed or pled. So I haven't seen that case. I don't know what it says. So I think it's a little inappropriate for them to be doing that.

But, no, it doesn't sound like a substantive due process claim to me. And just from what opposing counsel said about this nexus issue, of course they have a nexus to the recycling stream. They are selling -- 17 percent of the televisions

that are sold in this state are sold by VIZIO, approximately. I know they claim their Connecticut market share is less, but they have a large market share, and all of those televisions that are now being sold in Connecticut are going to come back later. So that's what this issue is about.

This fairness CRT claim that they like to focus on, I think there is two responses I think the Court should be aware of; one is factual, one is legal. Factually, VIZIO asks this Court to look at the recycling program in a single snapshot, at this moment in time, and say look how unfair it is right now. Never mind that it's a prospective statute that is going to apply for decades, and never mind that VIZIO is selling all of these televisions that are going to come back down the line.

So I think I've discussed in my brief, both in the beginning and in pages 37 through 40, the reality is that you have to look at this program over the lifespan in determining how fair it is. It may or may not be that right now VIZIO is paying to recycle televisions that it didn't produce. I don't know that they've adequately pled that they are disadvantaged by it today in fact because they haven't alleged what poundage of televisions they

are selling into the market right now. I know they claim that the TVs being sold today are lighter individually than old CRTs, but that doesn't mean that they're not selling more televisions so that the poundage is higher.

THE COURT: Just to make sure I understand the point you were just making just a minute go and continuing to elaborate on, what you are saying is that while on the one hand there seems to be this dissidence because -- in the legislation because VIZIO is expected to be responsible in Connecticut for the market share they have nationwide, I think what you are saying is that on closer examination there isn't as much of a gap because what you are recognizing is VIZIO is responsible for putting 17 percent of the televisions into the general market, some of that market is going to end up in Connecticut, so you are capturing that now.

MR. SKOLD: Exactly.

THE COURT: Although there could be a gap between what you actually capture since you are taking a guess that their market share is going to be reasonably reflective of what is going to end up in Connecticut at the end point.

MR. SKOLD: That's correct, your Honor. It's a rough approximation. The national market share is kind of a -- they're using it instead of Connecticut market share because Connecticut market share -- reliable Connecticut market share data doesn't exist. So it's a rough approximation. So over time it will likely roughly balance out. Once their products come back down the line they may or may not have to pay for -- the amount that they will have to pay down the line is going to be determined by their market share at that time. They may be out of business. They may have a 1 percent market share, just like RCA, which used to be a big producer but now has 3 percent. We don't know. That's the point. The fairness of this law over time is unknowable because it's going to depend on any number of market factors that change every single day. So that's the factual problem.

The legal problem for their claim is that under rational basis, substantive due process, all of this -- it doesn't have to be perfectly fair. They're essentially asking the Court to say we need to look at what specific televisions are returned in every period, what type of television they are, how much hazardous material they have, and only then can

you decide each manufacturer -- once you've engaged in that very specific analysis, can you assess costs on any each particular manufacturer.

Your Honor, that's strict scrutiny. That a narrowly tailored analysis that does not apply in this context. Under rational basis all the State has to show is that there is a problem and this is a rational way to address it. And I think that it absolutely and clearly is. It may be unfair, it may not, but that's not the standard for rational basis.

I just want to address the retroactive issue that counsel raised.

THE COURT: Sure.

MR. SKOLD: He cites Justice Kennedy's opinion from *Eastern Enterprises*. That was a single judge who said that. Four judges said that due process doesn't apply and the other four judges said that due process wasn't violated in that case. So I think that supports the state's position.

THE COURT: It might be instructive and ultimately could be the law, but at this point whether or not this Court sitting here as a district court should consider that as binding precedent is a bridge too far.

MR. SKOLD: Absolutely, your Honor. Also the law simply is not retroactive. It depends exclusively on their current sales. If they do not engage in current sales in this state, there is no liability for anything. So the entirety of their liability depends solely on their continuing to engage in present sales. And it's a prospective statute designed to keep televisions out of the waste stream on a prospective basis. Certainly they have alleged that the amount of their liability is determined, in part, based on some televisions that may have been produced before the law, but that doesn't make the liability retroactive.

THE COURT: Thank you.

Mr. Perch-Ahern, did you have anything more on the due process point?

MR. PERCH-AHERN: I'd like to just make a few arguments. I think that we -- I think that I explained how substantive due process is different, and what I'm essentially hearing is that the state thinks there is no differences between the two claims. I don't think that's correct. I think if you look at the cases you'll see there is a difference. I think Justice Kennedy's statement reflects a general sense of the law. I'm not saying

it's binding, but I'm saying it's, in my view, correct that retroactive laws are looked at with greater scrutiny.

And we're not arguing for strict scrutiny, we're arguing to -- we're arguing to move forward, to let the rational basis apply in the way the courts apply it with respect to the substantive due process issue. And, again, that applies not only to the CRT issue and the lack of connection to the waste stream, but it also applies based on the national market share. And it's happening outside the state.

I just wanted to take one second to explain that the law is retroactive. For example, the case law makes clear that environmental laws that seek to remedy environmental harms based on actions performed prior to the date of the law are retroactive in nature, like CERCLA. And here, the underlying liability is imposed on manufacturers. It's a manufacturer liability law. The underlying liability is based on the manufacturer. The operative act being regulated is not the putting of the television outside, it's the manufacturer. Therefore, the law, in our view, is retroactive, your Honor.

We clearly pled, and we pointed this out in the briefing, that Connecticut market share is less than national market share. We clearly are going to be able to rely on evidence to show that in discovery. Connecticut data, of course, does exist. Sales data does exist. It could be retrieved in numerous ways. And I also wanted to address that.

THE COURT: Okay. Thank you.

Mr. Skold, I'll let you take the lead on the takings, unless you want to say anything about substantive due process.

MR. SKOLD: No.

THE COURT: Okay. Let's move to the takings clause claim. Go ahead.

MR. SKOLD: Okay. Well, I think the takings clause, again, it's been briefed fairly comprehensively. The easiest way to get rid of the takings clause claim I think is very straightforward. It is that it just doesn't apply. Under the *Eastern Enterprises* case there were five justices that very clearly said -- it was Justice Kennedy and then the four dissenters, they said an ordinary regulatory obligation to pay money does not implicate the takings clause at all, you don't engage in any regulatory taking analysis.

And the reason for that is the takings clause does not limit the government's power to act. So if the government imposes regulatory costs on a business and then has to pay that back as a taking, just compensation, then the government can't do what it was trying to do. And the implications for the taxing power are extensive.

There are lots of cases in other circuit courts, I've cited them in my brief, that have all said the takings clause does not apply. Plaintiff has not cited a single case where it did apply. And so I think that is just straightforward. I'm happy to get into the regulatory taking analysis if your Honor would like.

THE COURT: No, that's fine.

MR. PERCH-AHERN: Briefly, your Honor. I don't want to belabor the point. I think we pointed out in the briefing the Supreme Court has twice analyzed a monetary obligation under a takings analysis, and yet there has never been a holding of the court that a monetary obligation cannot be analyzed or --

THE COURT: But the problem, though, is that just as a matter of logic, as I think Mr. Skold has pointed out, and I think that is the logic

inherent in what the five justices were saying in *Eastern Enterprises*, it is that if we look at every piece of regulation as a taking -- and we obviously started with the notion that takings were physical takings, and the law has expanded to recognize it could be regulatory takings, but there has to be, in essence, some taking. Simply what they are saying is if you are simply costing someone money, that's not actually causing you a loss of the use of property, then why aren't we really just talking about that as just a loss of money rather than putting it in the context of a taking?

MR. PERCH-AHERN: Well, I think here -- and certainly we're not arguing for any kind of judicial ruling or holding that in every case a monetary obligation can be subject to regulatory taking. I think here, your Honor, though, that the claim is apt. VIZIO is suddenly be required to pay nearly 20 percent for the state's recycling program when since the inception of the program it's had no connection to what is being regulated.

THE COURT: No, I understand, but that's a different point than the issue about does it simply impose cost, because in my view you are not saying anything more than saying you are imposing

cost. And I hear you when say, gosh, you are not asking for a broad ruling, but the reality is once I rule one way everyone else says, aha, this must mean that. So the challenge for me is why would I do this even if it is in the context of being a taking, A, given sort of the traditional way courts have used it, and then, B, looking at what the court has said in *Eastern Enterprises*, and then, C, there is just the basic underlying logic that this is really something -- it's just a simple regulation. I just don't know what the reasonable bounds are. If I accept your argument that this constitutes a taking, I don't understand what the bounds are that basically every piece of regulation would not be a taking.

MR. PERCH-AHERN: I think that when there is a complete divorce between who is being regulated and the products -- who is being regulated and what's being regulated, it's a different scenario, even if it ultimately can be characterized as a monetary obligation.

THE COURT: But you haven't lost property. What you are saying is we're paying money. The fact that there is a separation between what the regulation imposes and what you believe

your role is in having to be -- being governed by that regulation has nothing to do with the issue about whether or not there is actually a taking of your property. You are just asked to pay a cost.

MR. PERCH-AHERN: I understand your Honor's concern. I think that the cost does shake out a little bit differently here, and I think in discovery we'd be able to show the nature of the program and how it really plays out for manufacturers.

THE COURT: What would discovery show?

MR. PERCH-AHERN: I think discovery would show, among other things, that the manufacturers are essentially summoned into the state to participate in this program. And it's not just a simple tax. They need to comply with what amounts to a pretty detailed regulatory regime, and yet they're not actually doing the recycling. They have to be closely involved with the operation of the program. And I think that, in connection with the nature of the liability, makes this a little bit different.

And I understand your Honor's concern. We think this case is different. And given that the courts have been sort of unclear with respect to

whether it's substantive due process or regulatory taking or both, we'd ask the Court to defer on that issue when it comes to these fairness issues until we get a chance to move forward with the litigation and develop the evidence.

THE COURT: So tell me under what case law, what authority would give this Court a basis for saying, yes, that make sense, let's see what happens in discovery, see if we learn more. Because right now I'm not seeing anything in the case law that suggests that I would have a valid basis for moving forward even at this stage with respect to a takings clause.

MR. PERCH-AHERN: I think it's, I believe, the *Connolly* case and the *Concrete Piping Products* of California case where -- dealing with ERISA, where essentially ultimately something that came down to a monetary obligation was analyzed under regulatory takings. And so because *Eastern Enterprises* did not result in an actual holding of the court, those cases provide support for your Honor to say that it can be analyzed. You don't have to say that it is a regulatory taking here, but it can be analyzed under a regulatory takings analysis, which would make it premature to decide

the issue at this stage.

THE COURT: All right. Thank you.

Mr. Skold?

MR. SKOLD: Just very briefly on that last point, your Honor. Both Justice Kennedy and Justice Breyer in their opinions in *Eastern Enterprises* specifically discussed *Connolly* and *Concrete Piping* and said they do not stand for that proposition. And they said the court analyzed in those two cases the regulatory taking analysis for the obligation to pay money only because there was no taking. So if your Honor wants to conclude that there was no regulatory taking, then I suppose you could assume for the sake of discussion that -- you can engage in the analysis, but absent that, you cannot engage in that analysis -- or there is no legal justification.

THE COURT: Sure. All right. While you are up, Mr. Skold, before you sit down, let's turn our attention to the last issue, the commerce clause one. And I guess the big question -- I guess I should be more pointed. The thing I am admittedly struggling with this is this whole question about the national market share and whether that brings us into the realm of regulating interstate commerce in

a way that does pose some constitutional issues in a way perhaps these other constitutional issues do not. So what I need you to do is walk me through that particular aspect. Because we do have -- there are two dimensions to it. One is the dimension that obviously what -- by making the decision to rely on national market share they're relying on a figure to -- they're relying on some relationship to cost that has nothing to do with the state of Connecticut and has everything to do with what this company is doing elsewhere around the country.

The second piece is the point that Mr. Perch-Ahern has been pushing, which is that there is this likelihood, perhaps at least now and perhaps it maybe won't be as much in the future, where VIZIO ends up effectively funding the cost of recycling when -- funding the cost of recycling products it did not actually bring into the marketplace.

MR. SKOLD: First, with respect to that last point, I don't think that factors into the commerce clause analysis at all. There are specific prongs of the commerce clause analysis, and the fact that VIZIO has to pay -- this particular one company is paying for other companies' products, I don't think that is necessarily true, especially over the

long run.

THE COURT: Because that in and of itself -- what you are saying is that particular burden, however fair or unfair, it's not necessarily a burden that has anything to do with the interstate-intrastate relationship, although it's connected mainly because of the reliance on the market share. Right?

MR. SKOLD: Correct.

THE COURT: Because if you -- it's only because you relied on -- in essence, the two factors are really linked together because it's the reliance on the national market share, which is the only reason which would give rise to VIZIO paying for the recycling of products that are not its own.

MR. SKOLD: That, I guess, is correct, but as far as the fairness concern goes that doesn't factor into the commerce clause analysis. The Supreme Court has very clearly said the fact that it may have burdens on one company or particular in-state firms because of their position in the market is not relevant to the commerce clause analysis.

So I think it's probably easiest if I just take the Court through the individual claims.

I think the main one that they raise is the extraterritoriality claim. There is really two prongs. They have allegations and statements that raise a lot of things, but I think it can really be distilled into two theories. There is the interstate price control theory and there is the theory under *American Booksellers v. Dean*, they can't avoid their costs under the program. So I'll take them one by one.

On the interstate price control theory, that has its genesis in two Supreme Court cases, the *Healy* and the *Brown-Forman* case. Those were two price affirmation statutes that directly controlled how market -- or how prices were set in other states. It dictated the prices, either by forcing other states to use a price scale set by the regulating state or by restricting directly how manufacturers could price the products in other states.

And in contrast to those price affirmation statutes, which is the only types of statutes that the Supreme Court has held this extraterritoriality theory, in the *Freedom Holdings* cases, and lots of other cases that I've cited in my brief, the Second Circuit and other courts have made

very clear that just because a state regulation has the impact of increasing costs, reducing revenue margins, and reducing profits, which may cause upstream pricing impacts, that does not operate extraterritorially.

And so I think the cases make very clear that -- we're at a motion to dismiss. So they have to plead factual content to plausibly demonstrate that the E-waste law actually controls interstate prices. It's not enough to allege that it impacts prices by reducing -- increasing their costs.

THE COURT: Just to put a pin on that particular point. What you are saying is that if you take *Healy* and *Brown-Forman*, what that really requires is direct control, which we don't have here because the E-waste law program certainly doesn't control prices. It has this incidental effect because of its use of a national market share, and that incidental effect arguably could have some impact, but it doesn't necessarily control how you price around the country based on what is going on in Connecticut. You need to have that control in order to fall within the confines of *Healy* and *Brown-Forman* is what you are arguing.

MR. SKOLD: Absolutely. And the

national market share requirement, that's no different than the return share requirement as far its impact on prices. The return share is going to impose costs as well, the same costs, or maybe slightly less according to the plaintiff, but it's still going to impose cost.

THE COURT: But it's not only imposition. I suppose the difference between the return share and the national market share is not simply the mere fact that there is the imposition of cost, but what's the reason for the imposition of costs. The return share only imposes costs -- even if it has an interstate effect, it imposes costs that are directly related to a company's intrastate activities, while the national market share may impose costs that are related to interstate activities and not just -- and may have no connection at all to interstate activities in terms of imposition of costs. The question still remains whether or not that particular imposition of cost is a violation of the commerce clause, but --

MR. SKOLD: And that's the key question.

THE COURT: Yes.

MR. SKOLD: Ultimately I don't think there is any difference between national market

share and return share. The impact of both is to raise costs which they may raise prices. That's the only impact. So I'd like to take the Court to the plaintiff's sur-reply brief on page 1 and 2, if I could because --

THE COURT: Sure.

MR. SKOLD: -- that's really where they very concisely set out the allegations that they think in the complaint state this interstate price control theory. On the bottom of page 1, it's the last bullet point, "By tying manufacturers regulatory responsibility to national market share, the practical effect of the E-waste law is to directly regulate out-of-state sales." That's just a legal theory, a legal statement, taken directly from the cases. There is no fact in the complaint to show the E-waste laws use of national market share actually controls anything in other states. And it doesn't on its face.

THE COURT: But under that notion, if I was to basically say, gosh, the factual allegations are insufficient and then -- so what would actually -- I guess the question is, are there factual allegations one could make that would make that sufficient.

MR. SKOLD: No.

THE COURT: Because obviously if I simply basically dismiss it and say the factual allegations are insufficient, that also provides means for them to come back and submit other things. So the question is what actually makes up enough there. Or is that really always going to be an issue, that you are never going to know precisely and that it would be something for discovery, although perhaps *Iqbal* and *Twombly* say I can't take those statements anymore.

MR. SKOLD: That's exactly what *Iqbal* and *Twombly* say, that you cannot take that legal theory taken from a case and just say that's enough to get by a motion to dismiss. There has to be some factual basis in the complaint to actually show that it controls or regulates out-of-state conduct.

On its face, the E-waste law has nothing to do with how out-of-state sales are conducted. It doesn't say anything about prices. It doesn't say how a manufacturer can produce. It doesn't say how they can distribute. It doesn't say who they can sell to or how they can sell. All it says is that if a manufacturer, whether it's located out of state or in state, wants to sell in Connecticut, then they

have to pay these regulatory costs.

THE COURT: Perhaps you are not saying this as directly, so I'll say it, whether you are saying it or not, that the cost that VIZIO is concerned about, in essence this big gulf between what the actual sales were in some years and what they ended up having to pay, in the hundreds of thousands, I guess at some point over a million dollars in costs they had to pay with respect to the program, those are not direct costs on interstate commerce. They may be a secondary or tertiary effect in that those are costs that the company has to pay down the road as part of the program, and that may then have to some effect on the prices that VIZIO charges for its price throughout the country, but that secondary or tertiary effect on interstate commerce is not something that the courts have recognized as a violation.

MR. SKOLD: Exactly. It's just a cost. It just so happens that the way they calculate the amount of the cost uses national market share. But that doesn't mean we're regulating out-of-state sales, it's just we're taking data about those sales, which we have nothing to do with, the plaintiff can make those sales however it wants,

we're taking data about that and using that to compute an in-state cost. And I think --

THE COURT: But I guess -- I mean as much as I say it's secondary and tertiary, maybe it's secondary and not tertiary. I mean, if you are basically saying we're going to take everything you sold around the country and use that to determine what we're going to charge you for the products here, aren't you still in some way imposing a cost on what they're doing outside of Connecticut? And so why isn't that -- if it's not directly a concern, why couldn't that possibly be a concern? And then I'll add this piece. Why isn't the wiser course for me, at least with respect to this particular claim, to allow this part to go to discovery to see if there actually are costs? Because at the end of the day it may come out that there aren't really costs associated with it and then I'm in a much better position dealing with that in the context of a summary judgment than I am in trying to deal with it now?

MR. SKOLD: Because the pleading standard set forth in *Iqbal* and *Twombly* is there has to be some factual basis for it in this complaint. It's not enough for them to just say in discovery we

may find these facts.

THE COURT: But in this context, what would those facts tell me? What would those facts say that would be sufficient?

MR. SKOLD: I think you need to look at *Freedom Holdings II* and the district court decision on remand in *Grand River*. In those cases the court made very clear, both courts, that it's not about the fact that it imposes costs based on national market share on an interstate business and that may reduce their profits or may cause them to raise prices. In *Freedom Holdings II*, the Second Circuit said very clearly, we realize that this may nationally raise prices by using this national market share framework and that doesn't violate the commerce clause.

Now, in *Freedom Holdings II* there is a statement the use of national market share actually didn't come into play, but the court was focused on the fact that raising prices is not unconstitutional unless you are directly controlling that.

But the district court on remand in *Grand River* very clearly said -- first, national market share under that scheme in that case didn't actually come into play, but even if it did, that

would not amount to a violation of the extraterritoriality doctrine because there is nothing to show that it actually controls prices.

So just because you use national market share, if it does not result in controlling interstate prices, dictating prices along the lines of *Healy* and *Brown-Forman*, then there is no claim.

So we're here on a motion to dismiss. There has to be some factual basis in the complaint to say that prices are directly controlled by the use of national market share.

THE COURT: So you are saying-- I see. So the facts that have to be alleged would be facts that talk about not just the market share and not just how -- whether they are paying a particular cost, but how -- there is something that leads more to how the program itself is controlling the cost that you've actually made.

MR. SKOLD: Absolutely. That's -- the cases are very, very clear. That's the legal standard. And I'm not asking for plaintiff to have pled specific evidence or detailed facts or anything like that. It's an *Iqbal*, *Twombly* standard. But there has to be something that plausibly demonstrates interstate price control. And the

E-waste law has nothing to do with prices. It's not a price affirmation statute like *Healy* and *Brown-Forman*. It doesn't say anything about what they can or cannot charge either in Connecticut or anywhere else.

THE COURT: But if one accepted the notion that the standard provided -- there is the possibility that the law might allow for a commerce clause violation for something less than interstate price control, obviously something more than simply a mere effect on prices, that maybe there is some perhaps gray area, does that in and of itself suggest that either, A, there are more facts that might be pled, or B, whether or not there is something you might want -- this Court might want to allow to go to discovery.

MR. SKOLD: I'm not aware of any case where the court has said there is something in between. *Brown-Forman* and *Healy* are talking about price control. The Second Circuit and lots of others, the *EELI* case and -- I think it's the Tenth Circuit, and the other cases I've cited, there is nothing in between, either you are controlling out-of-state commerce or you are not. It's about that direct control. So every regulatory obligation

impacts out-of-state activity. The fact that it raises prices on VIZIO, just like every other manufacturer, cannot mean it's per se unconstitutional because that's what happens with extraterritoriality.

THE COURT: What you are saying is the reason for what I'll call, for lack of a better word right now, a rigid standard that deals with interstate price control is that -- the very thing that I talked about, this middle, it's so gray that it could begin to sort of swallow up possibly every regulation and then sort of leads to a great expansion of commerce clause litigation.

MR. SKOLD: Exactly. Keep in mind that the extraterritoriality doctrine is a per se violation. So if the Court concludes that there is something in between that's actually controlling out-of-state conduct, then these regulations -- you don't get to go into like the balancing test for *Pike* or anything like that. It's per se unconstitutional. And that would invalidate virtually every state regulation, your Honor.

So I'd like to just talk --

THE COURT: Yes. Go ahead.

MR. SKOLD: -- about *Grand River*, which

is the only case they cite for this whole theory.

THE COURT: Yes. *Grand River* is a curious case, isn't it.

MR. SKOLD: Well, I don't think it's that problematic here. It's not problematic, your Honor --

THE COURT: Okay.

MR. SKOLD: -- because, really, they ask this Court to read into *Grand River* a broad statement that all you have to do is say the magic words interstate price control and national market share and that's enough to get by a motion to dismiss. That's what *Iqbal* and *Twombly* rejected. You don't get to just say magic words and then go and get discovery on these types of claims.

In *Grand River* the court was faced with a very unique and detailed national settlement of a tobacco litigation. It was very complicated and it had lots of working parts, and the court, after going through a whole analysis of how it worked and their legal claims, said they stated enough, in the facts of that case, to show that there was -- the states were controlling the pricing mechanisms. That was the word that it used.

In *Freedom Holdings II*, the court made

it very clear, again, that was the legal standard, control. And again, I think it was the court, district court on remand in *Grand River*, where the court said that even if they used national market share to assess the costs, and even if that results in a nationwide increase in prices, that doesn't violate the extraterritoriality doctrine because there is no control of interstate prices.

So I think -- unless the Court has any questions on the interstate price control theory --

THE COURT: No.

MR. SKOLD: -- I'll turn to the *American Booksellers v. Dean* theory.

THE COURT: Sure.

MR. SKOLD: Their claim is because they sell to out-of-state retailers and they can't control where the out-of-state retailers sell in Connecticut, and if one of their televisions is sold in Connecticut they have to register, so, therefore, they cannot avoid the costs under the law. The Second Circuit in *NEMA* squarely rejected this kind of claim. It said that if -- if an out-of-state business could avoid its costs by, for example, changing its distribution process or changing its production process, then that -- just because they

don't do that or because they've chosen some other production or distribution process that subjects them to the state regulation, that's not the fault of the state regulation, that's the result of their choice about how they're going to conduct their business.

So there is lots of things that they -- under the *NEMA* case that VIZIO could do to avoid its regulatory obligation. It could stop selling in Connecticut directly. It could tell its retail customers, don't sell our products in Connecticut, and if the retailer said, no, we're still going to keep doing it, well, they could sell to different retailers or they could come up with some other distribution process to give them control over their own products. If they choose not to do that, it's a business decision, that's their choice. But if they're going to do that, their product is going to be sold in the state, then they have to comply with the regulatory obligations.

And I think just to -- if that's a factual dispute, which I don't think this plausibly is under *NEMA*, Section 22a-634 of the general statutes very clear says that if a manufacturer isn't registered, then the retailers cannot sell --

their retail customers can't sell in the state. So if VIZIO wants to avoid its liabilities under the law, just don't register and stop selling your direct sales into the state. Your retail customers will no longer be able to sell in the state and you won't have any liability under the law. It's a very easy way for them to avoid the law if they want to.

So on this point, just look at the allegations of the complaint. They have a bald statement that they cannot avoid the law because of how they've chosen to distribute through their retailers, and there is no allegation in the complaint they can't do any of these other things to avoid the law. So I think under *NEMA* that should dispose of their claim.

THE COURT: But you are actually saying more than that, which is even if you take their allegation in terms of what the state law actually says, it is that it gives them an easy way to avoid the obligations.

MR. SKOLD: Yes, that's dispositive. There is other problems with the dormant commerce clause. There is the *Pike* and discrimination and user fee. Do you want me to go through them?

THE COURT: Sure. I'm happy to have you

walk through them.

MR. PERCH-AHERN: Your Honor, if I can just make a recommendation. There is so much material with respect to extraterritoriality. We might want to stick with that. I can do it anyway your Honor would like.

THE COURT: I see what you are saying, give you an opportunity to respond to what he has said rather than having to wait for everything.

You don't have too much more?

MR. SKOLD: I don't have too much more.

THE COURT: Go ahead. Finish up.

MR. SKOLD: So the *Pike* balancing test, I think is the next claim, their main claim in the commerce clause, and I think that that has been solidly briefed. It's very clear under Supreme Court precedent, the *Kassel* case, *Pike*, and most recently *United Haulers*, that when it comes to the context of legitimate health and safety legislation under the police power, courts do not engage in any *Pike* analysis. They don't engage in the balancing test. The court -- in their brief, plaintiff says that the court has never said that, but I'll just quote from *Kassel*, which is 450 U.S. 670, where the court said, "Indeed, if safety justifications are

not illusory, the court will not second-guess legislative judgment about their importance in comparison with related burdens on state commerce."

THE COURT: Who knows if I remember correctly or not, but I guess my recollection of *United Haulers*, actually the procedural context of the Supreme Court, it was actually after summary judgment or in the summary judgment context that it was going up.

MR. SKOLD: It was, but that's not really relevant. What is relevant is the legal standard. The court said -- discussed what the parties said had developed through discovery and said we don't even have to decide what the burdens are under interstate commerce because these benefits of the law are not illusory. They're legitimate. So the court didn't need to get into any factual development.

THE COURT: Whether it needed to, the question is -- what's the old notion about taking chicken soup if you are sick, whether or not it actually, you know, has an ameliorative effect, it may not hurt. So the question is, at least if one sort of looks at the scope of what might be discovery in the context of this, which would likely

be fairly narrow, the question is what's the harm in terms of going through that narrow discovery and then dispositively addressing those issues in the context of summary judgment.

MR. SKOLD: Well, I think the harm is that we have a 12(b)(6) rule, procedure, and they have to plead facts that plausibly state a claim. The legal standard is that unless these benefits of the law are illusory, courts don't engage in *Pike* balancing. They have to allege facts that plausibly demonstrate that these benefits are illusory. Opposing counsel has conceded today very clearly that the benefits of this E-waste law are not illusory because if it was return share they would be just fine with it. So the idea of an E-waste law making them pay for these -- the manufacturers pay the recycling costs, that clearly is not an illusory environmental benefit. Now, whether the national market share is the best way to do it or return share, that's the --

THE COURT: The legislative choice.

MR. SKOLD: Legislative choice. The *United Haulers* court very clearly said we're not going to engage in the *Lochner*-era rigorous scrutiny of this kind of legislation under the banner of *Pike*

balancing. So I think that you don't even get into *Pike* balancing. I can address the *Pike* balancing. I don't think it's --

THE COURT: No. If you want to say a word about *Pike* balancing, that's fine.

MR. SKOLD: I think it's --

THE COURT: It's briefed. That's fine. If you want to stand on your brief, that's fine.

MR. SKOLD: I think the discrimination claim is briefed. They've basically abandoned any claim that the law discriminates against manufacturers. It clearly doesn't. There is no such thing in this type of context as a discrimination claim under the dormant commerce clause for -- just based on the impact on consumers.

They cite to *Camps Newfound* case. That's the only case they cite for that proposition, and that was where the state prohibited out-of-state residents from accessing in-state resources. It has nothing to do with what we're talking about here. Even if it did, there is no impact on out-of-state -- the law does not operate on out-of-state consumers at all. It doesn't say what out-of-state consumer can recycle or how they have to recycle.

And it doesn't -- the only impact the plaintiff identifies is increased costs. But, again, the E-waste law says nothing about how VIZIO has to spread its cost. If VIZIO wants to, it can recover all of its costs directly in Connecticut from only Connecticut consumers. The fact that VIZIO prices its products nationally and spreads its cost nationally, and, therefore, costs on consumers in other states may go up marginally because of Connecticut's costs, that has nothing to do with the E-waste law.

THE COURT: So your reading of the law, though, is that in terms of being able to sort of modify its prices to sort of address the effect of -- in the context of Connecticut's consumers, does it matter how much it has to modify? If I accept as true, which I have to in the context of this stage, what they're saying is basically what the actual cost would be of what they're actually paying for the limited amount of televisions they have actually put in the market would have astronomical sums. On one year I think they're basically saying, gosh, the cost for each set is $12,000.

MR. SKOLD: Your Honor --

THE COURT: So reasonably -- like I

said, just at this stage accepting that as true, it sounds like could they really bear the cost of charging $12,000 for televisions? That actually is not necessarily realistic. Does that matter at all in the balancing?

MR. SKOLD: First of all, I think no. I mean, if they can recover their costs in Connecticut, they can recover their costs in Connecticut. But that 12,000 number is based on direct sales.

THE COURT: I understand.

MR. SKOLD: In their complaint they say that --

THE COURT: Based on direct sales. We know they have other means of actually bringing televisions --

MR. SKOLD: I don't think you have to accept as true the cost of their -- their recycling costs per television sold in Connecticut is 12,000. That's not accurate even remotely. If that's their allegation, that's not good faith.

THE COURT: They said it was in terms of direct cost. But I guess the question is, just going back to the issue about whether do I need to resolve that now or let those factual issues play

out and deal with it in the context of summary judgment. But you say no, I know. Tell me why.

MR. SKOLD: The discrimination claim, your Honor, if they choose not to recover those costs in Connecticut and spread it nationally, that's their choice. That's not the law's choice.

And, secondly, the only plausible upshot of that is, because they're pricing nationally, Connecticut consumers are going to face the same price increase as every other consumer. So there is no disparate treatment, which is the linchpin of a discrimination claim. There is no -- Connecticut consumers, even under their own allegation, will not get any benefit as far as pricing goes. If what they're doing is pricing nationally, then they're pricing nationally.

And then the last point is the user fees claim. I think that has absolutely no basis. The *Oregon Waste Systems* case controls. It very clearly says that user fee analysis only applies if you are -- if the government's imposing costs for services or facilities that the government provides, and the government is not doing that here.

THE COURT: Okay. Thank you, Mr. Skold. I appreciate it.

Yes. Sorry, I did leave you a lot, but take your time and address in any order you wish.

MR. PERCH-AHERN: Thank you. I appreciate it, your Honor. I'm just going to try to go through it in the same order.

THE COURT: Okay.

MR. PERCH-AHERN: I've got a lot of notes, a lot of cases, but let me just try to break this down pretty simply. *Grand River* allows a plaintiff to proceed with an extraterritoriality claim based on a national market share provision with an allegation that the practical effect of that is to control prices out-of-state. That has never been abrogated by Second Circuit. That is still good law. It's very clear. It's probably the easiest issue in this case in terms of the motion to dismiss. We're allowed to proceed with that theory.

Now, we've alleged substantial facts regarding the control of prices out-of-state and the impact on VIZIO. But just by way of example, and this isn't intended to be an exclusive view about how a price control theory may shake out, but just by way of example, a law that's tied to national market share could impact the competitive pricing mechanism by affecting markets generally and leading

to price impacts. That's just one theory, your Honor. And I think that's where the *Grand River* court might have been headed.

THE COURT: Just saying more about that point, just to make sure I understand exactly what you said.

MR. PERCH-AHERN: Sure. This is just one theory, your Honor, but the theory would be that by tying the liabilities directly to national market share you are affecting the market shares, thereby affecting the concentration of the market, which leads to a price control.

THE COURT: Why? Let me just say --

MR. PERCH-AHERN: This --

THE COURT: Let me just tell you why I am a little baffled by that.

MR. PERCH-AHERN: Sure.

THE COURT: Let's say VIZIO is at 17 percent of the national market and, I don't know, Samsung is at 30 percent of the national market, and then there are other companies obviously that make up the remainder of the market. Why would charging -- and all of them presumably are going to be charged in Connecticut based on their national market share. Why would that charging, that pricing

scheme or that regulatory scheme, have any effect on what VIZIO's national market share would be vis-a-vis Samsung's? Or is that not the point you were making?

MR. PERCH-AHERN: The point is, it's really one of expert discovery. And I'm just saying it sort of prematurely, but I'm just illustrating the reality that there could be a price control out of state. The Second Circuit has endorsed that. The idea would be that a national market share regulation could actually affect the industry itself, thereby -- in the concentration of the market and result in pricing, perhaps monoplastic pricing, based on the market concentration.

THE COURT: I guess Mr. Skold's point, which he hammered home to me very effectively, whether I buy it is a different story, but he articulated it very effectively, which is that *Healy* and *Brown-Forman* really stand for the proposition that would constitute -- the commerce clause violation is interstate market control -- interstate price control. What you are saying is that the reliance on national market share as part of Connecticut's program may ultimately lead to interstate market control, but the colloquy I had

with Mr. Skold, it seems like that's a secondary or tertiary thing that is not going to happen immediately, and it's also not interstate pricing control.

MR. PERCH-AHERN: Well, there is two things. One, I think it is interstate price control. I think *Healy* and *Brown-Forman* are two cases, and based on those facts clearly there was price control. And I think *Grand River* relied on those cases to show that the practical effect of national market share regulation could also result in price control.

THE COURT: It may be a matter of use of terms. As I understand it, what the Supreme Court was really concerned about in *Healy*, is that you were essentially dictating -- not necessarily affecting, it was more than affecting, it was really effectively dictating what the price should be in a state other than -- in a state other than Connecticut, and it was that -- what they mean when they talk about interstate price control, they're basically saying you are going to have to use this price and that's going to be the governing principle how you do it.

Under the E-waste law program there is

no discussion at all about what VIZIO's prices should be or how they should deal with it. It only deals -- it says, look, we want to use market share, national market share, as a proxy of your effect in this particular market. And as long as they're doing the same for every other player in that market, then there is no incentive for any player in that market to do anything different in terms of their prices because everyone is affected in exactly the same way. Right?

MR. PERCH-AHERN: No. I think that -- number one, I think *Brown-Forman* and *Healy* were easy cases. There was a direct -- the control was very direct. Here we're talking about the practical effect.

THE COURT: No, I understand, and that was Mr. Skold's point. Mr. Skold's point was that, yes, they're easy case, but more importantly, they do stand for this proposition that you have to have interstate market control -- I mean price control, and that we understand interstate price control by exactly what happened in those particular cases, and we don't have precedent that clearly says that something less than that. And the use of national market share, which isn't direct interstate price

control, but obviously could have some impact on interstate prices, and so question is, is the impact of interstate prices that are caused by relying on the national market share raised to the point that we have a commerce clause violation. And what you are saying is that *Grand River* stands for that proposition.

So the question is that -- so walk me through that, how *Grand River* stands for that proposition and leads to a violation of the commerce clause. And I guess also I'll add onto it, we've got sufficient facts pled here and what are we going to learn in the context of discovery that's going to flesh out the alleged violation that you believe flows from the *Grand River* case.

MR. PERCH-AHERN: Well, I think *Grand River* allows us to move forward. If I could address the other issue which I think illustrates the point, which is the evolution of the tobacco cases. I think that we do not have the same view of what those cases say. I think it's important to point out that the evolution of -- first of all, let me go back to the tobacco cases, which is that the national market share provision was not automatically triggered. And, in fact, ultimately

the tobacco companies couldn't show it was ever invoked. So, therefore, the tobacco companies were only confronted with a regulation that was based on state sales, liability based on state sales. In that instance, the courts ultimately said you are talking about an economic impact, you are not talking about an interstate impact.

Grand River, however, still stands for the proposition that a national market share provision might impact interstate prices. And that ruling stands. The key distinction with the evolution of the tobacco cases is that in this case the national market share provision applies every single time. It wasn't just related to an escrow -- to a refund, like in the tobacco cases, that wasn't actually invoked. Here, it applies every single time. Our case is more egregious than the tobacco cases. And in that case the Second Circuit allowed the plaintiff to proceed just based on the reality that that provision may be invoked. Here we know it's being invoked every single time. That's how the liability scheme works.

So we don't agree that there is really much of an issue. We think that it's -- the next step would really become allowing us to move

forward, taking facts in discovery, and ultimately it's expert discovery.

The other portion of our extraterritoriality claim I want to make sure I'm able to have a chance to articulate, your Honor.

THE COURT: Take your time.

MR. PERCH-AHERN: There is really two parts of it. *Healy* says, "The commerce clause precludes application of a state statute to commerce that takes place wholly outside the state's borders whether or not the commerce has effects within the state." And that term "precludes application" I think is apt here. Connecticut is regulating every single time based on national market share. They're applying the state law to state sales every single time.

Now, I brought the Court's attention to *Allied Signal* earlier, and that case stands for the proposition that a state may not tax value earned outside its borders. And here the pegging -- the liability being imposed directly on national sales is directly creating a liability analogous to a tax that *Allied Signal* precludes. *Healy* says you can't apply your state statute to out-of-state conduct.

So I think, aside from price control,

there is another basis for an extraterritoriality claim. The Court can look to the cases and see that each of our claims could independently satisfy an extraterritoriality claim, but by looking at the overall effect of the statute, including this and the price control, there is sufficient allegations to move forward with our claim.

But related to that point of direct regulation, I do want to point out the other aspect of the claim, which is that the law applies to retail sales regardless of the manufacturer's presence in Connecticut. As applied to VIZIO, which conducts negligible sales within Connecticut, the law projects itself into VIZIO's out-of-state transactions with retailers despite its minimal nexus to Connecticut.

And VIZIO cannot avoid compliance with that and still comply with the Connecticut law at the same time. Every single time that the national market share provision is invoked, it's projecting itself into those out-of-state transactions. I think that the case law makes clear that states are prohibited from enacting laws that effectively control conduct in other states simply because the conduct may have effects in the state. And there is

the *American Booksellers v. Dean* case, a Vermont law that prohibited the dissemination of sexually explicit material to minors, and because the law controlled posting in other states, regardless of whether it would come to be located in Vermont, the law could not stand. The point was that the law bled into out of state conduct regardless of whether all such conduct had a linkage to Vermont.

Just like here, the law is bleeding into VIZIO's transactions out-of-state regardless of whether all those sales are occurring in Connecticut. It's the look to national sales that makes this clearly an interstate issue.

Now, if you look at *NEMA* and all of the other cases that the State cites in support of its case, each of those cases makes clear, has a statement in it that says there is no reference to other states in this statute. There are numerous references to other states in this statute. That's what is creating the commerce clause issue. Numerous references; the national market share provision itself.

Just by way of example, in *NEMA*, that dealt with a labelling law, the court held that the manufacturer could comply with the law by labelling

just its products that it is selling. Now, here, there is no ability to comply with the law in a way that would save its extraterritorial impact. Every single time it's invoked it's applying extraterritorially. *NEMA* is distinguishable, easily distinguishable.

And I want to raise another point which I think is very important to understand, and it's hard to decipher this upon a quick read of the case law, but withdrawal from a market, the argument that we could stop selling into Connecticut and that would save the law, is a red herring, a total red herring. That's not the question. The question is whether you can comply with the law and have it not be extraterritorial. Here you can't, clearly.

And we're not arguing that VIZIO -- that there is merely an upstream price impact. And we're not arguing that the burden is simply that it might become too expensive to do business in Connecticut. We're arguing there are interstate burdens caused by this. And we can go through the burdens, but I just wanted to explain withdrawal is no defense.

THE COURT: Okay.

MR. PERCH-AHERN: With respect to -- so I think that goes through my extraterritoriality.

With respect to *Pike*, I'll just address the health and the safety issue. The Court had -- Mr. Skold is arguing that there is no balancing, that *Pike* is abrogated. Let's be blunt about this. His argument is that *Pike* is abrogated if the State asserts a health and safety interest. That's just not the law. I think *United Haulers* is absolutely distinguishable, and it's a case that is limited to its facts, to the factual scenario where there is essentially -- that the state has brought under municipal control a public service to the detriment of all private interests. In those instances the *Pike* analysis looks different because there is no -- there is no selection or differentiation between private parties. And so the health and safety analysis shakes out differently. The court's pretty clear that's what they're saying in *United Haulers*.

That's not the case here. These are private recyclers that have been selected by the State. So *United Haulers* doesn't say that.

If you look at the *Kassel* decision, it says that a state is not insulated from a dormant commerce clause challenge. So we also don't believe the dormant -- that *Kassel* stands for that proposition.

If you look at recent Second Circuit cases, such as the *Selevan* case and the *Town of Southold* case, you'll see that even at the motion for summary judgment stage where the plaintiff has produced evidence and expert evidence that the interstate burdens clearly outweigh the alleged putative interests, that that's ultimately a balancing test based on -- a fact-intensive balancing test that's not appropriate even for summary judgment.

So for the state to say here that it's appropriate for resolution at a dismissal stage is a misstatement of law and it's asking the Court to look at the facts right now, and it's not appropriate. *Pike* balancing should move forward.

With respect to discrimination, I do want to take a minute to go through our analysis. You know, I mentioned at the beginning, your Honor, a point that wasn't expressly made in briefing that we wanted to make today and make it clearly, and that's that out-of-state residents do not have the same access to Connecticut's recycling program, that the statute on its face discriminates against out-of-state residents.

And I'd like to call the Court's

attention to a *City of Philadelphia v. New Jersey*, which is a seminal dormant commerce clause case where the court struck down a New Jersey law that prohibited the importation of out-of-state trash, and the court explained that New Jersey was isolating itself in erecting a barrier against the movement of interstate trade.

So here you are erecting a barrier against the movement of televisions and electronics products for recycling into Connecticut. And in *Camps Newfound*, a case which I think is very applicable and allows us to proceed, the court explained the state may not give preferred access to in-state resources to its residents. Preferred access. It's not just a prohibition, it's a preferred access, a differential access. The case law is very clear on this point.

And as I had mentioned at the outset, what's compounding this discriminatory effect of the law is the fact that the national market share provision places liabilities on sales that occur in other states. And the case law says that just the mere risk, just the mere risk of multiple taxation is itself enough to make a law constitutionally invalid under discrimination. Under the *Wynne* case

the court pointed to a number of decisions in which the court -- "the Court struck down a state tax scheme that might have resulted in double taxation."

In one of those cases, *J.D. Adams Manufacturing Company v. Storen*, 304 U.S. 307, the court invalidated an Indiana tax on income from out-of-state sales because interstate commerce could be subjected to the risk of a double tax burden. So here --

THE COURT: I guess I'm struggling to sort of find the proper correlation. Maybe you were getting to that point. Taxing seems a little bit different than what we have here. So I'm not sure -- because there certainly is not going to be -- we're not worried about double taxation in the same sense, and so I guess I don't see that analogy as apt. So go on, help me.

MR. PERCH-AHERN: Let me try to explain the analogy as I understand it, your Honor, which is there's multiple states that have E-waste laws. In Connecticut there is a law that says the manufacturer has to pay based on its national market share. It's essentially acting like a tax on its national market share -- its national sales. So in another state, just like a state that has an income

tax, if it's applying -- it taxes income outside the state -- or sales, then if there is another state that happens to have a similar law or happens to tax income earned in that other state, then the party is going to be subject to two taxes for the same thing, and the case law makes it very clear that the mere risk of that is --

THE COURT: But the problem is that the national market share actually does something slightly different. It is that -- because I think what I understand the *Allied Signal* line of cases are really talking about is are you going to tax -- -- if you want to tax -- I'll just make up a fictional corporation, I think it's probably safer. If the State of Connecticut decides to tax the Acme Corporation and use as a basis for its tax based on its revenue based nationwide and takes some percentage of that, now that is problematic and the courts deal with it.

But here this is a step removed from that, what we have here in the use of national market share, in that we're not simply looking at Acme in some abstract way of what are they doing nationally, it's really looking at what are we doing nationally vis-à-vis the other competitors. Because

what we're trying to do is figure out how we're going to fund this recycling program that's going to deal with all of the various competitors that have registered and said, look, we have sales in the context of this given state.

I understand the analogy. I understand why one would want to suggest the tax analogy is analogous to what we have here, but the national market share -- if you basically based it on a number based on their total sales and said we're going to take a percentage of that and that's what we're going to require you to fund, that would actually be analogous to the tax situation. But what we have here is a step removed from that, which is, we're going to look at your share vis-a-vis the market as a whole and try to allocate the recycling cost based on that number.

MR. PERCH-AHERN: So in operation there is numerous double counting, and I'm not going to have enough command to go over all the state statutes, but double counting risks abound, and that's what I wanted to bring your Honor's attention to, the risk of double counting. Some of the states have national market share, some states look at other mechanisms. There's the ability to look at

actual sales. There is the ability to look at -- the national market share is computed differently in other states. So there is different mechanisms used by states that creates the risk of multiple regulatory burdens. It can't do a double tax.

THE COURT: I'm still not sure I understand the double counting because -- I get it in the context of taxing, which is if the State of California has already taxed you on the billion dollars of sales that you have nationwide, to allow the State of Connecticut also to tax you on that same billion dollar shares, and that has no relation to the State of Connecticut, then that certainly makes sense. But here we're talking about we're going to do it based on market share and we're going to tax you on something in Connecticut. How are you then double counted for the share in California or Michigan?

MR. PERCH-AHERN: Well, just by way of example, in California there is an advanced recovery fee. So the consumer is essentially, under our allegation, being charged based on the national market share approach, is also being charged at point of sale, too, and that's a direct, in my view, way to explain the risk.

THE COURT: No, I understand there is certainly a risk, and this is certainly the risk inherent in the fact that we've got a constitutional scheme that both allows for national regulation and there is also power that state and local government has to do things, and they may do things that are consistent or inconsistent with each other, and those risks, if they add up, may add up in a particular way. But I guess I wouldn't characterize that as double counting, it's just a risk of regulation. The commerce clause is intended to regulate and prevent against certain unconstitutional regulation that might occur to the extent that Connecticut, you know, veers more towards affecting interstate commerce.

So the question then is -- I think the double counting doesn't help as long as we don't really sort of clearly analogize it to this question of interstate commerce. What it seems the case law is pushing towards, *Grand River* perhaps may create some space there, is pushing towards this notion that, well, we're not going to talk about these secondary or tertiary costs that relate to interstate commerce, what we're most concerned about is this question of interstate price control.

MR. PERCH-AHERN: I think you need to -- the way I look at it is that *Grand River* is another theory. What I'm talking about right now is a discrimination argument.

THE COURT: Sure. But the question is what's the burden? The discrimination argument relates to this notion that what Connecticut is doing is unfair and helps out in-state residents to the detriment to out-of-state residents, and what you are saying -- and the fact that another state may do something else doesn't necessarily mean that what Connecticut is doing would violate that discrimination principle. Or have I gotten it confused? I'm always happy to be advised, but that's maybe where I've lost you.

MR. PERCH-AHERN: No, I've probably confused myself at this point.

THE COURT: It's more likely me, but go on.

MR. PERCH-AHERN: I highly doubt it. But, your Honor, let me just take a quick step back and then move on to another --

THE COURT: Sure.

MR. PERCH-AHERN: -- because I think what you asked were some very good questions with

respect to the double taxation issue, but what I wanted to do is explain that's just one component of a larger argument, which is, number one, the State is depriving residents of the same access to resources at the same time it's shifting those costs out-of-state. So the analogy to the multiple taxation, that's one way of our -- of demonstrating our argument that there is discrimination.

And there is another piece of that argument, which is the differential between Connecticut's market share and national market share, which is we've alleged that the Connecticut market share is lower, and on that basis it stands to reason that there is a disproportionate impact on out-of-state residents. We have argued that that's akin to a surcharge.

So when you take that argument and then you look at the reference to the analogous tax cases, they both support an allegation that there is a shifting of costs out of state, effectively. Now, let's take back home the idea that the in-state -- the out-of-state residents are denied the same access to the state program. What you have is a double whammy that is demonstrative of the fact that you have a protection of local interests, which is

the hallmark of an unconstitutionally discriminatory statute. The residents are being deprived of the access, yet they're paying for the program. It's acting like a subsidy. In the *West Lynn* case, a tax and a subsidy was particularly dangerous to interstate commerce. And I'm raising that by way of an example. So that's our discrimination argument.

And I guess I would end with a quick discussion of user fee, which is the state is arguing that they are not state services, and I would just quickly call the Court's attention to the Bridgeport decision in which effectively a state statute enabled a port authority to charge residents that otherwise it would not have been able to do. It enabled essentially a new business model, let's just call it.

THE COURT: But I think particularly -- well, it was sort twofold. Mr. Skold is saying that one issue that distinguishes that is it was really the question of who you are actually paying the fee to in terms of the government agency as opposed to the private entity. And then I guess the other question, which I don't really see here, is that with the user fee in Bridgeport, the issue that the court was concerned about, the Supreme Court there,

was concerned about there, was the fact that the fee actually was being used to subsidize things other than the program was related to. I've not heard anything to suggest that the recycling program fee is being used for anything other than -- beyond the scope of recycling. That seemed to me really the heart of what the court was concerned about in Bridgeport. And then what you seem to suggest is that, well, the problem is that we're paying for -- it goes back to the old question of, you know, we're paying for the recycling of other products, which is different from the recycling fee is being used to do something other than recoup the costs related to recycling.

MR. PERCH-AHERN: Sure. So the user fees are being paid not only for the recycling, they're being paid for the entire state program. It's keeping the coffers filled and jobs on the books for the state. So all of those costs are taxed in proportion to market share. So it's paying for the entire program, your Honor, not just for recycling fees.

THE COURT: All right.

Anything else, Mr. Skold?

MR. SKOLD: Just a few brief responses,

your Honor. Opposing counsel led on the extraterritoriality argument with this idea *Grand River* supports the idea that impacts on interstate markets is enough to state an extraterritoriality claim. That is not at all what *Grand River* said. It said price -- controlling price determination schemes is how people control -- or set their prices. And just impact on interstate markets, that maybe you look at under *Pike*, maybe you don't. You certainly don't look at it under extraterritoriality.

The tobacco cases were not limited to the idea that the national market share provision was never invoked. The district court on remand in the *Grand River* case very clearly said that even if the national market share is used to assess the amount of the costs, and even if that results in nationwide price increases, that does not violate the commerce clause unless there is price control.

THE COURT: So is there a theme here? So price control is the theme?

MR. SKOLD: Yes. Just briefly on the *Pike* claim, your Honor, opposing counsel cited to the *Selevan* case and said -- for the proposition that in the context of health and safety legislation

you still have to go through *Pike*. *Selevan* was not a health and safety legislation case, it was a toll case, revenue-generation case, and the court said you don't apply *Pike*, you apply the user fee. So *Selevan* has nothing to do with the *Pike* analysis in this case.

And the *Town of Southold* case that they cite very clearly said that the reason it could go forward is because the plaintiff showed that the health and safety benefits were illusory. Okay? So that reinforces the idea that at the 12(b)(6) motion to dismiss stage they have to plead facts that plausibly demonstrate the illusory health and safety benefits. That principle is not just in *United Haulers*. It goes back to *Kassel*, which I quoted the statement from that case. Very clearly, the court will not engage in the balancing unless the benefits are illusory.

And then just real briefly on this double taxation issue and the lack of access to in-state resources. Again, they didn't plead any claim that out-of-state residents can't recycle in the Connecticut. So I think it's totally inappropriate to be raising that now without notice. In addition, I don't think there is anything in the

statute that says that out-of-state residents can't recycle through Connecticut recycling -- or recyclers located in Connecticut. It just says part of this mandatory program -- that that's not part of the mandatory program. So if there is a private recycler in Connecticut that they want to come and bring their -- as far as I'm aware, because they didn't raise this I haven't really looked at it, but I'm not aware of any provision that says an out-of-state resident couldn't go to a private recycler outside the confines of this program.

And then on the double counting issue, there is a lot of reasons why that is not an issue in this case. First of all, the Supreme Court in the *Wynne* case and lots of other cases have said the fact that there is double taxation or double counting, that's not unconstitutional unless it's discriminatory, unless the in-state -- or the state regulation is acting as a tariff by penalizing -- in assessing its costs or its tax, penalizing the fact that the income was earned outside of the state. So if there is two state statutes that happen to impose double costs in a nondiscriminatory manner, that's not unconstitutional in any way. And the Connecticut law doesn't discriminate against -- has

nothing -- plaintiff's costs under the E-waste law would be exactly the same if it sold out all of its products out of state or if it sold all of them in Connecticut. Because it just looks at national market share, it doesn't discriminate against where those are coming from.

And I think the last point is there is no double counting. The two hypotheticals that they've put forward are the New York example where they claimed that they have to pay a fee in New York and in Connecticut, that's just wrong. I briefed that in my initial brief and they don't respond to that. And with regard to the advanced recovery fee, your Honor, in California, to the extent that any California resident has to pay a double cost, it's only because VIZIO and other manufacturers have incorporated their Connecticut-specific costs into their national pricing. It has nothing to do with the E-waste law. That is solely attributable to their national pricing strategies. In the *Alliance v. Automobile Manufacturers* case that I've cited in my brief, Judge Hall made this point very clear, just because you choose to price nationally, that doesn't violate the commerce clause, it's not attributable to the statute.

I don't have anything else.

THE COURT: All right. Thank you, Mr. Skold.

Mr. Perch-Ahern, anything further?

MR. PERCH-AHERN: Just briefly, your Honor.

THE COURT: Yes.

MR. PERCH-AHERN: *Selevan*, there is two *Selevan* decisions.

THE COURT: Yes, I'm aware.

MR. PERCH-AHERN: I believe I was referencing *Selevan I*, I believe. We absolutely pled a claim. We pointed that out on page 8 of our sur-reply brief, footnote 8, with respect to differential treatment against out-of-state consumers.

I pointed out earlier that you don't have to be denied access. And I think Mr. Skold at this point doesn't know if they are denied access to the program. Well, they're absolutely denied access to the program. The question is, can they actually recycle anything in Connecticut. That's another question as I sit here today, I also don't know the answer. What I can say is they certainly don't have access to the Connecticut recycling program.

West Lynn stands for the proposition that the ability to change your pricing does not save a discriminatory law. That's a Supreme Court decision.

And just quickly on the *Alliance* case, there was no pegging or reference to out-of-state conduct, an out-of-state statute. The court made it very clear that that was the case and that was the basis for its decision. And the issue of the ability to invoke the concerns of the out-of-state dealer in that case is wholly different than it is here because there were associational standing issues. The Supreme Court case law makes it clear that we can claim impacts to the consumers because we're in the same stream of commerce.

And Mr. Avchen would like to --

THE COURT: Sure, please.

MR. AVCHEN: Thank you, your Honor. I just have three quick comments.

THE COURT: Sure.

MR. AVCHEN: I wanted to draw the conversation away from the details back to some of the generalities. *Grand River*, the way that I read that case is that it allowed the plaintiff the opportunity to get by a motion to dismiss because of

the allegation of national market share, and ultimately he wasn't able to prove that national market share impacted price control.

There was a subsequent case that, in fact, confirmed that in the sense that it said -- I think it was *Freedom Holdings*, said that, you know, we're not dealing here with national market share because in this case, you know, national market share was never invoked.

So the law is still good, and if this Court were to allow us, of course, to take discovery on *Grand River*, that would be the correct thing to do. Otherwise, in effect, it may be overturning *Grand River*, which none of the subsequent courts that have looked at *Grand River*, an older decision now, have ever done.

So we get an opportunity, I believe, to show under *Grand River* that we have price control. That's what that case stands for. And I understand the *Iqbal* standard. We pled more in our complaint than *Grand River* pled in its complaint. We pled enough. We certainly have enough, you know, at this point in time with expert opinions as to how we are going to prove *Grand River*, which I don't believe we necessarily have to share with Mr. Skold right now.

But if it's absolutely essential, then I would. But, believe me, we've discussed this with our experts and we're going to show price control in this circumstance. That's what we intend to do in discovery by way of expert testimony. That's *Grand River*.

The second point is on discrimination, and I just don't want this to get lost. Because the Connecticut court -- the Connecticut regs specifically state that nonresidents of Connecticut are not welcome in Connecticut to dump their trash, and I'm paraphrasing, that is facial discrimination. I think that the case that Mr. Perch-Ahern quoted, the *Philadelphia v. New Jersey* case, is almost right on point. And if you were to look at that case, I think that it would be illuminating.

The third and final point that I want to make is that under any circumstance -- we've been talking a lot about facts today, and as I've sat here I know that facts don't get decided on motions to dismiss. Facts get decided at the point in time of motion for summary judgment or trial. Here, what we've got is a situation where we've gone back and forth, Mr. Skold has made certainly some cogent arguments, and I think Mr. Perch-Ahern has, too. We

disagree about the facts. I could make more factual arguments as I stand here. I'm not going to do it, but, believe me, there are more factual arguments to refute the arguments made on the other side of the table.

But if the Court is inclined in any way to grant this motion, then I believe it's incumbent upon the Court to give us leave to amend to state facts which comport with what I've heard in the argument here and perhaps what the Judge may indicate to us.

It's interesting in the *Selevan* case, the district court was going to -- on a motion to dismiss was going to grant that motion, then allowed the plaintiff to replead his complaint, which the plaintiff did before the court even considered whether it was going to grant or deny the motion. Ultimately the court did grant that motion and it was reversed on appeal. But the point is, in most cases, and certainly in cases where there are *Pike* issues, balancing the tests, I have very rarely, if ever, seen a case which is decided on a motion to dismiss where there are balancing issues involved.

So we'd be happy, your Honor, to take this information back. I think it's very

informative and helpful in terms of how we're going to structure ongoing discovery. If -- you know, if you want us to look at amending the complaint, we would appreciate that opportunity.

Thank you.

THE COURT: Thank you, sir.

All right. Anything further, Mr. Skold?

MR. SKOLD: I don't think so, your Honor.

THE COURT: All right, great. Thank you all very much. This has been helpful. See, I probably left a misimpression when I set those five-minute time limits in the opening part. As I said, I don't use a clock, but I do appreciate the arguments from everyone.

Unless there is anything further, we are adjourned.

(Proceeding concluded 12:20)

I certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

4/3/16

Date

/S/ Sharon Montini

Official Reporter

UNITED STATES DISTRICT COURT
DISTRICT COURT OF CONNECTICUT

VIZIO, INC.,	:	
	:	
Plaintiff,	:	**Civil Action No. 3:15-cv-00929 (VAB)**
	:	
v.	:	
	:	
ROBERT KLEE, in his official capacity as the Commissioner of THE STATE OF CONNECTICUT DEPARTMENT OF ENERGY AND ENVIRONMENTAL PROTECTION,	:	
	:	
Defendant.	:	**MAY 20, 2016**

FIRST AMENDED COMPLAINT FOR
DECLARATORY AND INJUNCTIVE RELIEF

Pursuant to the Court's Ruling on Motion to Dismiss, dated March 31, 2016 (Doc. No. 36) and without waiver of its right to appeal any aspect of such Ruling, Plaintiff VIZIO, Inc. ("VIZIO") submits this First Amended Complaint for Declaratory and Injunctive Relief with additional factual allegations concerning VIZIO's claim that the E-Waste Law (as defined herein) violates the dormant Commerce Clause because it "has the practical effect of directly controlling the interstate prices" of televisions. (Doc. No. 36, at 27.) The additional factual allegations that are new to this First Amended Complaint are contained in Section VIII herein. Many of VIZIO's original allegations provide factual background and are also relevant to VIZIO's amended claim. Accordingly, VIZIO has restated a number of its original allegations. For the Court's convenience, with the exception of Paragraphs 7, 34, and 41, VIZIO has not modified the existing allegations other than simply deleting those paragraphs that are not necessary for the amended claim.

I. INTRODUCTION

1. VIZIO, Inc. ("VIZIO"), an American company headquartered in Irvine, California, prides itself on delivering high performance products at a significant value, which it passes along to its customers. As it has risen to success, VIZIO has spearheaded a number of environmental initiatives, won numerous energy efficiency awards for its products, and developed policies and practices that comply with environmental laws and regulations. In line with its forward-looking environmental policies, VIZIO is a firm believer in electronic waste ("e-waste") recycling and supports a law requiring television brand-owned sellers[1] to pay for the recycling of televisions in the same manner that manufacturers of other types of electronic products are regulated in Connecticut. The Connecticut e-waste recycling program (the "E-Waste Law") for televisions, however, is so deeply flawed and unfair that it threatens VIZIO's ability to innovate and competitively price its products for consumers.

2. The foundational problem with the E-Waste Law is that it requires television brand-owned sellers like VIZIO to fund the state's television recycling based on their most recent share of nationwide television sales (their "National Market Share"), rather than the sellers' televisions that have actually been disposed of and are in the e-waste recycling stream (their "Return Share"). For a company like VIZIO, the difference is staggering. A recent study of over 23,000 pounds of televisions collected for recycling in Connecticut revealed that not a single VIZIO product was returned for recycling. However, VIZIO's National Market Share has recently been pegged by the state at over 17%, the second highest recycling obligation of any television manufacturer in the state. Accordingly, VIZIO will pay over 17% of the total costs to recycle televisions in Connecticut, almost none of which are VIZIO products. At the same time,

[1] As set forth in paragraph 15 hereof, under Connecticut's E-Waste Law, a brand-owned "seller" like VIZIO is considered to be a "manufacturer" by definition. Accordingly, the terms shall be used interchangeably to describe VIZIO herein.

however, there are large foreign television brands that currently have a small National Market Share, but have a huge Return Share in Connecticut's e-waste stream. Such large foreign brands pay a fraction of what VIZIO pays under the E-Waste Law, and yet it is their televisions that are being recycled – not VIZIO's.

3. As a further matter, because each company must pay for its percentage-based National Market Share of the total weight of the televisions recycled by the state, and because the National Market Share assigned to each manufacturer does not account for the weight of manufacturers' actual televisions, the E-Waste Law penalizes companies that sell lighter, more innovative products. For a company like VIZIO, the impact is substantial. For example, today's e-waste stream is principally made up of the bulky cathode ray tube ("CRT") and/or rear projection televisions that other well-known international brands produced decades ago. As a relatively new entrant into the television marketplace, VIZIO has never sold CRT televisions and has only ever distributed flat panel televisions. CRT televisions often weigh more than 10 times as much as VIZIO's flat panel televisions. Under the E-Waste Law, VIZIO must pay its National Market Share percentage allocation of the total aggregated weight of recycled televisions, including CRTs.

4. While the E-Waste Law subjects television manufacturers to arbitrary e-waste regulation based on national sales, sellers of all other types of electronic devices that are recycled in Connecticut, such as computer manufacturers, are only required to pay to recycle their actual Return Share under the E-Waste Law. There is no supportable basis to treat television manufacturers differently than other electronic device manufacturers and to require television manufacturers to pay to recycle their competitors' products.

5. The methodology used by Connecticut to regulate television e-waste suffers from numerous constitutional infirmities. For example, by tying regulatory fees to National Market Share, the E-Waste Law has an extraterritorial reach that regulates sales in other states and controls manufacturers' conduct beyond state borders, something patently forbidden by the U.S. Constitution. VIZIO, for example, has a large National Market Share, but sells only a nominal share of its products in Connecticut. Despite VIZIO's negligible direct sales into Connecticut, the E-Waste Law broadly impacts VIZIO on a national level, affecting interstate pricing decisions and leading to additional transactional costs, lost profits, lost market share, and consumer price impacts.

6. Connecticut's E-Waste Law also subjects VIZIO to double penalties and inconsistent state obligations. For example, because almost all of VIZIO's sales are to retailers with distribution centers outside of Connecticut, VIZIO is frequently charged an e-waste compliance cost in the state of initial sale and then again in Connecticut under the National Market Share allocation. This is merely one example of the Connecticut E-Waste Law's incompatibility with the other state e-waste programs that exist in a disparate patchwork throughout the country.

7. The E-Waste Law controls interstate television prices by imposing unequal, inefficient, and burdensome costs on the low average-cost television producers of top brands that establish prices in the competitive television market. By allocating E-Waste Program costs in proportion to National Market Share, the E-Waste Law has imposed the highest cost allocations on low average-cost television producers such as VIZIO and forced them to raise their prices, which has caused an increase in television prices nationwide.

II. JURISDICTION AND VENUE

8. This Court has subject matter jurisdiction over this action pursuant to 28 U.S.C. § 1331 (federal question) and 28 U.S.C. § 1343 (Section 1983 jurisdiction). Jurisdiction also lies pursuant to 28 U.S.C. § 1332 because there is complete diversity between the parties and the damages exceed $75,000.00. Plaintiff VIZIO is incorporated in California and has its principal place of business in Irvine, California. Defendant Robert Klee is sued in his official capacity as the Commissioner of the State of Connecticut Department of Energy and Environmental Protection ("DEEP").

9. The Court is empowered to grant declaratory relief under 28 U.S.C. §§ 2201 and 2202 and Rule 57 of the Federal Rules of Civil Procedure. The Court is empowered to grant preliminary and permanent injunctive relief under, *inter alia*, 28 U.S.C. § 2202 and Rule 65 of the Federal Rules of Civil Procedure.

10. This Court has subject matter jurisdiction over Plaintiff's pendent state law claims pursuant to 28 U.S.C. § 1367.

11. This Court has personal jurisdiction over Defendant Klee because he conducts a substantial portion of his duties as Commissioner of the DEEP in the District of Connecticut. The Commissioner and the DEEP's main office is located in Hartford, Connecticut. Venue is proper in this District under 28 U.S.C. § 1391(b) because a substantial part of the events giving rise to this action occurred in the District of Connecticut.

III. THE PARTIES

12. Plaintiff VIZIO is a California corporation with a principal place of business in Irvine, California. VIZIO is and has been registered and regulated by the E-Waste Law.

13. Defendant Klee is the Commissioner of the Connecticut DEEP and is sued in his official capacity. Defendant Klee, acting through the DEEP, was and is charged, pursuant to the provisions of Connecticut General Statute 22a-637 and 22a-638, with enforcing and administering the E-Waste Law challenged in this case.

IV. OVERVIEW OF THE E-WASTE LAW

14. In July 2007, the State of Connecticut enacted Public Act No. 07-189 ("E-Waste Statute"). The E-Waste Statute has been amended several times and is codified into Sections 22a-629 through 22a-640 of the Connecticut General Statutes. The DEEP promulgated regulations that implemented the E-Waste Law, which became effective in June 2010, were amended in 2012 ("the E-Waste Regulations"), and are located at Sections 22a-630(d)-1 and 22a-638-1 of the Regulations of Connecticut State Agencies. The E-Waste Statute and E-Waste Regulations are collectively referred to herein as the "E-Waste Law" or "E-Waste Program."

15. The E-Waste Statute applies to each "manufacturer" of "covered electronic devices" (or "CEDs"). Conn. Gen. Stat. Ann. § 22-a-630(b). CEDs only include "desktop or personal computers, computer monitors, portable computers, CRT-based televisions and non-CRT-based televisions or any other similar or peripheral electronic device among other electronics." Conn. Gen. Stat. Ann. § 22-a-629. "Manufacturers" include:

> any person who: (A) Manufactures or manufactured covered electronic devices under a brand that it licenses, owns or owned, for sale in this state; (B) manufactures or manufactured covered electronic devices without affixing a brand, for sale in this state; (C) resells or has resold in this state under its own brand or label a covered electronic device produced by other suppliers, including retail establishments that sell covered electronic devices under their own brand names; (D) imports or imported into the United States or exports from the United States covered electronic devices for sale in this state; (E) sells at retail a covered electronic device acquired from an importer that is the manufacturer as described in subparagraph (D) of this subdivision, and elects to register in lieu

> of the importer as the manufacturer for those products; or (F) manufactures or manufactured covered electronic devices, supplies them to any person or persons within a distribution network that includes wholesalers or retailers in this state, and benefits from the sale in this state of those covered electronic devices through such distribution network.

Id. The E-Waste Statute defines "sell" or "sale" as "any transfer of title for consideration, including, but not limited to, transactions conducted through sales outlets, catalogs or the Internet, or any other similar electronic means, and excluding leases." *Id.* The broad definition of "manufacturer," which includes "any person who manufactures [CEDs] for sale in this state" and any manufacturer who "supplies [CEDs] to any person or persons within a distribution network that includes . . . retailers in this state, and benefits from the sale in this state," encompasses commercial activities that take place outside of Connecticut.

16. Under the central provisions of the E-Waste Law, each manufacturer must register with the DEEP and participate in the program to implement and finance the collection, transportation, and recycling of CEDs. The registration fees and the allocation of costs for television manufacturers under the E-Waste Program are based on a manufacturer's National Market Share.

17. The DEEP assigns National Market Share allocations based on national sales data for each CED category from the previous year. The E-Waste Statute defines "market share" as "a manufacturer's national sales of a particular product category of CEDs expressed as a percentage of the total of all manufacturers' national sales for such product category of CEDs." Conn. Gen. Stat. Ann. § 22a-629. The statute instructs that "Market share information shall be based upon available national market share data." Conn. Gen. Stat. Ann. § 22a-631(a). The E-Waste Regulations require the DEEP Commissioner to "determine a manufacturer's market share each year." Conn. Agencies Regs. § 22a-638-1(g)(1). The regulations further provide that

for each type of CED, the market share determination must be "based on an amount that approximates the total number of units sold by all manufacturers for the previous year and approximates the number of units sold that are attributable to each manufacturer." Conn. Agencies Regs. § 22a-638-1(g)(2). The E-Waste Regulations further provide that "[t]his determination shall be based upon nationally available market share data, including, but not limited to, the number of units shipped, retail sales data, consumer surveys, information provided by the manufacturers, or other nationally available market share data." *Id.* There is no process set forth in the E-Waste Law for disputing the DEEP's market share determination with data other than alternate nationally available data. Conn. Agencies Regs. § 22a-638-1(g)(3).

18. Manufacturer registration fees fund the DEEP's administration of the E-Waste Program. The initial registration fee for each manufacturer is at least $5,000, and manufacturers must pay subsequent annual registration fees that are "based on a sliding scale that is representative of the manufacturer's market share of covered electronic devices in the state. Market share information shall be based on available national market share data." Conn. Gen. Stat. Ann. §§ 22-a-630(c), (d). The "market share determination shall: . . . for all manufacturers, be used to determine a manufacturer's annual registration renewal fee." Conn. Agencies Regs. § 22a-638-1(g)(1)(A). Accordingly, all CED manufacturers pay registration fees for the administration of the E-Waste Program that are based on their national sales of CEDs.

19. The collection and recycling components of the state-run E-Waste Program for televisions are also financed by the manufacturers based on National Market Share. The E-Waste Law directs DEEP-approved Covered Electronics Recyclers ("CERs") to invoice each manufacturer for e-waste recycling according to the National Market Share percentages assigned

by the DEEP. There are limited or no audit rights of these bills, and there are no caps on the total amount that may be recycled and then billed to manufacturers.

20. The collection and recycling obligations of other regulated CEDs are based on Return Share, not National Market Share. Specifically, the DEEP-mandated allocation formula for computers, monitors, and printers only requires those manufacturers to pay for their Return Share of waste by actual weight, plus a portion of the total weight of unidentifiable orphan waste (which portion is based on the manufacturer's National Market Share for orphan waste of the same type), all multiplied by the DEEP-approved price per pound. Conn. Agencies Regs. §§ 22a-638-1(g)(1)(C) and (j)(3). In contrast, television manufacturers' invoices are expressly calculated by multiplying the manufacturer's National Market Share by the total weight of all televisions recycled (including orphan brands) and the DEEP-approved price per pound. Conn. Agencies Regs. § 22a-638-1(j)(6). The "market share determination shall: . . . for manufacturers of televisions, be used for billing by a CER." Conn. Agencies Regs. § 22a-638-1(g)(1)(B).

21. With respect to computers, monitors, and printers, the CERs must "maintain a written log that identifies responsible manufacturers by recording the brand and weight of each CED delivered to a covered electronic recycler and identified upon receipt as generated by a household in the state." Conn. Gen. Stat. Ann. § 22a-631(c). With respect to televisions, CERs need only "maintain a written log of the total weight of such televisions delivered each month to a covered electronic recycler and identified upon receipt as generated by a household in the state." *Id.*

22. The CERs "invoice manufacturers quarterly for the reasonable costs of transporting and recycling that the manufacturer is responsible for under this section, with such costs calculated for [television manufacturers] on a sliding scale basis that is representative of the

manufacturer's market share of such televisions in the state multiplied by the total pounds recycled [and] for [manufacturers of computers, monitors, and printers] on a per pound basis . . . ." *Id.*

23. CERs, which carry out the e-waste recycling and directly bill the manufacturers, are central to the E-Waste Program. The DEEP approves recyclers to become CERs through an application process. Conn. Agencies Regs. §§ 22-a-638-1(b)(2)-(5). During the application process, the DEEP considers such matters as the recycler's qualifications and experience for managing and recycling electronic waste, the recycler's proposed procedures and process flow, and the transporters and recycling and disposal facilities the applicant proposes to use. *Id.* The DEEP also considers and approves the recycling charges proposed by the applicant. *Id.* "In deciding whether or not to approve an application, the commissioner shall consider . . . the fees proposed by an applicant . . . which may provide a basis for denying an application." Conn. Agencies Regs. § 22a-638-1(b)(5).

24. Once approved, the DEEP retains oversight over a CER. A CER must notify the DEEP of certain modifications to information contained in its application, and the DEEP has discretion to revoke, suspend, or modify a CER's approval based on certain conditions. Conn. Agencies Regs. §§ 22a-638-1(b)(7)(B), (8)(A). A CER must comply with specific E-Waste Regulations such as CED separation requirements, recordkeeping and reporting requirements, specific standards for the recycling of CEDs and the disposal of recycling-generated waste, and requirements to ensure transporter and recycling and disposal facility permit compliance. Conn. Agencies Regs. §§ 22a-638-1(c)-(e).

25. As an alternative compliance mechanism, the E-Waste Law permits television manufacturers to participate in a private program or arrange for the return of CEDs for third

party recycling. However, the E-Waste Law still ties each of these alternatives to a manufacturer's National Market Share. Indeed, these alternatives would be more expensive for VIZIO to implement than participating in the standard e-waste recycling program.

26. The E-Waste Law provides that "No Connecticut resident giving seven or fewer covered electronic devices to a collector at any one time shall be charged any fees or costs for the collection, transportation or recycling of such covered electronic devices." Conn. Gen. Stat. Ann. § 22a-635(b). There is no similar exemption for non-residents.

27. The DEEP compiles a list of manufacturers that are in compliance with the E-Waste Law and requires retailers in Connecticut to consult the list prior to selling any CED. Retailers are prohibited from offering a CED for sale in Connecticut unless the manufacturer of the CED appears on that list. Conn. Gen. Stat. Ann. § 22a-634.

28. The E-Waste Statute gives the DEEP the power to impose cease and desist orders and to revoke registrations for any violations. Conn. Gen. Stat. Ann. § 22a-637. The E-Waste Law also empowers courts to grant temporary and permanent injunctive relief for violations, and empowers the state attorney general to bring a civil proceeding to enforce any violation. *Id.*

V. LEGISLATIVE HISTORY OF THE E-WASTE LAW

29. From the outset, the E-Waste Law was intended to have an interstate reach. When the law was being debated, various speakers at legislative hearings revealed the law's interstate impacts and effects.

30. The legislative history reveals that the law was intended to be one piece of a "uniform compact for New England." Among other comments, Senator Finch emphasized the law's "regional approach" during a debate of House Bill 7249, stating that the law would impose

responsibility on manufacturers with the eventual goal of creating a regional regulation system throughout New England.

31. The legislative history also reveals that participants questioned the legality of the E-Waste Law. For example, Representative Sawyer expressed discomfort at the fact that the proposed law regulated e-waste state-by-state, commenting that the electronics industry is international while Connecticut represents just a "tiny speck." Senator Kissel asked how Connecticut would obtain jurisdiction to enforce the E-Waste Law when so many consumer electronics manufacturers are located abroad. During the debate regarding amendments to the original E-Waste Law, when the National Market Share approach for televisions was being considered, at least one speaker noted the danger of Commerce Clause challenges.

VI. VIZIO'S COMPLIANCE HISTORY

32. VIZIO was incorporated in late 2002, and entered the television market by 2003. By industry standards, VIZIO is a new market entrant. As an American consumer electronics company, VIZIO competes in sharp contrast with large foreign conglomerates that have existed for decades and whose products are saturating the recycling waste stream. VIZIO has been remarkably successful in the consumer electronics industry by producing higher quality products that conform to higher design standards, are more attuned to market demands, and are competitively priced. VIZIO has been subject to and complied with the E-Waste Law since its implementation, paying all fees and invoices assessed since that time.

33. VIZIO's customers almost exclusively consist of large retailers. VIZIO's sales to these retailers generally take place in the states where the retailers have distribution operations, such as New York. After the retailers purchase the televisions from VIZIO, they distribute them, at their discretion, to various locations throughout the country for resale to individual consumers.

34. VIZIO does not sell to any distribution centers in Connecticut. As of the date of this First Amended Complaint none of VIZIO's retail customers utilize distribution centers or warehouses located within the state of Connecticut. Further, VIZIO's direct television sales in the state of Connecticut are negligible. For example, VIZIO's accounting data shows 97 sales in 2012 and 47 sales in 2013. Despite VIZIO's insignificant economic activity in Connecticut, it pays an exorbitant amount to comply with the Connecticut E-Waste Law. Currently, VIZIO's billable market share is 17.16%. The DEEP has previously determined that VIZIO's billable market share was 14.33% in 2013, 14.52% in 2014, and 16.088% in 2015. VIZIO spent $414,823.54 in 2013, $595,669.23 in 2014, and $647,141.72 in 2015 to comply with the E-Waste Law. As of December 31, 2015, Connecticut has required VIZIO to spend over $2.5 million to comply with the Connecticut E-Waste Program.

VII. SOME OF THE EFFECTS OF THE E-WASTE LAW

35. By tying manufacturers' regulatory responsibility to National Market Share, the practical effect of the E-Waste Law is to directly regulate VIZIO's out-of-state sales and to control VIZIO's conduct outside of the state's boundaries. By way of example only, one practical effect of the E-Waste Law is to control prices outside of Connecticut, which in turn affects interstate pricing decisions. In addition to direct compliance costs, the E-Waste Law impacts VIZIO's national budget, business model, pricing, and brand value, and leads to lost profits, opportunity costs, transactional costs, administrative costs, and/or market share loss. In the television market, pricing is extremely competitive, and as a result of the E-Waste Law, alone and together with similar state e-waste programs, VIZIO's competitiveness suffers. In short, the E-Waste Law stifles competition by reducing the narrow revenue margins that VIZIO can capitalize upon to price and compete.

36. The E-Waste Law, individually and collectively with other states' e-waste laws, is establishing a piecemeal pricing mechanism for interstate goods. The impact is to short circuit normal pricing decisions by effectively regulating a pricing mechanism for goods in interstate commerce.

37. Due to the broad definition of "manufacturer," manufacturers cannot escape the reach of the E-Waste Law by conducting their activities out-of-state. A manufacturer is required to comply with the E-Waste Law regardless of where its sale takes place. Once VIZIO sells a television to its retail customers out-of-state, VIZIO has no control over whether the televisions are then sold by the retail customer in Connecticut and/or ultimately disposed of in Connecticut. VIZIO cannot seek to lessen its regulatory burden by attempting to influence the political process in the state in which it makes the retail customer sale because that state is not imposing the regulatory burden of the Connecticut E-Waste Law.

38. Similarly, a manufacturer such as VIZIO that almost exclusively sells to out-of-state retail customers that then distribute VIZIO's televisions into Connecticut retail stores for resale, cannot lessen its compliance obligation by merely adjusting its sales activities within Connecticut's borders. The only way a manufacturer such as VIZIO may lessen its regulatory burden in Connecticut is by selling fewer products out-of-state so as to lower its National Market Share.

39. The E-Waste Law also controls conduct beyond Connecticut's borders by regulating electronics that are not destined for sale or disposal in Connecticut. On information and belief, many or most of the products being counted to formulate VIZIO's National Market Share are not being sold or disposed of by any person within Connecticut's borders.

40. The E-Waste Law makes manufacturers responsible for waste generated in Connecticut regardless of where the product was sold. As long as a recycler represents that a Connecticut household disposes of the product, it becomes part of the waste stream upon which CERs invoice manufacturers.

41. The E-Waste Law subjects VIZIO to double charges and double regulation on a single sale given its interplay with e-waste laws in other states. Twenty-four (24) other states regulate e-waste and most use some form of sales data as the basis for allocating recycling obligations. However, these e-waste laws' differing use of sales data subjects manufacturers to inaccurate allocations, double regulation, and double-counting.

42. VIZIO's sales in states that do not have an e-waste law or program, such as New Hampshire, are also counted towards VIZIO's National Market Share and are thus incorporated into VIZIO's recycling allocation under the E-Waste Law. For instance, despite the fact that New Hampshire has chosen not to regulate e-waste, the E-Waste Law places a Connecticut e-waste cost on a VIZIO transaction that occurs wholly outside of Connecticut's boundaries, thereby projecting Connecticut's regulatory program into another state.

43. The state e-waste programs conflict in various other ways, resulting in the imposition of overlapping, inconsistent, and confusing obligations on VIZIO and other manufacturers. Some state programs require use of state-sanctioned recyclers that invoice manufacturers throughout the year. Other states require manufacturers to actually collect and recycle CEDs. Some states set recycling "goals" for each manufacturer, while other states, like Connecticut, have no limits on the amount of waste that may be recycled and billed to manufacturers. Some state programs assign allocations according to sales, while others assign allocations based on television units returned for recycling. In determining regulatory

obligations, some state programs look to state sales data while others look to national sales data. Some state laws account for the weight of the manufacturers' televisions in deriving regulatory obligations, while others do not. VIZIO expends large amounts of resources to administer the different state programs, each of which imposes a separate obligation and additional cost on VIZIO. Among other conflicts, the interplay of these state programs often result in multiple e-waste fees for the same product or sale.

44. Because the E-Waste Law imposes a cost on VIZIO's transactions that occur wholly outside of the State, the only way that VIZIO could escape the law's reach would be to require its retail customers to suspend sales in Connecticut so that VIZIO would not fall subject to the E-Waste Law. Such a result would inhibit the free flow of interstate commerce, which is exactly what the Dormant Commerce Clause was intended to avoid.

45. The recycling aspects of the E-Waste Law are also disruptive of interstate commerce. The E-Waste Law interferes with national and even international markets relating to e-waste by prohibiting any party from collecting and recycling e-waste except those parties licensed by the state under a program that dictates many of the terms upon which the recyclers may conduct their business, including the very terms of service between the recyclers, manufacturers, and consumers. Onerous and unreasonable state control over the recyclers has created barriers to market entry and has led to recycling costs that are higher than the national average. For instance, under the E-Waste Program, the DEEP controls prices that recyclers may charge.

46. Any alleged public benefits of the E-Waste Law are outweighed by the burdens it imposes on regulated companies and interstate commercial activities. Furthermore, there are alternative methods that can be employed to accomplish e-waste recycling that are far less

burdensome on interstate commerce. For example, a less burdensome regulatory program for television e-waste is one that relies on Return Share, the same type of program that Connecticut uses to regulate all CEDs other than televisions.

VIII. ADDITIONAL ALLEGATIONS CONCERNING EXTRATERRITORIAL ASPECTS OF THE E-WASTE LAW

A. The E-Waste Law Controls Interstate Television Prices

47. The E-Waste Law has controlled and will continue to control interstate television prices in multiple ways.

48. For example, the National Market Share provision controls interstate television prices is by controlling the pricing decisions of low average-cost producers in the television industry, particularly the low average-cost producers of top-tier ("Tier 1") television brands.

49. The E-Waste Law imposes substantial, unequal, and disproportionate costs on low average-cost producers in the television industry because the E-Waste Law most severely penalizes manufacturers that have the highest National Market Shares. The E-Waste Law has forced low average-cost producers to raise their national television prices and has therefore altered the pricing mechanism in the television industry.

50. The television industry is a highly competitive market, with technological advancements and refinements introduced on an annual basis. The largest competitors are well established manufacturers with the ability to implement and sustain aggressive pricing strategies.

51. In the highly competitive television market, low average-cost producers drive down and establish minimum prices in the television industry. Low average-cost producers are able to move wholesale prices to the lowest levels because such producers can produce their products at the lowest cost given competitive advantages such as economies of scale or technological capabilities.

52. The prices that low average-cost producers in the television industry charge for their products are directly correlated to the minimum of their average costs. Because of their lower costs, these firms will expand output and charge relatively lower prices than their competitors. This is due to established and unavoidable economic consequences and market forces.

53. There will always be at least one low average-cost producer in a competitive market that drives the overall minimum market price. Other firms with higher average costs cannot consistently undercut the low average-cost producers' prices. If such firms try to undercut the low average-cost producers' prices, they will incur losses and eventually go out of business. Alternatively, firms with higher average costs could charge higher prices in order to avoid losses and stay in business. In either case, the low average-cost producer or producers will inevitably establish the overall minimum market price.

54. As a result of their competitive advantages, low average-cost producers have the highest National Market Shares in a competitive market. Empirical analyses of the television market show that as the price for a Tier 1 manufacturer's product decreases, the manufacturer's National Market Share increases. In particular, for the largest television producers, such as VIZIO, an increase in price for their televisions, relative to the market average, leads to a decline in their respective National Market Shares. Given that low average-cost producers establish market prices, as alleged above, there is a direct relationship between National Market Share and price.

55. The E-Waste Law does not impose a uniform and equal cost on all television manufacturers. Low average-cost producers pay a grossly disproportionate share of Connecticut's e-waste recycling costs under the E-Waste Law. This is because low average-cost

producers have the largest National Market Shares and e-waste recycling costs are allocated based on National Market Share. The E-Waste Law not only raises low average-cost producers' marginal costs, but distorts the national television market pricing mechanism because the highest E-Waste Program costs are arbitrarily imposed on those manufacturers with the lowest average costs, and those manufacturers are the driving force for lowering market prices for televisions. Further, the DEEP directly controls the E-Waste Program costs imposed on television manufacturers because CERs can only charge fees that are expressly approved by the DEEP. Conn. Agencies Regs. § 22a-638-1(b)(5)(B).

56. The E-Waste Law imposes costs on low average-cost producers that are disproportionate to their state sales activity. For example, in 2013, VIZIO's National Market Share was approximately 25-50% higher than its Connecticut state-specific market share. Thus, VIZIO's share of Connecticut's E-Waste Program costs was approximately 25-50% higher than its share of the Connecticut television market. The greater the difference between National Market Share and in-state market share, the greater the controlling impact of the E-Waste Law on interstate prices.

57. As a result of their average and marginal costs rising disproportionately in comparison to other manufacturers in the television market, the E-Waste Law has controlled the pricing of low average-cost producers, such as VIZIO. By way of example, low average-cost producers, such as VIZIO, have raised their prices, driving up the minimum price floor for televisions nationwide. In response to low average-cost producers raising their prices, other television manufacturers have raised their national television prices.

58. Connecticut is one of at least eleven states that have enacted a National Market Share-based approach for allocating the costs of recycling e-waste among manufacturers. The

cumulative effect of these laws exacerbates the extraterritorial price control exerted by any one state.

B. The Connecticut Legislature Intended to Control Interstate Television Prices and Shift E-Waste Recycling Costs to Out-of-State Consumers

59. The legislative history of the E-Waste Law demonstrates that the Connecticut General Assembly intended to control national television prices in order to maintain pricing parity with neighboring states and to shift the costs of the E-Waste Law to out-of-state consumers. Indeed, during one hearing, Senator Finch stated, "of all the methods that we could choose, the manufacturer's responsibility ***helps us control the price the best***."

60. Throughout the legislative debate on the E-Waste Law, Connecticut legislators expressed concern that manufacturers would pass on the costs of the E-Waste Law to Connecticut consumers through higher prices, which would harm both Connecticut consumers and retailers. For example, Representative Butler said during the legislative debate, "I have concerns on how these fees will affect the manufacturers, and how they will in turn actually pass on that cost to ***our state consumers*** . . . ." If manufacturers were able to pass on the costs of the E-Waste Law to Connecticut consumers, Representative Sawyer stated that it would "drive people across the state lines to do their purchasing." Senator Kissel likewise stated that retailers in his district were "always battling" retailers in neighboring Massachusetts.

61. The Connecticut legislature adopted the E-Waste Law provision in order to limit significant and detrimental price increases in Connecticut. As Representative Widlitz explained during legislative debate on the E-Waste Law, "one of the main points" of the statute was to ensure that it be "***free of cost***" to residential consumers. Similarly, Representative Chapin stated that the E-Waste Law "provides the best chance for ***our constituents*** to not have that price, and the cost of disposal thrust upon them."

62. The Connecticut legislature enacted the E-Waste Law in order to shift the costs of recycling Connecticut's e-waste to out-of-state consumers. During the legislative debate on the E-Waste Law, Representative Widlitz, stated that she "absolutely agree[d] . . . that there will be a cost ***somewhere***" and "that ***someone*** will pay" for the costs of the E-Waste Law.

63. The Connecticut legislature also attempted to minimize price increases in Connecticut by restricting access to the E-Waste Program to in-state residents. As Representative Widlitz explained during the legislative debate on the E-Waste Law, "[t]his plan is ***restricted to Connecticut residents*** depositing the computers and monitors and televisions that they have in their homes to their municipalities." This legislative intent was clearly incorporated into the E-Waste Law, which only applies to CEDs "generated by a household in the state," and which exempts only state residents from collection fees. Conn. Gen. Stat. Ann. §§ 22a-631(c); 22a-635(b). Indeed, the E-Waste Law regulations expressly provide, "A CER shall only submit an invoice regarding a CED generated by a household in Connecticut." Conn. Agencies Regs. § 22a-638-1(j)(1).

64. The Connecticut legislature intended for the E-Waste Law to be part of a "compact" among New England states that would enact similar statutory schemes for recycling e-waste. The Connecticut legislature intended to participate in this regional "compact" in order to control interstate television prices by ensuring that television prices would be uniform across New England and that Connecticut retailers would not be harmed by Connecticut consumers traveling out-of-state to purchase televisions.

C. Additional Factors Magnify the Extraterritorial Control that the E-Waste Law Exerts on Interstate Television Prices

65. As a result of the unequal, disproportionate, and arbitrary manner in which it allocates liability among television manufacturers, the E-Waste Law imposes burdensome and

inefficient costs on those television manufacturers that currently have high National Market Shares, such as VIZIO. These costs reduce the comparative advantage of such television manufacturers and result in higher national television prices.

66. The costs that the E-Waste Law imposes on television manufacturers are not proportionate to the manufacturers' respective contributions to Connecticut's e-waste stream, which augments the unequal, inefficient, and arbitrary costs being imposed on television manufacturers and exacerbates the E-Waste Law's extraterritorial control on television prices.

67. The E-Waste Law's arbitrary and unfair method of allocating e-waste recycling costs prevents manufacturers from establishing their own wholesale prices based on the cost of recycling their own products. The E-Waste Law does not require manufacturers to bear the full costs of recycling the televisions that they produce. Instead, the E-Waste Law requires certain manufacturers to pay the costs of recycling other manufacturers' televisions. The E-Waste Law does not fairly apportion e-waste recycling costs among television manufacturers over time, which leads to out-of-state pricing impacts and control. There were approximately 77 million CRT televisions remaining in United States households as of April 2014. These CRT televisions will continue to enter state waste streams for at least the next 15 years, if not longer, as they are replaced by newer models. Thus, CRTs will continue to drive not only the present costs of e-waste recycling, but also e-waste recycling costs for the foreseeable future. Even when newer television models begin to enter the waste stream, the cost of recycling CRT televisions will continue to represent the dominant share of e-waste recycling costs because they are heavier, more difficult to disassemble and contain more hazardous substances than newer model televisions.

68. The E-Waste Law fails to further any health or safety interest. Any purported health and safety interest advanced by the law is illusory. In fact, the law has had detrimental impacts to public health and safety. Among other things, it has resulted in the stockpiling, but not the recycling, of CRTs by CERs that lack the means to properly recycle CRTs in accordance with state and federal law. For example, former DEEP-approved CER Creative Recycling Solutions filed for bankruptcy in 2014, later converting that to a Chapter 7 liquidation, leaving behind a stock pile of roughly 30 million pounds of CRTs in warehouses on the East Coast. A spokesperson for the company admitted: "Going back in history, to me, it looks like there was no strategic plan as to how they were going to solve their glass problem." Additionally, the E-Waste Law may have increased exportation of e-waste oversees for improper recycling, leading to increased environmental and human health risk. A new report and study of e-waste drop off locations around the United States, performed by the Basel Action Network in conjunction with MIT, has shown that many products returned for recycling are being sent overseas in violation of nationally recognized responsible e-waste recycling certification programs such as e-Stewards and are not being handled and processed in accordance with U.S. and international laws.

69. The interstate price control impacts of the E-Waste Law are magnified by numerous other aspects of the E-Waste Law that impose costs on manufacturers, which are disproportionately allocated to the low average-cost producers. These inefficient allocations are caused by the fact that the E-Waste Law: shifts costs to out-of-state consumers; imposes higher costs on manufacturers with higher a National Market Share than Connecticut market share; imposes artificially high costs through unreasonable regulation of and control over CERs; restricts the flow of goods in the recycling stream; precludes out-of-state residents from utilizing the E-Waste Program; favors in-state commercial interests; imposes a surcharge on out-of-state

sales; requires manufacturers to pay to recycle televisions that they never made, sold or profited from; fails to take into account the amount of hazardous substances that are actually contained in manufacturers' televisions; gives manufacturers of competing products a discount and competitive advantage over television manufacturers by arbitrarily regulating television manufacturers based on National Market Share and other CED manufacturers based on a Return Share; and exacerbates environmental harms.

D. Price Control Impacts Cannot Be Avoided

70. The above-stated facts demonstrate that the E-Waste Law has the practical effect of controlling interstate prices. Manufacturers cannot avoid the grasp of the E-Waste Law absent a complete withdrawal of the manufacturer and its products from the recycling stream, but this is impossible. Furthermore, even if withdrawal were possible, that does not mitigate the extraterritorial effects of the E-Waste Law. The choice to avoid a compliance obligation by avoiding a state does not save an otherwise extraterritorial law. The operative question is whether a manufacturer can comply with the law in a manner that would avoid its extraterritorial reach. Here, the answer is no. If a manufacturer's regulatory burden under the E-Waste Law is triggered, its regulatory burden will invariably be tethered to its National Market Share, the consequence of which is to control prices through a distorted impact on those manufacturers with the highest market shares and most profound capabilities to establish market prices.

71. Low average-cost producers cannot avoid raising prices for televisions by absorbing the costs of the E-Waste Law. The low average-cost producers' revenue margins in the competitive television market are too narrow to absorb the substantial costs of the E-Waste Law. Given its narrow revenue margins and other factors, VIZIO cannot absorb the costs of the E-Waste Law.

72. It is impossible for low average-cost producers to avoid higher national prices by passing on the costs of the E-Waste Law solely to Connecticut consumers. Even if it were possible for low average-cost producers to raise the prices of their televisions only in Connecticut, the resulting price increases would result in Connecticut consumers purchasing fewer of the low average-cost producers' televisions. As predicted by the Connecticut legislature, instead of paying higher prices in Connecticut, some in-state consumers would likely travel to neighboring states, such as Massachusetts or New York, to purchase their televisions. The sale of fewer televisions in Connecticut would have a negligible impact on the low average-cost producers' respective National Market Shares due to the small size of the Connecticut market. Thus, low average-cost producers would continue to have to pay high E-Waste Program costs based on their high National Market Shares, and there would be increased shifting of costs out-of-state. By selling fewer televisions in Connecticut, low average-cost producers would recover a lower amount of their E-Waste Program costs directly from Connecticut consumers and a higher amount of their E-Waste Program costs from non-Connecticut consumers.

73. If low average-cost producers were able to raise the price of their products only in Connecticut in order to recover their E-Waste Program costs, the inevitable result would be a "death spiral" in which the low average-cost producers sell increasingly fewer televisions in Connecticut and pass on increasingly higher E-Waste Program costs per sale. Over time, in-state costs would escalate to a point at which no sale in the state could be consummated. If it were possible to pass E-Waste Program costs onto Connecticut consumers, an economic projection of the television market shows that the number of VIZIO televisions sold in Connecticut would decrease by more than 30,000 units by 2020, but VIZIO's E-Waste Program costs per unit would increase by more than a 1000% within that timeframe. By approximately 2021, VIZIO

television sales in Connecticut would cease. Accordingly, the only way for low average-cost producers to recover their E-Waste Program costs is to raise their national television prices. The costs cannot be recovered solely from in-state sales. Even if costs were able to be passed onto Connecticut consumers, the result would be an eventual suspension of televisions flowing from the interstate market into Connecticut. This result is antithetical to the dormant Commerce Clause.

74. As a practical matter, distributors do not and cannot enter into agreements with television manufacturers that would force the distributor to sell a manufacturer's televisions at a minimum price. Nor can television manufacturers as a practical matter preclude sales (or resales) of VIZIO televisions in Connecticut by contract. Television manufacturers cannot dictate where distributors sell manufacturers' products. Ultimately, manufacturers cannot avoid E-Waste Program costs and price-control impacts. The costs will ultimately be absorbed by VIZIO in proportion to National Market Share.

75. Further, any outcome where there is a significant barrier to VIZIO products being sold in Connecticut would represent a total disruption of the flow of goods in interstate commerce and result in a form of economic balkanization. Creating a wall around Connecticut is not a solution to an extraterritorial statute and would itself create a separate dormant Commerce Clause violation.

IX. CLAIMS FOR RELIEF

COUNT 1

VIOLATION OF THE DORMANT COMMERCE CLAUSE OF THE U.S. CONSTITUTION

76. Plaintiff repeats and realleges the allegations in Paragraphs 1 to 75 of the Complaint, as if fully set forth herein.

77. The Commerce Clause of the United States Constitution provides that only "(t)he Congress shall have the Power. . . (t)o regulate Commerce. . . among the several States. . . ." Art. I, § 8, cl.3. Likewise, the Commerce Clause bars states from unjustifiably discriminating against or burdening the interstate flow of articles of commerce.

78. Televisions and CEDs are articles in commerce that are subject to the sole power of Congress to regulate commerce among the several states under the Commerce Clause of the United States Constitution.

79. The E-Waste Law exceeds the authority of the State of Connecticut or the DEEP to regulate or burden interstate commerce. The E-Waste Law has an extraterritorial reach that has the practical effect of controlling manufacturers' conduct and regulating goods in commerce beyond the boundaries of the state.

80. At all times, Defendant acted under color of state law.

81. Defendant's enforcement of the E-Waste Law deprived Plaintiff of its rights under the Commerce Clause of the United States Constitution, in violation of 42 U.S.C. § 1983.

82. Any applicable state administrative procedures were exhausted and/or are futile and inadequate and do not provide for the relief sought hereby.

83. Plaintiff will suffer immediate and irreparable harm if Defendant is permitted to enforce the E-Waste Law.

PRAYER FOR RELIEF

WHEREFORE, VIZIO respectfully requests a judgment against Defendant as follows:

(1) Declaring that the E-Waste Law (Sections 22a-629 through 22a-640 of the Connecticut General Statutes and Sections 22a-630(d)-1 and 22a-638-1 of the Regulations of Connecticut State Agencies) is unconstitutional under the Commerce Clause.

(2) Preliminarily and permanently enjoining Defendant from enforcing the E-Waste Law (Sections 22a-629 through 22a-640 of the Connecticut General Statutes and Sections 22a-630(d)-1 and 22a-638-1 of the Regulations of Connecticut State Agencies).

(3) Awarding Plaintiff costs and attorneys' fees pursuant to 42 U.S.C. § 1988 and any other applicable laws.

(4) Granting Plaintiff such other and further relief as the Court deems just and proper.

JURY DEMAND

Plaintiff demands a trial by jury.

By: /s/ Terry D. Avchen

Terry D. Avchen, *pro hac vice*
Noah Perch-Ahern, *pro hac vice*
Clare M. Bienvenu, *pro hac vice*
GLASER WEIL FINK HOWARD
AVCHEN & SHAPIRO LLP
10250 Constellation Boulevard, 19th Floor
Los Angeles, CA 90067

Patrick M. Fahey
SHIPMAN & GOODWIN LLP
One Constitution Plaza
Hartford, CT 06103

Attorneys for Plaintiff
VIZIO, INC.

CERTIFICATE OF SERVICE

I hereby certify that on this 20th day of May, 2016, a copy of the foregoing was filed electronically and served by mail on anyone unable to accept electronic filing. Notice of this filing will be sent by e-mail to all parties by operation of the Court's electronic filing system or by mail to anyone unable to accept electronic filing. Parties may access this filing through the Court's system.

By:/s/ Noah Perch-Ahern

UNITED STATES DISTRICT COURT

DISTRICT OF CONNECTICUT

VIZIO, Inc., Plaintiff, vs. ROBERT KLEE, in his official capacity as the Commissioner of the State of Connecticut Department of Energy and Environmental Protection Defendant.	:	Case No. 15cv929(VAB) 915 Lafayette Blvd Bridgeport, CT December 1, 2016

TRANSCRIPT OF ORAL ARGUMENT ON DEFENDANT'S MOTION TO DISMISS

BEFORE: THE HONORABLE VICTOR A. BOLDEN, U.S.D.J.

APPEARANCES:

FOR THE PLAINTIFF:
PRATIK SHAH, ESQ.
JAMES TYSSE, ESQ.
Akin, Gump, Strauss, Hauer & Feld
1333 New Hampshire Avenue N.W.
Washington, DC 20036

PATRICK FAHEY, ESQ.
Shipman & Goodwin
One Constitution Plaza
Hartford, CT 06103

FOR THE DEFENDANT:
MICHAEL SKOLD, ESQ
Office of the Attorney General
55 Elm Street
Hartford, CT 06141

Sharon Montini, RMR, FCRR
915 Lafayette Blvd
Bridgeport, CT 06604
Official Court Reporter

(Proceeding commenced 12:55)

THE COURT: Good afternoon. Please be seated. We're here in Vizio, Incorporated v. Klee. Will counsel please state their appearances for the record. We'll start with plaintiff.

MR. SHAH: Patik Shah for Vizio, Inc.

MR. TYSSE: James Tysse for Vizio, Inc.

MR. FAHEY: And Patrick Fahey for Vizio.

MR. SKOLD: And Assistant Attorney General Michael Skold for the defendant, your Honor.

THE COURT: All right. So I think we've been on this case before. There is another motion to dismiss, Mr. Skold?

MR. SKOLD: I apologize, your Honor.

THE COURT: What are you apologizing for? That's what you are supposed to do, I guess.

Are you ready to proceed?

MR. SKOLD: Yes.

THE COURT: Go ahead.

MR. SKOLD: The only claim that's left in this case, your Honor, is the extraterritoriality claim. In the initial complaint and in the briefs on the first motion to dismiss the plaintiff raised three theories as to why it thinks that the E-waste law violates the extraterritoriality doctrine. The

Court rejected all three of those theories and made clear that in order to state an extraterritoriality claim in an amended complaint, the plaintiff had to allege facts showing that the E-waste law directly controls or dictates price. The Court was very clear about that. But there is no claim in either the amended complaint or in the plaintiff's brief on this motion to dismiss that the E-waste law does that. There is no assertion that it directly controls or dictates. There is certainly no facts to support that.

Instead, they have attempted to rehash a different theory that this Court did not permit them to replead, and they essentially argue that price controls how much national market share they have, and because the E-waste law uses national market share to assess costs, in effect what it's really doing is indirectly creating liability based on those out-of-state pricing decisions.

Putting aside the fact that the Court did not permit them to replead this theory, I'd like to direct the Court to pages 23 and 26 of the memorandum of decision where the Court expressly rejected this exact same argument. On page 23, at the bottom of the page, the Court noted the

plaintiff's argument then was that the E-waste law "effectively regulates their" Vizio's "out-of-state sales because the law's use of national market share data creates liability based on out-of-state conduct."

That's the exact same theory that they are presenting now. The only change is you have to substitute the word "sale" for "discretionary pricing decision," which is part of the sale. So there is really no difference in their theory now.

And on page 26 of the Court's decision, after the Court correctly distinguished several cases that they relied on before that they no longer rely on, the Court held "while it is true that plaintiff's in-state and out-of-state sales influence the amount that plaintiff must pay under the E-waste law for recycling e-waste collected in Connecticut, the fact that plaintiff's out-of-state sales have local impacts in Connecticut does not in any way equate to extraterritorial regulation of those out-of-state sales" that could violate the dormant commerce clause.

That conclusion holds true here. Again, the only change you would have to make is substitute the word "sale" for "discretionary pricing

decisions." There is no rationale or facts or legal authority cited in their brief that compels a different conclusion now compared to what the Court reached before. So I think that's the law of the case and that the Court should adhere to its prior decision.

The only case they do cite, which they didn't really cite before but now they do, is *Healy*, which is the seminal extraterritoriality case. I discuss that a lot in my reply brief, so I won't go through it in great detail here, but there were two critical factors in *Healy* that allowed the extraterritoriality doctrine to apply that do not apply here.

First is that it was a blatant economic protectionism measure. There was a price control statute designed to assist in-state sellers from out-of-state pricing competition from out-of-state sellers. We don't have that here. This is not an economic protectionism measure. The Court correctly noted that in its prior decision. It's a geographically neutral health and safety measure, and that's all it is.

The other factor that I think is even more critical is that in *Healy* the law at issue

directly controlled and dictated how out-of-state sellers could price their products out of state. Once they set their prices in Connecticut -- it was a price affirmation statute. Once they set their prices in Connecticut, they could not change their prices out of state.

And another factor that the court pointed out in *Healy* was that they could not take advantage of local conditions and impose competitive pricing strategies out of state because the Connecticut law required them to import those in-state. So it was directly controlling and dictating how they could price their products. That was the critical distinction.

We don't have that here. Again, there is no plausible argument, and they don't make one, that the E-waste law in any way dictates prices; they're discretionary pricing decisions that they can make, however, whenever they want.

And one final point that I would like to make, and I think it kind of goes to the fundamental flaw in their whole claim, is they state at various points in their brief in a conclusory fashion that of course the state couldn't tie costs, recycling costs in Connecticut directly to price without the

national market share kind of in between. Of course they don't cite a single case that supports that. They make those statements and there is no case. There isn't a case because that's not correct.

If the state were to tie costs directly to price in a way that controlled out-of-state prices, in the same way that was the case in *Healy*, for example preventing them from setting or changing the prices in the manner that they want, then we would have a case like *Healy* and the extraterritoriality doctrine might apply. If the state sets in-state recycling costs, ties them directly to price in a manner that let's them still set prices however and whenever they want, then the very most that you would have is a potential burden -- not a regulation, a burden of interstate commerce that you would have to look at through *Pike*. And that's really the fundamental fallacy in this extraterritoriality claim that they have in this case. What they are trying to do is convert a standard *Pike* claim, where you are just burdening -- potentially burdening interstate commerce, and trying to change that into an extraterritorial claim, which is per se unconstitutional, and that's just not what the law requires, your Honor.

THE COURT: So essentially once again you don't want them to get to discovery. That's fair to say?

MR. SKOLD: Pardon me?

THE COURT: Once again you don't think they get to do discovery.

MR. SKOLD: I do not think they do, no.

THE COURT: Thank you, Mr. Skold.

MR. SKOLD: Thank you, your Honor.

THE COURT: Who is up for the defendants? You, Mr. Shah?

MR. SHAH: Yes, your Honor.

THE COURT: Welcome.

MR. SHAH: Thank you. I agree with Mr. Skold to the extent that this -- we agree that your Honor did narrow the case, of course, and ruled on and took out several of the theories that were presented in the prior motion to dismiss. So we tried to limit our new opposition, new complaint, new opposition to the extraterritorial price control theory. The reason we think that -- where we, I guess, disagree with Mr. Skold is that your Honor foreclosed the argument that we are now making on the current complaint. And the reason is that national market share for televisions -- and this is

alleged in paragraph 54 of the new complaint -- that national market share is a direct function of price. So the state's decision to tie Vizio's E-waste burden to national market share necessarily ties it to interstate prices as well. So for that reason the state's national market share-based regime has the practical effect of regulating interstate prices. That effect goes beyond sort of the mere upstream pricing impact that your Honor said was not sufficient in its last order. And here is how it goes beyond just a mere upstream pricing effect: That Connecticut's regime, what it does is acts as a constraint on Vizio's interstate pricing decisions. The reason why is because a decrease in interstate television prices will increase Vizio's regulatory burden in Connecticut, and vice-versa.

THE COURT: Just say that last point again.

MR. SHAH: Sure. So the way in which it acts as a constraint is when Vizio decreases its interstate prices, it will have the effect of increasing the regulatory -- the amount it has to pay in Connecticut. The reason is because of the inverse relation between price and market share, when it decreases its price, interstate price, its

national market share goes up, and, therefore, it has to pay more in Connecticut.

So effectively the way we think about it is as follows: In effect, Connecticut is levying a penalty on Vizio when it decreases its prices and increases market share such that the more successful Vizio is in selling televisions outside of Connecticut, the more it has to pay inside of Connecticut. That's a sort of penalty on interstate commerce that is inconsistent with the dormant commerce clause.

THE COURT: But why would that be any -- why is that any different from, you know, any regulation, or even -- I mean, I don't want get -- the last time we had this argument I may have gone too far afield talking about taxes, but that would be the same thing with tax, which is, in essence, the more successful you are the more you may end up paying in taxes, even if you had, say, a flat tax. Say there was a flat tax of, you know, basically 2 percent of all of your sales being taxed. Obviously the more you sell the more you are going to end up paying in taxes, and so, therefore, the fact that you should actually decrease your sales, that would then affect the amount you pay in taxes.

So how is that actually regulating -- or actually not really -- "regulating" is actually not the appropriate word. The trigger word, as I see under *Healy*, the question is controlling your price. You may affect the price. You can call it regulation or whatever, but I think there is a difference between controlling the price and actually affecting the price. Why isn't this law merely affecting prices? Why is it actually controlling? And not only controlling, the key word is not just control, but direct control, because -- and I think what these cases stand for is that if we don't make this distinction between direct control of prices and you merely allow indirect or incidental effects on prices that constitutes something that might be in the rubric of interstate commerce, then effectively every regulation would conceivably be under the rubric of interstate commerce, and, therefore, no local or state regulation would ever survive.

MR. SHAH: Sure, your Honor. Let me start by saying, look, there is a fundamental difference between the sort of regulation here which is expressly tied to national market share and interstate prices.

THE COURT: But it's not expressly tied to prices.

MR. SHAH: Right. So expressly tied to national market share, and then by the allegation, because there is a direct relationship between market share and prices, it has that same effect on prices. There is a fundamental difference between --

THE COURT: But doesn't by actually saying that, what we do is affect market share, which then you say directly affects prices, doesn't that in effect mean there is an indirect effect on prices? Because there is some intermediary between how this law interacts with prices, and that intermediary would be market share.

MR. SHAH: Your Honor, it is true that they chose to peg it to national market share and not price, but as you heard Mr. Skold say, they don't think there is any problem if they had just pegged it directly to prices as well. He said that.

THE COURT: That's fine, but fortunately that law is not before me. The law before me is one that is actually pegged to market share. When Connecticut does the next one, we can come back.

MR. SHAH: Sure.

THE COURT: And Mr. Skold can make that argument and we'll see how that goes. Let me deal with the statute I have first.

MR. SHAH: Sure. So with the law that you have, the language in *Healy* is does it have the practical effect. Right? The practical effect. We think the practical effect is the same because -- because of that very close and economically justifiable or supportive relationship between national market share and price. And it's alleged in several paragraphs in our complaint, starting at 54, when you decrease the price, it increases the market share. So the practical effect is the same, in our view, as to -- whether it was tied directly to national market share or prices.

THE COURT: But isn't that going to be the case with every regulation?

MR. SHAH: No, your Honor.

THE COURT: Because every regulation, it imposes some cost on the business, presumably.

MR. SHAH: Sure.

THE COURT: Well, let's say -- let's assume it does, which seems like a fair assumption.

MR. SHAH: Yes.

THE COURT: The government asks you to

do X. If you didn't have to do X, you would not incur the cost associated with X. So the government asks you to do X. And by asking you to do X, that's going to affect your prices. So how is this situation distinguished between -- from that general proposition that every time you regulate you affect the price?

MR. SHAH: Sure, your Honor. And there is a key difference. I'm glad you asked the question between that scenario, which applies -- I agree, applies to all sorts of regulations -- right? -- it increases the cost of doing business and that might be passed on to consumers. That I would put into the category of upstream pricing impact, which this Court addressed in its last order and said that's not good enough, precisely for the reason that you are saying, that, look, you can pretty much cast any regulation in that bucket, they're all going to have some degree of upstream pricing impact, the dormant commerce clause doesn't exclude all of those sorts of regulations.

Here is the difference between this regulation and all of those. This one is expressly tied to out-of-state commerce. So it's not the case, for example, as you gave the tax hypothetical,

the more business you do in Connecticut, if they tax 2 percent of your Connecticut sales, the more tax you are going to have to pay. Sure, that's certainly the case, but I know of no other regime, no other regime in all of the regulatory contexts that you can think of where a state can tax you for the sales that you are making in a different state or for the fact that you are increasing productivity in different states. That is what Connecticut is doing here.

THE COURT: No, I understand. And I foolishly took us down this road of taxes, and the reality is that there is a fundamental difference between regulations that may affect prices and taxing, and certainly in the context of the way the law works in terms of taxing, it certainly would be the case that Connecticut couldn't impose a tax based on the sales that are done elsewhere. That clearly is something the law would violate.

But here, sticking with the concept of a regulation or burden that the state is imposing on a business, and part of the way they're imposing on that business is saying, look, we're going to impose it on this national figure, and apparently different states seem to do this differently, so isn't this

just the reality of the system that we have, that we have a federal system of regulations and we allow state and local governments to sort of regulate, but, as I understand the commerce clause, what we're not going to allow state and local governments to regulate is in such a way that they actually control directly prices. We have a law here that imposes burdens, but doesn't appear to control directly prices.

MR. SHAH: Sure, your Honor. So the control prices within *Healy*, I agree with you, and I would concede we're outside of the facts of *Healy* in which you have that direct control, that is, a state saying you cannot sell in our state unless it matches the price in another state. So if in your view --

THE COURT: Or it matches X price which you need to build in as a component in order to address the concerns of this E-waste law. That would be another way of doing it, right?

MR. SHAH: Yes. So if that were the outer bounds of the dormant commerce clause -- and I agree this case doesn't get there, but here is why I don't think that can be the outer bounds of the dormant commerce clause, because what you have here

-- and remember, *Healy*, it did have the language of direct price control, but the broader framework being applied in *Healy* was the extraterritorial regulation prong of the dormant commerce clause. So as we cited in page 8 of our opposition, *Healy* starts, the general principle is you can't regulate outside of your state's borders. The exact quote is "commerce that takes place wholly outside of the state's borders" even if it has impacts within the state. That is the framework under which *Healy* is doing it. And then a subcategory of that, which were the facts of *Healy*, is when you actually have the sort of direct price control that was there.

So we don't have that explicit same price control here, I will concede that, but what you do have is something beyond a mere ordinary upstream pricing impact which would impact all regulations. What you do have here is essentially a state saying -- and again, I know of no case which has ever allowed this. I don't know of any regulatory regime outside of these sort of E-waste producer laws in which a state has ever tried to peg its regulation to what a company or business is selling outside of the state. And so, again, if this were posed -- and I think -- I can't think of

any analytical difference between a state saying we are going to impose a penalty on you -- for each 10 percent of increased sales that you have in our neighboring state, we're going to increase 10 percent the amount you have to pay in our state. If a state did that, that would run afoul of the dormant commerce clause. I don't think that there would be a colorable argument that it wouldn't.

THE COURT: Taking that proposition, that there are two aspects to *Healy*, and there is this broader principle about what you are doing in terms of affecting commerce in another state, and then within that broader principle is this more narrow principle about price control, what is the case that applies *Healy* -- and as you admit, this is outside the facts of *Healy*. What is the case that applies *Healy* with that broader concept that would strike down the regulatory scheme that we have here?

MR. SHAH: Well, your Honor, again this sort of scheme -- I don't have a case in which it's applied where a state has tried to regulate national market share or out-of-state prices and been upheld, because that has never happened. This would be unprecedented, for a state to say -- and this is the basic theory behind dormant commerce clause, right,

that states can do whatever they want in imposing regulation and regulating your conduct within the state, and of course if that has incidental impacts on you having to raise prices across the country, that's fine.

That's not our claim here. We're not talking about incidental impact. What they are doing is they are saying we're starting as the benchmark for our regulation what you are doing outside of Connecticut, your national market share prices.

So the best case I have in terms of national market share, just because it hasn't happened anywhere, is the *Grand River* case, which I realize you've already distinguished on multiple grounds.

THE COURT: So effectively -- and there is nothing wrong with that, I just have to sort of deal with it. Effectively, if I was to rule that this claim actually did sort of survive, I would be effectively the first court to do so.

MR. SHAH: Either way you would be the first court to do so. If you uphold the statute, you would be the first court to ever uphold a state regulating based upon out-of-state commerce. So

either way it truly is I think a challenge of first impression, and Vizio realized that when it brought this. These laws are new. I mean, within the last decade you've seen essentially local -- state and local governments shifting some of the costs out of state, and there are many mechanisms by which they can do that, but one mechanism by which they cannot do that is this novel approach of tying it to out-of-state commerce. So I think that's where we part company.

And again, you know, *Healy* -- while of course *Healy* itself, and a couple of Supreme Court cases, do deal with price affirmation, explicit control, *Healy* of course has been cited by all sorts of courts, courts of appeals, in other extraterritorial regulation contexts, some of which you dealt with in your other opinion, internet, energy, intangible products, but also things like soda beverage labelling that have consequences outside of state. We just happen to be familiar which that case, *ABA v. Snyder*. There is all sorts of cases where courts, lower courts, have applied *Healy* beyond price affirmation contexts, just not in this context because it's never had a chance to.

THE COURT: Okay.

MR. SHAH: I'm happy to take any questions.

THE COURT: No. If there are any other points you wish to make. I understand your basic argument.

MR. SHAH: Thank you, your Honor.

Anything else, Mr. Skold?

MR. SKOLD: Just very briefly, two points. First of all, we're not in any way penalizing pricing decisions outside of the state. The reason -- if it's true that prices increase national market share, and that, therefore, they incur higher costs, that's because they're selling more products and more products have to get recycled. So it's not like we're penalizing out-of-state conduct. There is harm happening in Connecticut and the manufacturer is being charged for that.

THE COURT: But Mr. Shah's point is well-taken to the extent that -- because what you are not doing is you are not necessarily looking at Vizio's market share in Connecticut. Right? Because his argument would have absolutely no merit if in fact Connecticut E-waste's law basically said we're going to, you know, use as a measure for this

law your market share within the state.

MR. SKOLD: Right. There is no Connecticut market share data, so it's in proxy. That's why we're doing it.

THE COURT: Exactly.

MR. SKOLD: I don't dispute that. But the state is not trying to penalize for out-of-state --

THE COURT: I understand, which is a different point. Just to be clear, by the fact that you are doing that, it's necessarily a different thing about whether or not this Court should read *Healy* as going beyond what it expressly held in terms of price -- direct price control and then extend it to the broader notion of looking at these extraterritorial effects and then finding a violation of the commerce clause there. But at least we would be moved out of the realm of that legal issue where apparently either side is asking me to break new ground, and I will ask whether you buy that notion as well. I assume you don't.

MR. SKOLD: I don't see there is breaking of new ground here at all. They are asking for a dramatic extension of *Healy*, for sure.

THE COURT: So I'm on safer ground if I

rule your way.

MR. SKOLD: Yes. Your Honor, there is no -- the reason we're not breaking new ground is because the *Pike* analysis already addresses exactly what they are saying. They are saying there is a burden on interstate commerce, on their interstate pricing decisions, maybe they are disincentivized to lower prices because they'll have to pay more. Whatever the burden might be, that's classic *Pike*. It's not breaking new ground because that's the analysis that exists for that type of claim.

Again, they're trying to transform this into an extraterritorial claim and that's just not what *Healy* or any other case supports. In fact, the cases are exactly the opposite. I think that's brought home by the fact -- because if the only thing that mattered is the state is looking at out-of-state conduct, pricing, national market share, whatever it might be, then *Healy* would have been a one-page decision, there would have been no analysis about control or any of that. They looked to out-of-state prices directly. We don't do that, but they did in that case. And the court didn't say that's just automatically unconstitutional. They went through a whole control analysis. If their

argument holds weight, then all of that analysis would have been superfluous.

THE COURT: I suppose another way of saying what you are saying is that the point may be well-taken about *Healy*, but at the end of the day what this Court is actually bound by is actually the holding of *Healy* which really dealt with direct price control. The other language might be sort of dicta, and so the question of whether I should be relying on its express holding or its dicta is a question I should be dealing with. Is that why you are arguing I'm on safer the ground?

MR. SKOLD: Yes. And the fact that every case since *Healy* has focused on this aspect of control. The *NEMA* case, we discussed a lot in the last argument, the *Freedom Holdings* case, control is what drives the extraterritorial analysis. So any sort of application of that doctrine in this case is going to be a dramatic extension of that doctrine. It is the most dormant doctrine in all of dormant commerce clause jurisprudence and for which there is already a different doctrine that applies, *Pike*.

THE COURT: Thank you, Mr. Skold.

Did you have anything further, Mr. Shah?

MR. SHAH: If I may just make --

THE COURT: Sure you may. We're here, why not?

MR. SHAH: Two quick points. One is Mr. Skold has said that we have -- we're essentially stating a *Pike* claim, but your Honor has foreclosed the *Pike* claim. So to the extent we are stating --

THE COURT: It's a backdoor *Pike* claim.

MR. SHAH: So I just wanted to flag that.

The other point I want to make is to the extent that folks are focussing on the language in *Healy* and the facts of *Healy* about explicit price control, again, *Healy* was a case that set out a -- it was about that subcategory, but the category is controlling commerce beyond the state's borders even if it has an impact there.

So I know your Honor limited this hearing, so I don't want to go beyond that to the explicit price control, but as you are thinking through it, I think it would be helpful to ask, well, if you don't want to go one step removed to prices, then just focus on the national market share piece because national market share is explicitly regulating commerce outside the state's borders. So you don't have to go to the subfacts of *Healy*, you

can just start with the general principle of *Healy* from which it was derived, which is you can't be regulating commerce outside of your state even if it has impacts in your state.

That's -- the reason why we've briefed this as this price control, which I agree has that one step removed, is because we wanted to be limited to this Court's order, but to the extent the Court is thinking about *Healy* and this extraterritorial regulation, I think it is -- I think, quite frankly, the stronger argument is really to start with national market share because that is explicit regulation of out-of-state commerce that would be prohibited under what I think are traditional principles of dormant commerce clause from which *Healy* then reasoned to the subcategory of price control.

THE COURT: Just to my point that I was saying to Mr. Skold a minute ago about the difference between the holding and dicta, this talk about the general principles, at the end of the day what was really applied and the binding holding, the precedent that this Court has to follow is really about direct price control. Isn't that fair?

MR. SHAH: In *Healy*, but *Healy* is

relying on other Supreme Court cases which were not price control cases, they were extraterritorial regulation cases. And I think *Healy* even has a passage where it summarizes -- and we quote on page 8 of our brief -- *Healy* says "taken together, the Supreme Court's cases concerning the extraterritorial effects of state economic regulation stand at a minimum for several propositions," the first of which is the more general proposition that you can't regulate wholly outside of a state's borders even if it has state impacts. And then it gets to the subprinciple of explicit price control.

So I think, your Honor, when you go back and look at *Healy*, *Healy* is relying on a body of Supreme Court precedents that are not price control cases. It then applies its holding to price control. So you are right if you are applying *Healy* itself, but the general principle did not start with *Healy*. *Healy* was applying that general principle to price control, and I think we've become fixated on price control just because of the narrow nature of the second hearing, but I think really the dog wagging the tail here is the general principle, which is not confined to *Healy*, which is a state

cannot be regulating outside of its borders even if it has an incidental in-state impact. And that principle has been applied by a number of courts of appeals that have -- in cases that have nothing to do with price impacts.

And so, your Honor, I would just ask that -- to the extent you are looking at this, that you consider that broader principle as well.

THE COURT: All right, thank you.

Anything further, Mr. Skold?

MR. SKOLD: Sorry.

THE COURT: It's your motion, so I'll give you the final word.

MR. SKOLD: On that last point that Attorney Shah was making, he wants to focus on the idea of out-of-state conduct, but the extraterritoriality doctrine focusses on controlling and regulating. So I'd point the Court again to the *NEMA* decision. In that case it was out-of-state producers who had to change the way they made light bulbs out of state. So it was having an impact on that out-of-state business, but it wasn't controlling it and it wasn't dictating it, so that's why the Second Circuit said it was okay to do under the extraterritoriality doctrine. So it's not just

the idea that there is out-of-state conduct happening, it's control.

THE COURT: All right. Well, thank you all very much. This is both well briefed and well argued, and I appreciate it. I'll try to issue a decision as expeditiously as possible. Thank you very much.

We're adjourned.

(Proceeding concluded 1:30)

I certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

1/4/17

Date

/S/ Sharon Montini

Official Reporter

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

VIZIO, INC.,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Case No. 3:15-cv-00929-VAB
	)	
ROBERT KLEE, *in his official capacity as the Commissioner of the State of Connecticut Department of Energy and Environmental Protection*,	)	
	)	
Defendant.	)	January 23, 2017

NOTICE OF APPEAL

Notice is hereby given that Plaintiff VIZIO, Inc., hereby appeals to the United States Court of Appeals for the Second Circuit from the December 29, 2016 final judgment entered in favor of Defendant and the relevant orders relating thereto—including the March 31, 2016 order dismissing the complaint (Doc. No. 36), and the December 22, 2016 order dismissing the amended complaint with prejudice (Doc. No. 60).

Respectfully submitted,

/s/Patrick M. Fahey
Patrick M. Fahey
SHIPMAN & GOODWIN LLP
One Constitution Plaza
Hartford, CT 06103
Telephone: (860) 251-5000
Facsimile: (860) 251-5219
pfahey@goodwin.com

Pratik A. Shah, *pro hac vice*
James E. Tysse, *pro hac vice*
AKIN GUMP STRAUSS HAUER & FELD LLP
1333 New Hampshire Ave, NW
Washington, D.C. 20036

Attorneys for Plaintiff VIZIO, Inc.

CERTIFICATE OF SERVICE

I hereby certify that on January 23, 2017, the foregoing was filed electronically and a copy served by mail on anyone unable to accept electronic filing. Notice of this filing will be sent by email to all parties by operation of the Court's electronic filing system or by U.S. mail, postage prepaid, to anyone unable to accept electronic filing as indicated on the Notice of Electronic Filing. Parties may access this filing through the Court's CM/ECF system.

/s/ Patrick M. Fahey