IN THE CIRCUIT COURT OF THE STATE OF OREGON

FOR THE COUNTY OF MULTNOMAH

NICOLAS BLUMM and CLAIRE GATES, individually and on behalf of all others similarly situated, Plaintiffs, v. NORTHWEST NATURAL GAS COMPANY and NORTHWEST NATURAL HOLDING CO. Defendants.	Case No. 24CV48490 Hon. Benjamin Souede **PLAINTIFFS' RESPONSE IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS FIRST AMENDED COMPLAINT** ORAL ARGUMENT REQUESTED

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I. INTRODUCTION

As their names suggest, Defendants Northwest Natural Gas and Northwest Natural Holding Company ("Defendants" or "Northwest Natural Gas") sell natural gas, composed almost entirely of the climate super-pollutant, methane. This case arises out of Northwest Natural Gas's pervasive greenwashing in the marketing and delivery of its "Smart Energy" program, which deceived Plaintiffs Nicolas Blumm and Claire Gates and a proposed class of similarly situated natural gas customers.

As Plaintiffs allege, Northwest Natural Gas offered and promised it customers, in exchange for a fee, an "offset" or mitigation of the greenhouse gas ("GHG") emissions attributable to the customers' monthly natural gas use. Yet those customers, including Plaintiffs, received nothing of the sort. Defendants instead sent customers' "carbon offset" payments to industrial dairies that intentionally generate methane from cow manure and use technology to purportedly "capture" those emissions—a process fundamentally incapable of zeroing out customers' natural gas emissions, and at odds with Defendants' representations. On behalf a proposed class of injured customers, Plaintiff Blumm seeks to hold Defendants accountable for their false and misleading representations under Oregon's Unlawful Trade Practices Act ("UTPA"). And both Plaintiffs seek redress for Northwest Natural Gas's breach of its contract, in failing to deliver the greenhouse gas mitigation Plaintiffs and the proposed class paid for.

In an attempt to avoid liability, Defendants raise several arguments in their motion to dismiss, none of which has merit. First, contrary to Defendants' assertion, Plaintiff Blumm adequately alleges that both "carbon offsets" and environmental credits from "renewable natural gas" (RNG) production are "goods" sold to Smart Energy customers within the meaning of ORS 646.608(1)(f), and that Defendants violated ORS 646.608(1)(b) by causing a likelihood of confusion or misunderstanding as to the "source" and "certification" of those goods and of Defendants' emissions-mitigation services. Defendants' authority says no different. Second, Plaintiff Blumm amply pleads facts demonstrating Defendants' knowledge and intent in carrying

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out the Smart Energy scheme—facts that Defendants simply ignore in arguing that he failed to plead Defendants' willful, reckless, or knowing violation of the UTPA. Third, Defendants' constitutional arguments fail because Plaintiff Blumm's UTPA claims are based on Northwest Natural Gas's misleading commercial speech, not any speech protected under the state or federal constitutions. Fourth, Plaintiffs adequately state a claim for Defendants' breach of a valid contract, which Defendants' tariff neither displaces nor negates. For similar reasons, Defendants' attempt to abate Plaintiffs' dispute to the Public Utilities Commission ("PUC") fails, because Plaintiffs' UTPA and breach of contract claims are properly before this Court. Fifth and finally, Plaintiffs sufficiently plead claims against Defendant Northwest Natural Holding Company, which is also responsible for deceiving customers. This Court should deny Defendants' motion to dismiss.

II. LEGAL STANDARD

Under ORCP 18 A, a plaintiff's complaint must contain "[a] plain and concise statement of the ultimate facts constituting a claim for relief without necessary repetition." ORCP 18 A. Consistently with that code-pleading standard, "whatever the theory of recovery, facts must be alleged which, if proved, will establish the right to recover." *Davis v. Tyee Indus., Inc.*, 295 Or 467, 479, 668 P2d 1186 (1983). In other words, a pleading must contain a " 'fairly specific description of facts' " giving rise to the request for relief. *Id.* (quoting Comment to ORCP 18; F. Merrill, Oregon Rules of Civil Procedure: A Handbook 36 (1981)).

"In assessing a motion to dismiss for failure to state a claim [under ORCP 21 A(8)], the only relevant document is plaintiff's complaint, and the only relevant issue is its legal sufficiency." *Adamson v. WorldCom Commc'ns, Inc.*, 190 Or App 215, 221, 78 P3d 577 (2003) (citing *Thompson v. Tele. & Data Sys., Inc.*, 130 Or App 302, 881 P2d 819, *modified on recons*, 132 Or App 103, 888 P2d 16 (1994)). "In reviewing the legal sufficiency of the allegations of the complaint, [the Court should] consider only those facts alleged and accept as true all well-pleaded allegations, giving plaintiff the benefit of all favorable inferences that reasonably may be

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drawn from those allegations." *Id.* at 218. If a fact "is expressed in plain and concise language," then it is well pleaded. *Joyce v. City of Portland*, 24 Or App 689, 692, 546 P2d 1100 (1976) (citations omitted). "On a pretrial motion to dismiss under ORCP 21 A, 'the trial court can dismiss only if the pleading on its face fails to state a claim.' " *Lamka v. KeyBank*, 250 Or App 486, 494, 281 P3d 639 (2012) (quoting *Bus. Men's Serv. Co. v. Union Gospel Ministries*, 120 Or App 228, 852 P2d 199 (1993)), *abrogated on other grounds by Alfieri v. Solomon*, 358 Or 383, 365 P3d 99 (2015).

III. FACTUAL BACKGROUND

This case arises out of Defendants' representations regarding their Smart Energy program. As Defendants are aware, corporate claims of sustainability and lower climate impacts are important to consumers, including in Oregon; as the world inches closer to "the point of no return" due to atmospheric warming, Oregonians not only are demanding decarbonization from lawmakers and industry, but also are changing their own habits and purchasing practices. Compl. ¶ 5. Consumers are seeking out, and showing a willingness to pay more for, products and services that they perceive as sustainable or having a lighter climate impact. Compl. ¶ 6. Businesses have been quick to adjust their marketing—if not always their practices—in response. Compl. ¶ 6.

Plaintiffs allege that Defendants' representations to customers regarding the Smart Energy program are false, misleading, or otherwise deceptive to Oregon consumers, including to Plaintiffs. To understand why, Plaintiffs' complaint alleges substantial background material about "carbon offsets," "renewable natural gas," how each is relevant to Northwest Natural Gas's Smart Energy program, and how each affects GHG emissions or contributes to climate change. Plaintiffs first summarize that background material. Then, they turn to their allegations that Northwest Natural Gas engaged in unlawful and deceptive conduct in violation of Oregon's UTPA and in breach of the agreements it makes with Smart Energy customers. Defendants

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move to dismiss each of Plaintiffs' claims for relief, but for the reasons set forth below, the Court should deny that motion.

A. Carbon Offsets and Renewable Natural Gas

Defendants market "renewable natural gas" and their "Smart Energy program as a way to, as they claim, "offset the carbon emissions" from customers' natural gas use. Customers who join agree to pay a monthly fee—an "Average Home" option for a set $8 per month, or a "Climate Neutral" option for a variable fee based on the customer's monthly natural gas use. Compl. ¶ 82. Defendants represent to consumers that Northwest Natural Gas will use those monthly fees to purchase so-called "carbon offsets" from projects across the Pacific Northwest, which have the effect, according to Northwest Natural Gas, of mitigating the carbon emissions from customers' natural gas use. *See* Compl. ¶ 74 ("Join over 84,000 NW Natural customers who mitigate the carbon emissions from their natural gas use through Smart Energy! Smart Energy mitigations are like taking about 424,000 cars off the road every year.").

Defendants further represent to consumers that they have "begun to convert waste into Renewable Natural Gas to help reduce emissions from the air and provide a net zero carbon energy for the future." Compl. ¶ 63. By joining Smart Energy, Defendants claim, customers can "address the carbon emissions from [their] natural gas use through (1) carbon offsets from projects that reduce, or prevent, the release of greenhouse gases, or (2) a mix of carbon offsets and renewable natural gas projects." Compl. ¶ 82. Central to this case, then, is what constitutes a "carbon offset" and "renewable natural gas," and whether what Defendants purchase on customers' behalf does, in fact, cancel out customers' natural gas emissions.

1. Carbon offsets must have certain attributes to be legitimate.

"Carbon offsets" are a market-based tool intended to counteract greenhouse gas emissions associated with one activity (*i.e.*, generation and delivery of natural gas) with the purchase of credits by an equivalent reduction of emissions elsewhere. Compl. ¶ 9. They can be complex and require certain attributes to be legitimate. Compl. ¶ 11. Indeed, federal

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environmental marketing guidelines caution against marketing carbon "offsets" that are not based on reliable scientific and accounting methods, that sell the same emissions reductions more than once, that misrepresent emissions reductions as having already occurred or occurring in the immediate future, or that claim reductions already required by law. Compl. ¶ 10.

According to the Biden Administration's published principles of carbon credits, legitimate credits must have the following attributes:

> (1) additional: the activity is not required by law or regulation and would not have occurred absent the incentives of the crediting mechanism;
> (2) unique: one credit corresponds to only one ton of carbon dioxide (or its equivalent) reduced or removed from the atmosphere and is not double-issued;
> (3) real and quantifiable: claimed emissions reductions or removals represent genuine atmospheric impact determined in a transparent and replicable manner using robust, credible methodologies, with activities designed to prevent "leakage"—emissions from occurring, being shifted, or intensifying beyond their boundaries due to the activity;
> (4) verified: activity design is validated, and results are verified, by a qualified, accredited, independent third party;
> (5) permanent: the emissions removed or reduced will be kept out of the atmosphere; and
> (6) premised upon robust baselines: ones based on rigorous methodologies that avoid over-crediting.

Compl. ¶ 11. To the extent that corporations market something as a "carbon offset" that lacks one or more of the above attributes, that is deceptive. Compl. ¶ 12.

2. The climate benefits of "biogas" and "renewable natural gas" are, at best, unclear.

Industrial animal agriculture plays a significant role in driving the climate crisis. Compl. ¶ 13. According to recent estimates, animal agriculture is responsible for at least 14.5 percent of global anthropogenic greenhouse gas emissions annually. Compl. ¶ 14. Its outsized methane emissions are particularly staggering; methane is an incredibly potent greenhouse gas, with a global warming potential over 80 times that of carbon dioxide over a 20-year period. Compl. ¶¶ 15–16. Animal agriculture is the largest source of anthropogenic methane emissions globally, contributing around 32 percent of total emissions each year. Compl. ¶ 17.

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The vast majority of these methane emissions come from enteric fermentation, the digestive process by which cows and other ruminants break down plant matter. Compl. ¶ 17. Methane from enteric fermentation enters the atmosphere chiefly through cows' burps. Compl. ¶ 17. Enteric fermentation alone is estimated to account for a quarter of U.S. methane emissions—second only to those from fossil natural gas and petroleum production. Compl. ¶ 18.

Methane emissions from enteric fermentation dwarf—indeed, more than double—those associated with animal waste management systems. Compl. ¶ 19. Methane emissions from animal waste management systems also vary depending on the type of system. Compl. ¶ 20. Dry management systems, such as solid storage, dry lot, pasture, and composting, produce only trace amounts of methane. Compl. ¶ 20. Wet management systems, by contrast, produce considerable methane. Compl. ¶ 20.

Very large dairies produce a lot of waste, and most choose wet management systems to process it. They use large quantities of water to flush manure from barns and funnel it into massive cesspools known by industry as "lagoons." In these cesspools, organic matter breaks down in anaerobic (oxygen-free) conditions, spewing methane and other noxious gases into the atmosphere. Compl. ¶ 21. Many dairies using such systems have installed "digesters" that cover these cesspools to create an oxygen-free environment in which methane-generating microorganisms can thrive. Compl. ¶ 25. The anaerobic digestion that results creates a mix of greenhouse gases—primarily methane, and some carbon dioxide. Compl. ¶ 26. The methane can then be captured, processed, and used to generate electricity or further refined for use as fuel. Compl. ¶ 26. The dairy and energy industries have referred to this manure-derived methane, created through a manure "digester," as "biogas" and the upgraded product, "biomethane." Compl. ¶ 27. Now, they call biomethane "renewable natural gas," or RNG. Compl. ¶ 28.

Although manure digesters are not new, in recent years industrial dairies have aggressively promoted them, claiming they prevent methane emissions. Compl. ¶ 28. That claim is problematic for several reasons. First, even if manure digesters *did* meaningfully reduce

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methane emissions associated with waste management—which is dubious, as explained below—digesters have no effect whatsoever on emissions from enteric fermentation, which again, accounts for the greatest proportion (by more than 2x) of industrial dairies' emissions. Compl. ¶¶ 30, 19. Second, methane emissions from manure are largely a problem of the dairies' own choosing; flushing and storing waste in open cesspools that vent methane is not inevitable, but a deliberate management decision. Compl. ¶ 31.

Digesters' climate benefits are further undercut by the fact that, when the digester produces more gas than can be processed, the gas is flared or burned off. This releases nitrous oxide, a powerful greenhouse gas 300 times more potent that carbon dioxide, and carbon monoxide, a toxic gas that indirectly worsens climate change by contributing to the build-up of methane and atmospheric ozone. Compl. ¶ 32. And when manure methane is further processed to enable companies to inject it into natural gas pipelines, further climate risks ensue. Compl. ¶ 33. Digesters and pipeline infrastructure are notoriously leaky; a recent report identified almost 2,600 natural gas pipeline incidents (leaks and explosions) between 2010 and 2021, which collectively released 26.6 billion cubic feet of methane, equivalent to the annual emissions of more than 2.4 million passenger vehicles. Compl. ¶ 33.

Any climate benefits of digesters are also called into question by the lack of comprehensive monitoring and analysis. Compl. ¶ 35. There is scant on-site measurement to verify that claimed emissions reductions—which are typically based on modeling that assumes continuously running equipment—are in fact happening. Compl. ¶ 35. As EPA has noted, decision-makers lack "clear guiding principles for emissions measurement, reporting, and verification" for manure digester gas. Compl. ¶ 35. Indeed, Northwest Natural Gas itself is well aware of that; in an interview, a company executive acknowledged that there is no universal standard to measure how much a renewable natural gas project actually helps the climate, and admitted that claimed emissions reductions vary based on the accounting method used. Compl. ¶ 35.

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B. Northwest Natural Gas's "Renewable Natural Gas" Campaign

Notwithstanding that knowledge, few Oregon companies have done more to bolster the idea that manure biogas and RNG are a climate boon than Northwest Natural Gas. Compl. ¶ 44. As Oregon's largest natural gas utility, the Company sells natural gas, chiefly made up of methane. Compl. ¶ 46.

Northwest Natural Gas has known for years how much its customers care about addressing the climate crisis. A series of consumer perception and awareness surveys it conducted found that, as of 2018, 71 percent of its customers reported being "extremely" or "very" concerned about climate change. Compl. ¶ 48.

On the heels of a decades-long campaign by the natural gas industry to use terminology meant to downplay the climate harms and fossil origins of its product, *see* Compl. ¶ 51, in 2018 Northwest Natural Gas conducted a survey to assess its customers' familiarity specifically with RNG. Compl. ¶ 49. That survey found that 52 percent were "not familiar at all" or only "slightly familiar" with "renewable natural gas" or RNG. Compl. ¶ 50. Only 14 percent of customers reported being "extremely" or "very" familiar with RNG. Compl. ¶ 50. This lack of familiarity with RNG was Northwest Natural Gas's ticket to continue operating a fossil fuel-dependent business in the face of increasingly aggressive climate policies and consumer sentiment in favor of climate action. Compl. ¶ 55.

Northwest Natural Gas thus embarked on a marketing blitz to shore up customer affinity for natural gas—dampening the growing trend of electrification starting to gain traction Oregon communities, while capitalizing on customers' widespread concern about climate but lack of knowledge about RNG. Compl. ¶ 56. It needed to convince Oregonians that RNG was the climate solution they were looking for, both in state policy and with respect to their own decisions as natural gas consumers. Compl. ¶ 57. Its "solution" was a "a comprehensive campaign that highlighted both individual and [Northwest Natural Gas's] corporate efforts to

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combat climate change and promote sustainability," which "positioned natural gas as a clean and reliable energy source." Compl. ¶ 59. The tagline for this campaign: Less We Can.

Northwest Natural Gas trumpeted about RNG in Less We Can flyers, ads, and mailers, through a new campaign website, and through commercials, equating RNG with solar, wind, and hydroelectric energy:

Compl. ¶ 62. It told Oregon consumers that it had "begun to convert waste into Renewable Natural Gas to help reduce emissions from the air and provide a net zero carbon energy for the future." Compl. ¶ 63. It claimed that RNG was "[s]ustainably reducing emissions and closing the loop on waste," with "over 80% carbon reduction." Compl. ¶ 64. It did not disclose—and it remains unclear—the baseline from which that reduction was measured. Compl. ¶ 64. It spread its message about RNG broadly. Compl. ¶¶ 65–66. And while prioritizing its own acquisition

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and development of RNG, Compl. ¶ 69, Northwest Natural Gas promoted its so-called "Smart Energy" program as the way customers could do *their* part to combat climate change—to "Use less" and "Offset the rest." Compl. ¶ 70.

C. Northwest Natural Gas's "Smart Energy" Program

Northwest Natural Gas started Smart Energy in 2007. Compl. ¶ 71. As of March 2023, it reported that 13 percent of its Oregon residential consumers had enrolled in the program. Compl. ¶ 72. As of May 2024, the company counted over 92,000 Smart Energy customers. Compl. ¶ 77.

Northwest Natural Gas heavily courts its customers to enroll in Smart Energy and pay a voluntary fee every month to "offset the carbon emissions" from their natural gas use. Compl. ¶ 73. It advertises the program across many platforms, including through inserts in customer utility bills, calling on customers to "mitigate the carbon emissions from their natural gas use through a mix of carbon offsets and renewable natural gas." Compl. ¶ 74.

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On its website, Northwest Natural Gas invites its customers to work with the company to "address climate change." It boasts,

> "Smart Energy has purchased carbon offsets from 19 projects across Oregon, Washington, Idaho, California, Utah, Alaska, and British Columbia. Some of these projects used captured methane, a potent greenhouse gas, as a renewable energy source—now that's smart!"

Compl. ¶ 75. It displays a map of these "projects" and claims that Smart Energy offsets save as much greenhouse gas emissions as taking nearly a half-a-million gas-powered cars off the road for a year. Compl. ¶ 76. It makes similar claims in videos on its social media pages, Compl. ¶¶ 77–78, and in its customer newsletter, Comfort Zone, Compl. ¶ 79. Northwest Natural Gas customers are also prompted to join Smart Energy every time they sign into their online

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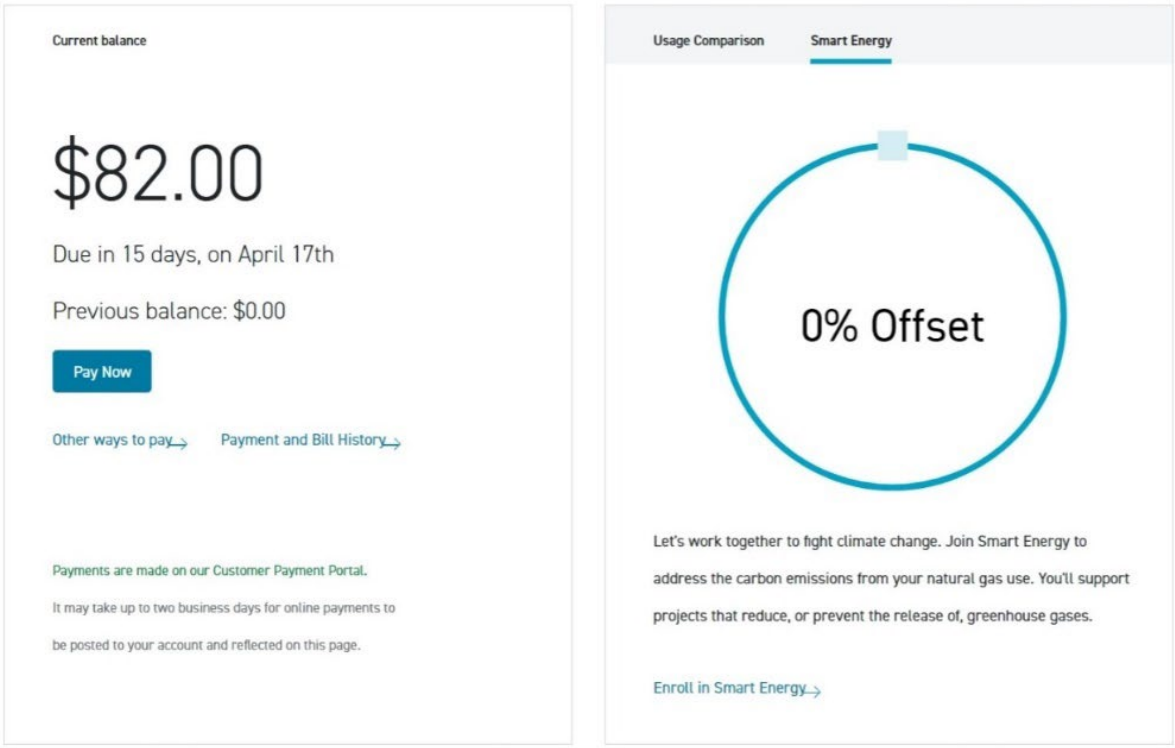
accounts, with an image reminding them that they have "offset" zero percent of their natural gas use, and inviting them to start fighting climate change by joining the Smart Energy program.



Compl. ¶ 80.

While customers sign up for Smart Energy, the representations continue. Customers are prompted to "address the carbon emissions from *your* natural gas through (1) carbon offsets from projects that reduce, or prevent, the release of greenhouse gases, or (2) a mix of carbon offsets and renewable natural gas projects." Compl. ¶ 81 (emphasis added). Customers can pay to "offset" the natural gas emissions of the average residential Northwest Natural Gas customer (the "Average Home" option) or pay a variable fee to "address 100% of the carbon emissions" from the customer's actual monthly usage (the "Climate Neutral" option). Compl. ¶ 82. Once enrolled, Northwest Natural Gas continues to personalize the "offset" representation, providing

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customers with the specific amount of carbon emissions they have supposedly offset each month as a result of their enrollment in Smart Energy. Compl. ¶ 83.

D. Northwest Natural Gas's Smart Energy representations are false and misleading, and the Company fails to delivery on its promises.

Northwest Natural Gas's representations are false and misleading. As set forth below and alleged in Plaintiffs' complaint, the "offset" and RNG "projects" that Smart Energy customer dollars fund lack legitimacy and fail to cancel out customers' greenhouse gas emissions.

1. Northwest Natural Gas's Smart Energy "offsets" lack core attributes of legitimacy.

First, Northwest Natural Gas uses customers' monthly payments to purchase what it describes as "offsets" from manure digesters. Compl. ¶ 85. But these "offsets" lack the core attributes of a bona fide offset: additionality, uniqueness, measurability, verifiability, and permanency. Compl. ¶ 85. More specifically, Northwest Natural Gas does not disclose that the "carbon offsets" it sells do not verifiably remove specific quantities of carbon emissions from the atmosphere, and does not disclose that they are not funding new, permanent reductions of greenhouse gas emissions that would not have otherwise occurred. Compl. ¶ 86.

Northwest Natural Gas uses customers' Smart Energy dollars to fund manure digesters at large, industrial dairies in Oregon, Washington, Idaho, and California. Compl. ¶ 87. Those mega-dairies produce enormous amounts of methane emissions from enteric fermentation—emissions in no way reduced or avoided by customers' Smart Energy dollars. Compl. ¶ 88. And rather than avoid or reduce emissions, the manure digesters to which Northwest Natural Gas directs Smart Energy dollars entrench the ongoing production of excess methane from cow waste—perhaps even incentivizing the increased production of that waste. Compl. ¶ 89. Many of the digesters the Smart Energy program funds have also been operating for years, supported by a raft of supports and subsidies and generating offset credits for other programs besides Smart Energy. Compl. ¶ 90.

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Some examples illustrate the misleading nature of Northwest Natural Gas's Smart Energy representations:

TMF Biofuels Boardman

One of Northwest Natural Gas's Smart Energy-supported manure digesters, TMF Biofuels Boardman, claims that thanks to Smart Energy, it has "[c]aptured methane from co-digested organic waste and cow manure," which Northwest Natural Gas says "generates about 4.8 million megawatts of renewable electricity annually." Compl. ¶ 92. That is misleading. "TMF Biofuels" is the manure digester for Threemile Canyon Farms, which as of August 2023 had over 61,000 cows. Compl. ¶ 93. That number of cows produces huge amounts of methane pollution—between 154 and 264 pounds of methane gas per cow per year. Compl. ¶ 94.

Before installing its manure digester in 2009, Threemile Canyon Farms used solid-liquid separation (SLS), a practice that *actually* reduces methane emissions at facilities using wet manure management by partially removing organic and inorganic solids from manure before it is stored in the cesspools. Compl. ¶ 95. But once Threemile installed a digester and began participating in California's Low Carbon Fuel Standard (LCFS) program—a pollution-trading scheme—Threemile stopped using SLS, maximizing the methane emissions that could be generated, "captured," and sold as credits. Compl. ¶ 96. Since 2009, Threemile Canyon Farms' digester has been reaping significant financial gains through pollution-trading regimes; from 2013 to 2020, TMF Biofuels received over 238,000 "offset" credits through California's legacy cap-and-trade program. Compl. ¶ 97. And in 2019, it received regulatory approval to build a publicly subsidized gas treatment system so that it could pipe manure-derived methane to fuel vehicles in California and take advantage of the even more lucrative crediting regime, LCFS. Compl. ¶ 98. By 2021, TMF Biofuels was one of the largest dairy manure-to-"RNG" facilities in the country. Compl. ¶ 99. Yet recently published data have documented methane plumes from Threemile and its digester—plumes emitting up to 399 kilograms of methane per hour. Compl. ¶ 103.

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Putting aside the staggering enteric emissions of over 61,000 cows, a facility like Threemile Canyon Farms that spews avoidably created methane into the atmosphere does not do what Northwest Natural Gas claims Smart Energy does: offset or mitigate the carbon emissions attributable to customers' natural gas usage. Compl. ¶ 105.

Farm Power Northwest, LLC

Farm Power Northwest, LLC, to which Northwest Natural Gas also directs its customers' Smart Energy "carbon offset" dollars, is another example. Farm Power Northwest operates several manure digesters in Oregon and Washington, at least two of which are funded by Smart Energy customer dollars. Compl. ¶¶ 106–07. Both Smart Energy-funded Farm Power digesters have been operating for over a decade (since 2012), and both have received significant federal funding, undercutting Northwest Natural Gas's representation that the projects, and their supposed emissions "reductions," would not have otherwise occurred but for Smart Energy. Compl. ¶ 108. Moreover, the Oregon Department of Environmental Quality (DEQ) cited the Smart-Energy funded Farm Power digesters for equipment failures persisting for two- and three-year periods which allowed the digesters to emit methane and other pollutants "at uncontrolled rates." Compl. ¶¶ 110-112. Northwest Natural Gas did not disclose these failures to customers. Instead, it led them to believe that this and other Smart Energy "projects" were offsetting customers' monthly natural gas emissions in a reliable, consistent manner. Compl. ¶ 112.

Van Warmerdam Dairy Digester

Northwest Natural Gas also directs customers' Smart Energy "carbon offset" dollars to manure digesters out of state—at large dairies in California and Idaho, including the Van Warmerdam Dairy outside Sacramento, California, which houses approximately 1,500 cows. Compl. ¶ 113. This, too, is a long-operational facility whose construction was enabled by federal grants over a decade ago. Compl. ¶ 114. And like Threemile, Van Warmerdam Dairy has long reaped gains from California's cap-and-trade and LCFS programs, generating credits for over a decade. Compl. ¶ 114.

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Despite Northwest Natural Gas representing to Smart Energy customers that they are funding the Van Warmerdam Dairy methane capture "project," the Sacramento Municipal Utility District made the same representation about the very same digester to California credit regulators. Compl. ¶ 115. Thus, even if the digester could be said to reduce emissions, another entity entirely made those reductions possible—not Smart Energy. Compl. ¶ 115.

2. Contrary to its promises, Northwest Natural Gas's Smart Energy-funded manure digesters do not zero out customers' carbon emissions.

Beyond Smart Energy "offsets" lacking the core attributes for legitimacy, another fundamental flaw with Northwest Natural Gas's promise that customers are zeroing out the monthly carbon emissions from their natural gas is that Smart Energy-funded digesters can *never* cancel out those carbon emissions. Compl. ¶ 117. To suggest otherwise, as Northwest Natural does, equates apples to oranges: Northwest Natural Gas promises customers an offset of their carbon dioxide emissions from the avoided release of methane. But methane, albeit potent, is short-lived, while carbon dioxide persists in the atmosphere for 300 to 1,000 years. Compl. ¶ 118. This means that as long as customers are burning natural gas, they are *adding* to the cumulative load of carbon dioxide in the atmosphere—greenhouse gas emissions which even bona fide avoided methane emissions could not cure. Compl. ¶ 118. Northwest Natural Gas's promises and representations of emissions mitigation and carbon neutrality are thus simply false. Compl. ¶ 118.

3. Contrary to its promises, Northwest Natural Gas uses customers' Smart Energy "carbon offset" payments in ways they would not reasonably expect, such as on its own marketing and administration of the Smart Energy program.

Northwest Natural Gas spends almost a quarter (22 percent) of customers' Smart Energy payment *not* to fund carbon offset and RNG projects "that reduce, or prevent the release of greenhouse gas," but on the Company's own marketing and program administration for Smart Energy. Compl. ¶ 120. And once collected, customers' "carbon offset" payments may not be

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used to combat the climate crisis at all for up to two years; in many circumstances, the payments will instead sit in a Northwest Natural Gas bank account. Compl. ¶ 120.

Northwest Natural Gas may also be piggy-backing, or intend to piggy-back in the future, on Smart Energy customers' supposed greenhouse gas reductions to attempt to meet the Company's own regulatory obligations under the Oregon Climate Protection Program. Compl. ¶ 121. While the company says it "currently" isn't using Smart Energy offsets "for compliance requirements in Oregon," it would like to, because in Northwest Natural Gas's view, "[a]dding RNG sources that are eligible for [Climate Protection Program] compliance to the Smart Energy program is an obvious choice for Northwest Natural Gas and our customers." Compl. ¶ 123.

IV. ARGUMENT

Northwest Natural Gas makes a series of arguments in support of its motion to dismiss Plaintiffs' complaint, none of which should prevail. As to its motion to dismiss Plaintiff Blumm's UTPA claims, Plaintiffs' complaint states ultimate facts sufficient to constitute a claim for relief under ORS 646.608(1)(f) (representing that goods were new if they are used or secondhand) and ORS 646.608(1)(g) (representing that goods or services are of a particular standard, quality, or grade if they are not). It also states ultimate facts sufficient to allege that Northwest Natural Gas willfully, recklessly, and knowingly violated the UTPA in all of the ways that Plaintiffs allege.

As to its motion to dismiss Plaintiffs' breach of contract claim, Plaintiffs state ultimate facts sufficient to establish the existence of a contract between Plaintiffs and Northwest Natural Gas, and Northwest Natural Gas's tariff does not foreclose the formation of that contract. Finally, all of Plaintiffs' claims are properly before this Court, not the Public Utility Commission (PUC). There is no reason to abate these proceedings. For those reasons, and for the additional reasons set forth below, the Court should deny Defendants' motion.

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A. Plaintiffs' complaint states facts sufficient to state a claim for relief under the UTPA.

Oregon's UTPA was enacted as a comprehensive statute intended to protect consumers from unlawful trade practices. *Pearson v. Philip Morris*, 358 Or 88, 115, 361 P3d 3 (2015) (citing *State ex rel. Redden v. Discount Fabrics*, 289 Or 375, 382, 615 P2d 1034 (1980)). The statute is to be construed liberally to effectuate that legislative intent. *Denson v. Ron Tonkin Gran Turismo, Inc.*, 279 Or 85, 90 n 4, 566 P2d 1177 (1977).

"The trade practices declared unlawful under the UTPA are extensive, too much so for description." *Pearson*, 358 Or at 115; *see also* ORS 646.608 (listing 79 unlawful trade practices). As relevant here, under ORS 646.608(1)(b), (e), (f), and (g), a person engages in an unlawful trade practice if, in the course of the person's business, vocation or occupation, the person

> (b) "[c]auses likelihood of confusion or of misunderstanding as to the source, sponsorship, approval, or certification of * * * goods or services";
>
> (e) "[r]epresents that * * * goods or services have * * * characteristics, ingredients, uses, benefits, quantities or qualities that the * * * goods or services do not have * * * * *";
>
> (f) "[r]epresents that * * * goods are original or new if the[y] are * * * used or secondhand"; and
>
> (g) "[r]epresents that * * * goods or services are of a particular standard, quality, or grade * * * if the[y] are of another."

ORS 646.608(1)(b), (e), (f), (g). A person who suffers an "ascertainable loss of money or property, real or personal, as a result of another person's willful" use of a trade practice declared unlawful may file an action to recover "actual damages or statutory damages of $200, whichever is greater." ORS 646.638(1). Under the UTPA, "willful" is a negligence standard; thus, "[a] willful violation occurs when the person committing the violation knew or should have known that the conduct of the person was a violation." ORS 646.605(10). In a class action, "[s]tatutory damages * * * may be recovered on behalf of class members only if the plaintiffs in the action

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establish" that the defendant's use of the trade practice declared unlawful was "reckless or knowing." ORS 646.638(8)(a).

1. Plaintiff Blumm states a claim under ORS 646.608(1)(f).

Northwest Natural Gas contends that Plaintiff Blumm fails to state a claim under ORS 646.608(1)(f) because, in its view, Plaintiffs' complaint does not state facts sufficient to establish that carbon offsets and environmental credits associated with RNG are "goods" within the meaning of the UTPA. This argument should be rejected.

ORS 646.608(1)(f) makes it unlawful to "[r]epresen[t] that real estate or goods are original or new if the real estate or goods are deteriorated, altered, reconditioned, reclaimed, used or secondhand." The statute does not define the term "goods."[1]

This Court must afford the term "goods" its plain and ordinary meaning. *State v. Dickerson*, 356 Or 822, 829, 345 P3d 447 (2015) ("When the legislature does not provide a definition of a statutory term, we ordinarily look to the plain meaning of the statute's text to determine what particular terms mean."). Dictionary definitions "provide a useful starting point." *See State v. Holloway*, 138 Or App 260, 265, 908 P2d 324 (1995); *see also Jenkins v. Bd. of Parole*, 356 Or 186, 194, 335 P3d 828 (2014) (where "the legislature has not expressly defined the words in the disputed phrase, dictionary definitions * * * can be useful"). The Court must still, of course, " 'critically examine how the definition fits into the context of the statute itself.' " *Marshall v. PricewaterhouseCoopers LLP*, 371 Or 536, 543, 539 P3d 766 (2023) (quoting *State v. Gonzalez-Valenzuela*, 358 Or 451, 461, 365 P3d 116 (2015)).

The plain and ordinary meaning of the word "goods" is broad and generally includes anything "that has economic utility," "personal property having intrinsic value," or "something

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[1] The UTPA defines the phrase "real estate, goods or services" only to make clear that the phrase "means those that are or may be obtained primarily for personal, family or household purposes, or that are or may be obtained for any purposes as a result of a telephone solicitation." ORS 646.605(6)(a); *see also Cullen v. Inv. Strategies, Inc.*, 139 Or App 119, 125 n 4, 911 P2d 936 (1996) (observing that "somewhat circular" definition and noting that "[t]he UTPA does not set out separate definitions of 'real estate,' 'goods,' or 'services' ")

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manufactured or produced for sale." *Webster's Third New Int'l Dictionary* 1244 (unabridged ed 1993).[2] For UTPA purposes, a "consumer good" includes any "good" exchanged "with the objective of satisfying some personal, family or household purpose." *Searle v. Exley Express, Inc.*, 278 Or 535, 538–39, 564 P2d 1054 (1977); *see also Avenue Lofts Condos. Owners' Ass'n v. Victaulic Co.*, 24 F Supp 3d 1010, 1016–17 (D Or 2014) (applying *Searle* to define "consumer goods" for UTPA purposes). Importantly, "goods" may be tangible or intangible. *Webster's Third New Int'l Dictionary* at 1244 ("good" includes anything "that has economic utility"); *see also*, *e.g.*, *State ex rel. Stephan v. Bhd. Bank & Trust Co.*, 649 P2d 419 (Kan Ct App 1982) (same, construing "consumer transaction" liberally).

Consumer goods include, as Plaintiffs allege here, carbon offsets and environmental credits associated with RNG that Defendants market and sell to their customers through the Smart Energy program. Although intangible, carbon offsets certainly constitute "goods"; they plainly have economic utility, as is clear from Defendants' Smart Energy marketing and sales transactions. *See also* Black's Law Dictionary (12th ed 2024) ("goods" may include "things that have value, whether tangible or not"). Like many other goods, they are bought and sold on a market. Construed liberally to protect Plaintiffs, as consumers, "goods" include the emissions-offsetting products at issue in this case.

Northwest Natural Gas argues otherwise, relying solely on the federal district court's decision in *Gilberto v. Walgreen Co.*, 2019 WL 9441666 (D Or Oct 20, 2019). In *Gilberto*, the plaintiff purchased beverages from an Oregon Walgreens store, on which Walgreens had charged a ten-cent "bottle deposit," which was ostensibly required under Oregon's "Bottle Bill." *Id.* at *3–4. The plaintiff later learned that the beverage containers were not returnable under the Bottle Bill. *Id.* When the plaintiff asked Walgreen Co. ("Walgreens") to give back the deposit it

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[2] *Webster's Third New International Dictionary* (unabridged ed 2002) is the dictionary of choice of the Oregon appellate courts. *See, e.g.*, *PacifiCorp Power Mktg., Inc. v. Dep't of Revenue*, 340 Or 204, 215, 131 P3d 725 (2006).

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unlawfully had charged, it refused. *Id.* The plaintiff sued Walgreens under the UTPA, alleging that it had engaged in several trade practices declared unlawful under the UTPA, including ORS 646.608(1)(b), (1)(e), (1)(i), (1)(s), and (1)(t). *Id.* at *6.

Walgreens moved to dismiss for failure to state a claim, arguing, among other things, that the 10-cent bottle deposit did not constitute "real estate, goods, or services" within the meaning of the UTPA. *Id.* The district court held that the 10-cent charge was not a "good": "Whether the term 'goods' is given its ordinary or legal meaning, both make clear the ten-cent bottle deposit is not a 'good'—a conclusion Gilberto does not dispute." *Id.* at *9.

Gilberto does not help Northwest Natural Gas. Plaintiffs here do not allege that the *money* they paid Defendants in exchange for the promise to purchase carbon offsets that actually reduce the greenhouse gas emissions associated with Plaintiffs' natural gas use—a promise that Defendants did not fulfill—is a "good" within the meaning of the UTPA. Instead, Plaintiffs allege that the carbon offsets themselves are "goods" subject to ORS 646.608(1)(f). Unlike a bottle deposit, a carbon offset has commercial value and is obtained for personal or household use, ORS 646.605(6)(a); indeed, offsets are routinely traded through marketplaces, *see*, *e.g.*, *Remove carbon dioxide with Climeworks*, Climeworks, https://climeworks.com/ (last visited Mar 8, 2025). Plaintiffs further allege that the carbon offsets Defendants held out as "new" (*i.e.*, applicable and corresponding to only one unit of carbon dioxide abated or removed from the atmosphere) are actually "used" (*i.e.*, double-issued) and thus are not what Defendants market them to be. *See* Compl. ¶¶ 11, 12, 85–120. On those facts, Plaintiffs state a claim under the UTPA. *Gilberto* does not compel otherwise.

2. Plaintiff Blumm states a claim under ORS 646.608(1)(b).

Plaintiff Blumm also states a claim under ORS 646.608(1)(b), which prohibits causing likelihood of confusion or misunderstanding of the source, sponsorship, approval, or certification of real estate, goods, or services—here, the emissions-offsetting products in Northwest Natural Gas's Smart Energy program.

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ORS 646.608(1)(b), by its terms, makes it unlawful "caus[e] likelihood of confusion of or misunderstanding as to the source, sponsorship, approval, or certification of * * * goods or services." "The key phrase in the statute is '[c]auses likelihood of confusion or of misunderstanding.' " *State ex rel. Rosenblum v. Living Essentials, LLC*, 371 Or 23, 35, 529 P3d 939 (2023). Textually, that phrase does not require any statement or representation directly to a consumer, let alone require the consumer to have relied on that statement or representation before a violation occurs. Indeed, ORS 646.608(1)(b) does not require a "representation" at all; it requires only that the conduct at issue, whatever it may be, results in "likelihood of confusion" or "likelihood of * * * misunderstanding" as to the "source, sponsorship, approval, or certification" of the goods or services.[3] Consistently with that understanding, this Court has similarly described ORS 646.608(1)(b) to prohibit

> "conduct whereby a person (1) produces or brings about (2) a probability (3) that another person will experience either (i) a lack of understanding or a misinterpretation, or (ii) a state of being that involves mental confusion, or being discomfited or disconcerted, or a diminished ability to distinguish or choose, regarding (4) the 'source, sponsorship, approval, or certification of real estate, goods or services.' "

Living Essentials, 371 Or at 36–37.

Northwest Natural Gas argues that Plaintiffs' complaint "does not attempt to identify which specific allegations support this claim [and] identifies no statement by NW Natural as to the 'source, sponsorship, approval, or certification of' the Smart Energy services it provides—let alone a 'confus[ing]' one." Motion to Dismiss at 4. This is simply not true; Plaintiffs' allegations make clear that Northwest Natural Gas's marketing of its Smart Energy program,

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[3] The "likelihood of confusion" standard is met where "an appreciable number of people [are confused] as to the source of the product." *The Learning Internet v. Learn.com*, 2009 WL 6059550, at *16 (D Or Nov 25, 2009) (citing *Entrepreneur Media, Inc. v. Smith*, 279 F3d 1135, 1151 (9th Cir. 2002)); *see also Restatement (Second) of Torts* § 729 cmt a (Tent Draft No. 8) ("[T]he issue is whether an appreciable number of prospective purchasers of the goods or services involved are likely" to become confused.).

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which includes representations about the carbon offsets it claims to purchase and the climate impacts of "renewable natural gas," are likely to create confusion about the source or certification of those goods and services.

Take, for instance, Defendants' statements about carbon offsets. As Plaintiff Blumm alleges, "carbon offsets" must have certain attributes to be considered legitimate, Compl. ¶ 11; for that reason, federal environmental marketing guidelines caution against marketing carbon offsets that are not based on reliable scientific and accounting methods, that sell the same emissions reductions more than once, that misrepresent emissions reductions as having already occurred or occurring in the immediate future, or that claim reductions already required by law, Compl. ¶ 10. But Northwest Natural Gas does anyway, and through that marketing causes likelihood of confusion about whether Smart Energy funds new, unique emissions reduction "projects" (source) and whether the offsets are verified and legitimate (certification).

Indeed, in the complaint, Plaintiff Blumm alleges specific representations Defendants make about the source or certification of the offsets they purchase using Smart Energy customer funds, as well as specific examples supporting the conclusion that those representations are false or misleading. For instance, Defendants tell consumers that these *sources* save as much greenhouse gas emissions as taking nearly a half-a-million gas-powered cars off the road for a year. Compl. ¶ 76. And the numeric specificity with which Defendants tell customers that their emissions have been offset causes confusion about what *certification* (if any) the offsets have. Compl. ¶ 83.

As Defendants are aware, these representations are either false or misleading with respect to both the source and certification of the offsets Defendants purchase for Smart Energy customers. Putting aside the fact that Defendants spend a substantial percentage of customers' Smart Energy "carbon offset" payments not to purchase carbon offsets at all, but to fund Defendants' own marketing campaign, Compl. ¶ 120, the "offsets" they do purchase are chiefly

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from manure digesters that lack the core attributes of a bona fide offset: additionality, uniqueness, measurability, verifiability, and permanency. Compl. ¶ 85.

Indeed, one of the projects they fund predates the Smart Energy program itself, belying any notion that any "offsets" the digester was responsible for were made possible by the Smart Energy Program. Compl. ¶ 91. Another Smart Energy-funded digester maximizes its methane emissions so that it can "capture" and sell them as credits, Compl. ¶¶ 96–97, has been fined repeatedly by environmental regulators for violating emissions limits, Compl. ¶¶ 101–03, and generates methane plumes that have emitted up to 399 kilograms of methane per hour into the atmosphere, Compl. ¶ 103. That digester simply does not offset or mitigate the carbon emissions attributable to Defendants' customers' natural gas usage, as Defendants claim it does. Compl. ¶ 105. These allegations more than suffice to state a claim under ORS 646.608(1)(b), that Defendants cause likelihood of confusion or misunderstanding as to the source or certification of goods (carbon offsets) or services (Smart Energy's emissions-reduction program) that Defendants provide.

The same goes for Defendants' representations and advertising of the RNG in the Smart Energy program. As Plaintiffs allege, Defendants tell customers that, by joining Smart Energy, customers can "mitigate the carbon emissions from [their] natural gas use through a mix of carbon offsets and renewable natural gas projects." Compl. ¶ 75. They do not tell customers, though, about the *source* of that "renewable natural gas." Instead, Defendants take advantage of customers' lack of familiarity with RNG, likening it to solar, wind, and hydroelectric energy, and telling customers that "convert[ing] waste into RNG [will] help reduce emissions from the air and provide a net zero carbon energy for the future." Compl. ¶¶ 62, 63. But biomethane—even if from biological sources—is still a potent greenhouse gas, the use of which in leaky infrastructure makes its ability to neutralize customers' natural gas emissions (as Defendants claim) dubious at best. Compl. ¶¶ 33, 34. In likening RNG to true renewables and touting its emissions-cancelling abilities, Defendants create a likelihood of confusion or misunderstanding

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about the source or certification of their goods (RNG) or services (Smart Energy's carbon-reduction program).

Gilberto changes none of this. Defendants rely on that case for two propositions related to ORS 646.608(1)(b): (1) "that alleged misrepresentations about the mere qualities or characteristics of a good or service are not actionable under [subsection (1)(b)] if those qualities or characteristics have no link to the 'source, sponsorship, approval, or certification' of the good or service"; and (2) a [subsection (1)(b)] claim must allege likelihood of confusion 'with respect to the goods]—and, by extension, the services—themselves, and not merely 'in relation to the sale or advertisement of' the services." Motion to Dismiss at 14–15.

The first proposition may be true, so far as it goes, but it doesn't help Defendants. Here, Plaintiffs allege that Defendants cause likelihood of confusion or misunderstanding about the source or certification of the goods (carbon offsets and RNG) or services (the Smart Energy carbon-reduction program) themselves, as explained above. The allegations of Plaintiffs' complaint directly link the misrepresentations to the source and certification of those goods and services. On this point, *Gilberto* does not compel (or even support) dismissal.

Defendants do not explain how the second proposition is distinct from the first, and as far as Plaintiffs can tell, it's not. *See* Motion to Dismiss at 15 ("Instead, the confusion must be as to the source or approval of the goods or services themselves."). Moreover, Defendants' argument that "[t]he FAC does not offer a single allegation that someone other than NW Natural is the 'source' of these services," Motion to Dismiss at 16, is beside the point. Plaintiffs do not contend that someone other than Defendants provides the Smart Energy services or sells "carbon offsets"; Plaintiff Blumm alleges that Defendants cause a likelihood of confusion as to the offsets' and RNG's source in several other ways, as explained above. *Gilberto* does not support the cramped, literal reading Defendants assign "source" in ORS 646.608(1)(b), and such a reading would be contrary to legislative intent that the UTPA be construed liberally. *See*

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Denson, 279 Or at 90 n 4; *Living Essentials*, 371 Or at 43. Plaintiffs' allegations suffice under ORS 646.608(1)(b).[4]

3. Plaintiffs allege ultimate facts to support a conclusion that Northwest Natural Gas willfully, recklessly, and knowingly violated the UTPA.

Northwest Natural Gas next contends that Plaintiff Blumm fails to state a claim under any of the alleged provisions of the UTPA because the complaint does not contain ultimate facts sufficient to support a conclusion that Defendants acted willfully, recklessly, or knowingly when it engaged in the alleged unlawful conduct. Defendants' argument—that Plaintiffs' complaint "offers only the conclusory assertion that Count 1 of Blumm's UTPA claims alleges a 'willful violation' of the statute," and that because "the allegations [of Count 2] are based on the same alleged conduct and omissions as Count 1, [the Complaint] necessarily fails to allege sufficient facts to meet [Count 2's] heightened reckless and knowing standard," Motion to Dismiss at 11—ignores all the prior allegations of Plaintiffs' complaint. Plaintiffs allege substantial (and sufficient) facts to support the conclusion that Northwest Natural Gas acted willfully, recklessly, and knowingly when it violated the UTPA.

Again, under the UTPA, "willful" is a negligence standard; thus, "[a] willful violation occurs when the person committing the violation knew or should have known that the conduct of the person was a violation." ORS 646.605(10). In a class action, "[s]tatutory damages * * * may be recovered on behalf of class members only if the plaintiffs in the action establish" that the defendant's use of the trade practice declared unlawful was "reckless or knowing." ORS

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[4] Defendants also argue that "[t]he FAC does not allege that any customer is or was confused as to whether a third party had 'sponsor[ed], approv[ed], or certif[ied]' these services." Motion to Dismiss at 16. But ORS 646.608(1)(b) does not apply only to "customers"; it applies to the market in which Defendants sell their services. *Daniel N. Gordon, PC v. Rosenblum*, 276 Or App 797, 812, 370 P3d 850 (2016), *aff'd sub nom. Gordon v. Rosenblum*, 361 Or 352, 393 P3d 1122 (2017); *Shakey's Inc. v. Covalt*, 704 F2d 426, 431 (9th Cir 1983). Moreover, actual confusion—by a customer or any other person—is not, and never has been, required under ORS 646.608(1)(b). *See Shakey's Inc.*, 704 F2d at 431 n 6.

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646.638(8)(a). *See Weigel v. Ron Tonkin Chevrolet Co.*, 298 Or 127, 138, 690 P2d 488 (1984) ("recklessness" includes "making a false representation with the awareness that one does not know its truth or falsity").

The allegations of Plaintiffs' complaint readily satisfy those standards, especially when construed in Plaintiffs' favor, as this Court must do. As Plaintiffs allege, Defendants were aware that Oregon customers, like those across the country, are likely to pay more for products they perceive to be sustainable or having a lighter climate impact, and that Oregonians also lacked familiarity with "renewable natural gas"—biomethane, including that generated from manure digesters on industrial dairies. Compl. ¶¶ 6, 48, 50. Indeed, Defendants and other natural gas industry participants conducted a long campaign to *downplay* the climate harms and fossil origins of natural gas; after that campaign, Defendants conducted a survey of Oregon consumers aimed at understanding specifically how they perceived RNG. Compl. ¶¶ 48–53.

Increasingly aggressive climate policies and consumer sentiment in favor of climate action (including electrification) threatened Defendants' fossil-fuel-dependent business. Compl. ¶¶ 54–55. But they had a secret weapon with which to respond: Oregonians' lack of familiarity with RNG. Compl. ¶¶ 50, 55. Defendants used that ignorance to their advantage, embarking on a marketing blitz to shore up customer affinity for natural gas and capitalizing on the lack of understanding of the climate realities of RNG. Compl. ¶¶ 56–66. That campaign was aimed at "position[ing] natural gas as a clean and reliable energy source." Compl. ¶ 59.

Defendants' campaign misled consumers to believe that RNG was something it is not. Compl. ¶¶ 57, 62–68. It equated RNG with solar, wind, and hydroelectric energy. Compl. ¶ 62. It promised that RNG was "on its way" to customers' homes, and suggested customers wouldn't have to "chang[e] a thing" to have "renewable" energy. Compl. ¶ 62. It told Oregon consumers that it had "begun to convert waste into Renewable Natural Gas to help reduce emissions from the air and provide a net zero carbon energy for the future." Compl. ¶ 63. It claimed that RNG was "[s]ustainably reducing emissions and closing the loop on waste," with "over 80% carbon

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reduction." Compl. ¶ 64. It did not disclose—and it remains unclear—the baseline from which that reduction was measured, Compl. ¶ 64, and Northwest Natural Gas did not tell consumers how, exactly, RNG is produced, or the fact that biomethane is, chemically, the same climate super-pollutant the company currently distributes. It also knew, but did not tell consumers, that the operations that generate RNG have no reliable way of measuring how much, if any, climate benefit they are creating. Compl. ¶ 35.

As for the carbon offsets in the Smart Energy program, Defendants' representations were equally deceiving, made with knowledge that the "offsets" Defendants purchase and the "projects" in which they invest do not bear the attributes of legitimacy, Compl. ¶ 85, undermine Defendants' representations regarding the use of customer funds and the climate impacts of those funds, Compl. ¶¶ 90–115, and could even give rise to climate risks due to repeated environmental violations, leaky infrastructure, and the inevitable emission of nitrous oxide, a toxic gas 300 times more potent than carbon dioxide. Compl. ¶¶ 32, 33. As Defendants themselves state:

> "The information that Plaintiffs rely on in their allegations to support their opposition to anaerobic biodigesters was publicly available well before October 9, 2023, including: (1) a 2018 article that purportedly asserts that methane emissions from enteric fermentation exceed those associated with management of the animals' waste; (2) a 2017 article purportedly discussing the environmental dangers of flaring at digesters; (3) a 2018 report allegedly demonstrating the climate benefits of manure digestion are unclear; (4) an October 2021 report allegedly demonstrating that, with high leakage, biomethane provides inadequate climate benefits; and (5) a December 2021 EPA report allegedly indicating that decisionmakers lack clear measurement and reporting principles for manure digester gas."

Motion to Strike at 21 (citations omitted). While Northwest Natural Gas customers had no reason to be aware of this information (as explained in Plaintiffs' opposition to Defendants' Motion to Strike, filed concurrently herewith), the Company itself certainly "had knowledge of the types of methane capture projects used to generate emission credits for the Smart Energy

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program and could have reviewed this publicly available information to identify any concerns purportedly associated with those types of projects." *Id.*

Finally, even if methane releases were avoided by Smart Energy projects, Defendants had to know that the projects could never cancel out customers' *carbon* emission, as Defendants' claim; as long as customers are burning natural gas, they are *increasing*, not decreasing, the cumulative load of carbon dioxide in the atmosphere. Compl. ¶ 118. Never mind the fact that Defendants don't even spend Smart Energy customer funds the way they say this will; they spend almost a quarter of customer's "carbon offset" payment not to purchase carbon offsets at all, but on the Company's own marketing campaign and administration of the Smart Energy program. Compl. ¶¶ 120.

Those allegations easily satisfy Plaintiffs' burden at the pleading stage to establish that Defendants knowingly, recklessly, and willfully violated the UTPA in the manner that Plaintiffs allege. *See McKie v. v. Sears Prot. Co*., 2011 WL 1587112, at *9 (D Or Feb 22, 2011), *report & recommendation adopted*, 2011 WL 1587103 (D Or Apr 26, 2011) (distinguishing the "proof" requirement for willfulness from the "pleading" requirement where mere "factual allegations" that "plausibly raise the inference" of a defendant's "willfull[ness]" suffice). The Court should not dismiss.

B. The UTPA claims are based on Northwest Natural Gas's misleading commercial speech, not speech protected under the state or federal constitutions.

Defendants next argue that Plaintiffs' claims are "doom[ed]" to the extent they challenge statements that Northwest Natural Gas made in the exercise of its free speech rights under the state and federal constitutions. Motion to Dismiss at 16. In Defendants' view, the statements Plaintiffs challenge concern matters of public concern and "controversial subjects such as climate change," so their statements lie "squarely within the core protected zone of free speech" and cannot be subject to UTPA liability. Motion to Dismiss at 17 (citing *Lowell v. Wright*, 369

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Or 806, 825, 512 P3d 403 (2022); *Janus v. Am. Fed'n of State, Cnty., & Mun. Emps., Council 31*, 585 US 878, 914, 138 S Ct 2448, 201 L Ed 2d 924 (2018)). Defendants are wrong. Plaintiffs' claims are based not on Defendants' broad, constitutionally protected public statements about climate change generally, or even about carbon offsets or renewable natural gas specifically, but on Defendants' misleading *commercial* speech. That speech is not protected from regulation. Under well-settled state and federal law, Defendants' constitutional argument should be rejected.

1. Article I, section 8, of the Oregon Constitution does not bar Plaintiff Blumm's UTPA claims.

Oregon's free speech clause provides that "[n]o law shall be passed restraining the free expression of opinion, or restricting the right to speak, write, or print freely on any subject whatever; but every person shall be responsible for the abuse of this right." Or Const, art I, § 8. In Defendants' view, Plaintiffs' claims—and, by extension, Oregon's UTPA—contravene Article I, section 8, because they "rely in whole or in part" on statements that Northwest Natural Gas made about climate change, carbon emissions, and energy policy. Motion to Dismiss at 18. According to Defendants, regardless of whether its statements are false or misleading, they are protected under Article I, section 8.[5]

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[5] Defendants treat as indistinguishable the free speech clauses of Article I, section 8, and the First Amendment. *See* Motion to Dismiss at 16–18. But as the Oregon Supreme Court long has held, they are not. *See generally State v. Robertson*, 293 Or 402, 649 P2d 569 (1982) (setting forth Oregon's independent state constitutional interpretive framework of Article I, section 8). Consistently with the Oregon Supreme Court's "first thing's first" approach, Plaintiffs address first Defendant's argument under Article I, section 8, before turning to the First Amendment. *See State v. Babson*, 355 Or 383, 432–33, 326 P3d 559 (2014) (citing Wallace P. Carson, Jr., "*Last Things Last": A Methodological Approach to Legal Arguments in State Courts*, 19 Willamette L Rev 641, 648–49 (1983) (advocating first resolving claims under state constitutional law, before addressing federal constitutional law, to provide stability, allow for independent state protection of individual rights, and eliminate guesswork on how the United States Supreme Court will interpret the federal constitution)). Defendants' argument fails under both.

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State ex rel. Rosenblum v. Living Essentials, LLC, 371 Or 23, 529 P3d 939 (2023), rejects that argument. There, the Oregon Supreme Court considered whether claims brought under ORS 646.608(1)(b) and (1)(e)—which declare unlawful two of the four trade practices at issue in this case—violate Article I, section 8, of the Oregon Constitution or the First Amendment to the U.S. Constitution. As to both free speech clauses, the Supreme Court held that they do not.

As *Living Essentials* explains, *State v. Robertson*, 293 Or 402, 649 P2d 569 (1982), provides the analytical framework for assessing constitutionality under Article I, section 8.

> "[U]nder the first category of the *Robertson* framework, a law that is 'written in terms directed to the substance of any "opinion" or any "subject" of communication' is unconstitutional unless the restriction is wholly confined within an historical exception. If the law passes that test but 'is directed in terms against the pursuit of a forbidden effect' and 'the proscribed means [of causing that effect] include speech or writing,' then the law falls into the second category of *Robertson* and is examined for overbreadth. If a law is 'directed only against causing the forbidden effects,' it falls into the third category of *Robertson.* A law that falls into the third category can be challenged by arguing that the law 'could not constitutionally be applied to [a person's] particular words or other expression.' "

Babson, 355 Or at 393–94 (internal citations omitted).[6] Regardless of the *Robertson* category, though, speech that falls wholly within an historical exception to constitutional protection may permissibly be subject to state regulation. *Robertson*, 293 Or at 412 ("[T]he scope of the restraint [must be] wholly confined within some historical exception that was well established when the first American guarantees of freedom of expression were adopted and that the guarantees then or in 1859 demonstrably were not intended to reach.").

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[6] A "category one" law, which by its terms prohibits speech based on its substance, is unconstitutional unless it falls "wholly" within a historical exception such as perjury or fraud. The historical exceptions can be extended "to contemporary circumstances or sensibilities." *Robertson*, 293 Or at 433–34. A "category two" law is one that, "by [its] terms, purport[s] to proscribe speech or writing as a means to avoid a forbidden effect." *State v. Illig-Renn*, 341 Or 228, 235, 142 P3d 62 (2006) (emphasis added). Category two laws are analyzed for overbreadth. *Living Essentials*, 371 Or at 45. "Category three" laws prohibit forbidden results without referring to expression. *Id.* at 46.

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As *Living Essentials* suggests, that is true with respect to each of Plaintiffs' claims in this case. Plaintiffs' claims are grounded in Defendants' misleading and deceptive representations to consumers—speech that the framers "would have conceived [as] fraud," which is a historical exception to state constitutional protection:

> "ORS 646.608(1)(e) is a restriction on speech that serves a purpose—avoidance of economic harm based on deceptive commercial practices—that was recognized when Article I, section 8, was drafted and is consistent with how the framers would have conceived of fraud. The statute has 'at [its] core' the prevention of an 'underlying actual harm to an individual or group, above and beyond any supposed harm that the message itself might be presumed to cause to the hearer or to society,' which makes it unlikely that the framers would have viewed it as incompatible with the free speech guarantee that they enshrined in the constitution."

Living Essentials, 371 Or at 51 (quoting *State v. Ciancanelli*, 339 Or 282, 318, 121 P3d 613 (2005)).[7] For that reason, Plaintiffs' claims are not foreclosed by Article I, section 8.

2. The First Amendment does not bar Plaintiff Blumm's UTPA claims.

Nor are the UTPA claims based on speech protected under the First Amendment. Again, as the Supreme Court held in *Living Essentials*, states may regulate false or deceptive commercial speech, through laws like the UTPA, without running afoul the First Amendment. *See* 371 Or at 58 (citing *Friedman v. Rogers*, 440 US 1, 10 n 9, 99 S Ct 887, 59 L Ed 2d 100 (1979) ("By definition, commercial speech is linked inextricably to commercial activity: while the First Amendment affords such speech 'a limited measure of protection,' it is also true that 'the [s]tate does not lose its power to regulate commercial activity deemed harmful to the public whenever speech is a component of that activity."). For one, "[u]ntruthful speech, commercial or otherwise, has never been protected for its own sake." *Friedman*, 440 US at 9 (quoting *Va.*

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[7] *Living Essentials* holds that ORS 646.608(1)(e) is a category one law that facially does not violate Article I, section 8. 371 Or at 51. That analysis applies with equal force to subsections (f) and (g). *Living Essentials* further holds that ORS 646.608(1)(b) is a category three law that may only be challenged as applied. 371 Or at 56–57. As applied here, for the reasons set forth above, it does not violate Article I, section 8.

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Pharm. Bd. v. Va. Consumer Council, 425 US 748, 771–72, 96 S Ct 1817, 48 L Ed 2d 346 (1976)). And states are free to regulate speech to ensure that it is false or misleading: "[t]he First Amendment * * * does not prohibit the State from insuring that the stream of commercial information flow cleanly as well as freely." *Id.* Commercial speech generally receives "a different degree of protection" than other forms of speech falling within the scope of the First Amendment, *Living Essentials*, 371 Or at 58 (citing *Va. Pharm. Bd.*, 425 US at 771 n 24), because it is "less at risk of being 'inhibited by proper regulation.'" *id.* (quoting *Friedman*, 440 US at 10).

The test for determining whether a state's regulation of commercial speech through laws like the UTPA violates the First Amendment comes from *Central Hudson Gas & Electric Corp. v. Public Service Commission*, 447 US 557, 566, 100 S Ct 2343, 65 L Ed 2d 341 (1980), which explains that if commercial speech is " 'more likely to deceive the public than to inform it,' the government can prohibit it as unprotected speech." *Living Essentials*, 371 Or at 58–59 (internal citations omitted). In *Living Essentials*, the Supreme Court ruled that ORS 646.608(1)(b) and (1)(e), to the extent that they concern and seek to regulate misleading commercial speech, do not violate the First Amendment. Plaintiff Blumm's UTPA claims, which target solely Defendants' misleading commercial speech, stay within this stricture. They are not barred by the First Amendment.

C. Plaintiffs state a claim for breach of contract.

Plaintiffs adequately allege the existence of an enforceable contract with Northwest Natural Gas. Contrary to Defendants' assertion, the Smart Energy tariff does not preclude the parties from forming an enforceable contract over Smart Energy.

1. Plaintiffs adequately allege the existence of an enforceable contract.

To state a claim for breach of contract, a plaintiff must first allege the existence of a contract and its terms. *Slover v. Or. State Bd. of Clinical Soc. Workers*, 144 Or App 565, 570, 927 P2d 1098 (1996). And because ORCP 18 A requires only a "plain and concise statement of

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the ultimate facts constituting a claim," Plaintiffs need not provide details or supporting evidence of a contract's formation—or of Defendants' breach or Plaintiffs' damages—at the pleadings stage. *Moyer v. Columbia State Bank*, 316 Or App 393, 404–05, 505 P3d 26 (2021); *Lowes v. Thompson*, 331 Or App 406, 415, 546 P3d 311, *rev allowed*, 372 Or 560, 551 P3d 398 (2024).

A contract is formed by an offer, an acceptance of that offer, and an exchange of consideration. *Moyer*, 316 Or App at 403. Offer and acceptance form mutual assent, *i.e.*, a "meeting of the minds," which may be expressed verbally or inferred from the parties' actions. *Homestyle Direct*, *LLC v. Dep't of Hum. Servs*., 354 Or 253, 262, 311 P3d 487 (2013). Consideration is the parties' mutual exchange of something of value. *Moyer*, 316 Or App at 405.

Enrollment in a program can give rise to an offer, acceptance, and consideration. *Homestyle Direct*, 354 Or at 263. In *Homestyle Direct*, a contractor agreed to deliver home-cooked meals to Medicaid participants through a program offered by the Department of Human Services ("DHS"). *Id*. at 255–56, 258. After the contractor executed DHS's provider agreement and began delivering meals, DHS revoked the contractor's eligibility based on the contractor's noncompliance with standards set forth in the agreement. *Id*. at 258. The contractor sued, arguing that the agreement was merely an administrative form designed to collect information, not a contract. *Id*. at 261. The Supreme Court disagreed, holding that the parties had manifested mutual assent and satisfied consideration when DHS offered to reimburse the contractor in exchange for the contractor's agreement to provide meals and comply with DHS's standards, an offer the contractor accepted by executing DHS's enrollment form. *Id*. at 263.

This case is no different. Through the Smart Energy program, Defendants offered to mitigate the greenhouse gas emissions from Plaintiffs' natural gas in exchange for a fixed or variable fee. Compl. ¶¶ 1, 143–44. As in *Homestyle Direct*, Defendants invited customers to enroll in the program by completing a standard form stating those terms. Compl. ¶¶ 80–83. And as in *Homestyle Direct*, Plaintiffs accepted Northwest Natural Gas's offer by selecting their preferred subscription option and completing the enrollment process. Compl. ¶¶ 125, 127, 145–

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47. Plaintiffs further allege consideration: they agreed to pay Defendants the specified monthly fee in exchange for the company's delivery of the promised offset. Compl. ¶ 148.

Defendants offer no authority to explain why this straightforward commercial exchange would not constitute an enforceable contract—why the Court should construe Northwest Natural Gas's Smart Energy offer and the Plaintiffs' acceptance and payment as mere "steps in the overall enrollment process" that "cannot stand alone as independent contractual agreements" simply because they "occurred within the scope of the broader Commission-approved Smart Energy program." Motion to Dismiss at 19.

2. Northwest Natural Gas's tariff does not preclude the parties from forming a contract over Smart Energy.

A utility can form an enforceable contract with customers or other entities consistent with, independent of, and notwithstanding a tariff concerning the same subject. *PacifiCorp v. Nw. Pipeline GP ("PacifiCorp")*, No. 10-99-PK, 2010 WL 3199950, *13 (D Or June 23, 2010), *report & recommendation adopted*, 2010 WL 3219533 (D Or Aug 9, 2010); *Perla Dev. Co. v. PacifiCorp ("Perla Development")*, 82 Or App 50, 53–54, 727 P2d 149 (1986); *Klamath Off-Project Water Users, Inc. v. PacifiCorp ("Klamath")*, 237 Or App 434, 441–43, 240 P3d 94 (2010).

In *PacifiCorp*, the federal district court denied a motion to dismiss PacifiCorp's breach of contract claim, which was based on an agreement that incorporated language of a separately filed tariff. 2010 WL 3199950, at *13. PacifiCorp had contracted with the defendants for the delivery of gas to the utility's power plant. *Id*. at *1. After the defendants had delivered gas containing lubricating oil, which damaged PacifiCorp's plant, PacifiCorp sued for breach of their agreement. *Id*. Even though the agreement incorporated language from one defendant's Federal Energy Regulatory Commission (FERC) tariff requiring that gas be "commercially free from" harmful "impurities and other objectionable substances," *id*. at *2, the court did not construe the

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tariff as precluding the existence of any other contract. *Id.* at *13. Instead, it recognized the parties' agreement as a standalone, enforceable contract notwithstanding the related tariff. *Id.*

Likewise, in *Perla Development*, the court recognized the existence of a valid contract between PacifiCorp and a subdivision developer that arose out of PUC regulations and PacifiCorp's tariff. 82 Or App at 53–54. Although the court ultimately held the parties' agreement unenforceable, it was *not* because PacifiCorp's tariff precluded it or because, as a general matter, tariffs somehow foreclose separate contracts with utilities regarding the same product or service. *See id.* Instead, it was because a later PUC order and tariff amendment prohibited PacifiCorp from performing under the initial agreement, thereby discharging PacifiCorp's contractual duty. *Id*. at 54. Importantly, the court found that PacifiCorp's duty would *not* have been discharged had PacifiCorp agreed to perform regardless of supervening illegality. *Id*.

Defendants' authority, *Klamath*, says no different. 237 Or App 434. There, California Oregon Power Company ("Copco") entered into an agreement to provide a certain amount of electricity to the plaintiff, an association of water users residing near Copco's hydroelectric plant, for 0.75 cents per kilowatt hour—a rate consistent with Copco's electricity tariff. *Id*. at 436–37. After Copco, and later its successor, PacifiCorp, had been selling electricity to the water users for fifty years, the tariff was amended to reflect a higher rate, which PacifiCorp began charging. *Id*. at 437–38. The association sued for breach of the initial agreement. *Id.* at 438. The court dismissed the plaintiff's breach claim, again *not* because PacifiCorp's tariff had nullified or displaced the parties' contract, but because their particular agreement was of an indefinite duration and thus terminable at will. *Id*. at 441–43. As a result, PacifiCorp had not breached any duty by terminating it and seeking a higher rate before the PUC. *Id*. at 441.

In reaching that conclusion, the Court of Appeals held that private contracts with utilities are regarded as entered into subject to the reserved authority of the state to *modify* the contract in the public interest. *Id*. at 444. The court reasoned that without such reserved authority, utilities

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and customers could simply bypass utility regulation. *Id*. This, of course, only proves Plaintiffs' point: a tariff and contract concerning the same subject can coexist unless and until the State (through the PUC) intervenes to modify the contract in the public interest. Thus, *Klamath* does not support Defendants' argument that Plaintiffs seek to "bypass" statutes and regulations governing public utilities by creating a separate agreement. Motion to Dismiss at 21 (citing *Klamath*, 237 Or App at 444).

True, if Plaintiffs were seeking through this lawsuit to renegotiate the cost of the Smart Energy product, or if Northwest Natural Gas wished to cancel the Smart Energy program and Plaintiffs insisted it must continue, Northwest Natural Gas's arguments might carry some weight.[8] But Plaintiffs neither allege nor seek any such thing. They simply seek to enforce Northwest Natural Gas's contractual obligation—which Northwest Natural Gas chose to undertake—to offset their greenhouse gas emissions in exchange for a fixed or variable fee, consistent with Northwest Natural Gas's tariff, including Schedule 400.[9] Northwest Natural Gas's contract with its customers, including Plaintiffs, does not cease to exist simply because it was entered into against the backdrop of a regulated program or incorporates the terms of a filed tariff. *PacifiCorp*, 2010 WL 3199950, at *13. The contract is enforceable consistent with, independent of, and notwithstanding Schedule 400 governing billing, payment, and disbursement of funds collected under Smart Energy. *Id.*

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[8] For the same reason, Defendants' citation to a statement that allegedly appeared on its website is immaterial. Motion to Dismiss at 21 n 5. Whether or not Northwest Natural Gas previously stated, on an FAQ page, that "[p]articipation in Smart Energy is voluntary, requires no contracts, and can be changed or canceled at any time" does not preclude the existence of an enforceable contract between Plaintiffs and the company, and Northwest Natural Gas cites no authority to the contrary. Defendants' attempt to characterize Plaintiffs' allegations as having "arbitrarily identify a new 'contract' based on their enrollment decision," Motion to Dismiss at 12, is baseless.

[9] Schedule 400 is one component of Northwest Natural Gas's larger tariff. *See* NW Natural, Oregon Tariff Book, https://www.nwnatural.com/about-us/rates-and-regulations/oregon-tariff-book (last visited Mar 1, 2025).

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Hoping to avoid this result, Northwest Natural Gas also points to ORS 756.565, which provides that all tariffs approved by the PUC are prima facie lawful and reasonable until deemed otherwise by the PUC. Motion to Dismiss at 19. But again, Plaintiffs' claim does not attack as unlawful or unreasonable any terms or conditions of Schedule 400, nor seek to modify Schedule 400. The statute does not foreclose Plaintiffs' claims.

For similar reasons, the limitation on liability in Tariff Rule 25 (which Schedule 400 incorporates) also does not affect the existence or enforceability of the parties' Smart Energy contract, as Defendants wrongly assert. Motion to Dismiss at 20. Rule 25 only precludes liability "arising out of" the company's actions with regard to "services, terms, and conditions covered in this Tariff." Tariff Rule 25 at Original Sheet RR-25. But Plaintiffs' common-law breach of contract claim does not "arise out of" Northwest Natural Gas's conduct under Schedule 400, any other part of the tariff, or any statute or regulation administered by the PUC; it arises out of the company's failure to mitigate greenhouse gas emissions as promised in its independent agreement with its customers, including Plaintiffs.

In any event, Oregon courts have interpreted analogous tariff provisions limiting utilities' liability narrowly. *See*, *e.g.*, *Olson v. Pac. Nw. Bell Tel. Co.*, 65 Or App 422, 426, 671 P2d 1185 (1983) ("Assuming, *arguendo*, that the extent of defendant's liability may be limited reasonably by tariffs or regulations, we do not agree that this tariff insulates defendant from *all* liability under other theories."). And even if relevant, Rule 25 would still not apply because Plaintiffs allege that Northwest Natural Gas engaged in "willful misconduct" in breaching the contract. *See, e.g.*, Compl. ¶ 137; Tariff Rule 25 at Original Sheet RR-25; *Adamson*, 190 Or App at 222 (finding utility's reliance on tariff liability shield "unavailing" because "the effect of a tariff on a particular claim depends on the nature of the claim and the specific terms of the tariff" and that tariff did not shield utility from liability under the UTPA for willful misconduct).

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Plaintiffs' complaint includes a "plain and concise statement of the ultimate facts constituting" their breach of contract claim. ORCP 18 A. Nothing more is required at this stage. *Moyer*, 316 Or App at 404–05. The Court should not dismiss.

D. Plaintiffs' claims are properly before this Court, not the PUC.

Northwest Natural Gas next seeks to evade judicial review by invoking primary jurisdiction, a doctrine that gives courts the discretion, in "narrow circumstances," to offer agencies the first shot at deciding a matter. *Pacificorp*, 2010 WL 3199950, at *11; *Boise Cascade Corp. v. Bd. of Forestry*, 325 Or 185, 191, 935 P2d 411 (1997) (describing primary jurisdiction as a "judge-made doctrine" the "scope and effect [of which are] determined by judicial reasoning" (internal quotation marks omitted)); *Holman Transfer Co. v. Pac. Nw. Bell Tel. Co*., 287 Or 387, 400 n 7, 599 P2d 1115 (1979) (primary jurisdiction doctrine "does not involve the court's jurisdiction in the strict sense"). Courts consider a variety of factors in determining whether to abate an action for an agency to first address. *Boise Cascade*, 325 Or at 192; *Dreyer v. Portland Gen. Elec. Co*., 341 Or 262, 284, 142 P3d 1010 (2006); *Portland General Elec. Co. v. Duncan, Weinberg, Miller & Pembroke, P.C. ("Duncan Weinberg")*, 162 Or App 265, 280, 986 P2d 35 (1999). But those factors uniformly dictate that the doctrine has no place here: (1) no specialized PUC expertise is needed to resolve Plaintiffs' UTPA and breach of contract claims, which are squarely justiciable in this Court; (2) there is no need for uniform resolution of the issues because Plaintiffs' is the only proceeding; (3) judicial resolution will not adversely impact the PUC's performance of its duties; (4) the PUC cannot provide Plaintiffs complete relief; and (5) abatement would cause unnecessary delay. *Id.*

1. Plaintiffs' claims fall squarely within this Court's ambit, and the PUC's ratemaking expertise would be of no help.

In determining whether an agency has primary jurisdiction, courts consider the extent to which the agency's specialized expertise makes it a preferable forum for resolving the issue. *Dreyer*, 341 Or at 284.

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The PUC's expertise is ratemaking. *Id*. at 285. In *Dreyer*, current and former utility customers of Portland General Electric ("PGE") sued over PGE's collection and retention of rates that unlawfully allowed PGE to recover a return on its investment in a defunct power plant. *Id*. at 265–66, 273. Plaintiffs alleged violations of utility regulation statutes, ORS 756.185 and ORS 757.225, and common-law claims for money had and received and unjust enrichment. *Id*. at 273–75. The Supreme Court held that the PUC's specialized ratemaking expertise gave it "primary, if not sole," jurisdiction over a potential remedy in the case: the revision of rates to offset those unlawfully collected in violation of ORS 757.355, a statute prohibiting utilities from including particular costs in their rate base. *Id*. at 285. Here, by contrast, the PUC does not have any experience or authority—let alone specialized expertise—in resolving unfair and deceptive business practice claims under the UTPA, the enforcement of which is committed to the Attorney General and private parties. *See generally* ORS 646.605–ORS 646.656.

The Court of Appeals' decision in *Adamson* is illustrative. There, the court declined to apply the doctrine of primary jurisdiction to a consumer's UTPA claim challenging a telecommunications utility's misrepresentation of billing and termination-of-service practices, rejecting the utility's argument that the PUC's specialized expertise in regulating telecommunications service providers gave it primary jurisdiction. 190 Or App at 218–19, 223–24. The court held that claims about deceptive advertising are state-law matters that fall within state courts' general jurisdiction and are regularly disposed of by state courts. *Id*. at 224; *see also Facaros v. Qwest Corp*., 2011 WL 2270588, at *1, 3–5 (D Or June 7, 2011) (primary jurisdiction does not apply to customer's UTPA claim alleging utility's fraudulent and unlawful billing where claim did not implicate the utility's tariff).

Likewise, Oregon's state courts, not the PUC, are tasked with adjudicating common-law claims like breach of contract—the resolution of which is neither aided by nor dependent upon PUC expertise. *See, e.g.*, *Or. Trail Elec. Consumers Co-op, Inc. v. Co-Gen Co*., 168 Or App 466, 7 P3d 594 (2000) ("determination of parties' rights under a contract is a common-law issue

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that falls within a circuit court's general jurisdiction," especially where parties were not "presently subject to PUC regulation * * * with respect to" the subject of their contract dispute).

Oregon courts, including this Court, have found that the doctrine does not apply even where a plaintiff's breach of contract claim relates to a tariff or a matter regulated by an agency. *See Perla Development*, 82 Or App at 52–54 (courts, and not PUC, have primary jurisdiction to decide plaintiff's breach of contract claim and requested relief, notwithstanding the claim's relation to PUC regulations and defendant's tariff); *Black v. PacifiCorp*, No. 22CV08622, 2024 WL 3022945, at *5–6 (Or Cir Ct Mult Cnty Mar 28, 2024) (rejecting argument that because PUC had regulatory authority over PacifiCorp's use of a "public safety power shutoff," PUC also had authority to decide traditional legal claims of inverse condemnation and tort stemming from fire caused by PacifiCorp's faulty and poorly maintained powerlines). This is true even where the claim is explicitly premised on the terms of a tariff. *PacifiCorp*, 2010 WL 3199950, at *12 (FERC did not have primary jurisdiction over plaintiff's claim to enforce contract that incorporated provisions of a filed tariff). The underlying rationale is that state contract law and utility regulation serve different purposes: "state contract law, which assures that parties to a contract receive the benefit of their bargain, does not serve the same end as [a utility regulator's] regulation of rates to protect consumers from monopolization." *Id.* at *10.

As in *Adamson*, *Oregon Trail*, *Perla Development*, *Black*, and *PacifiCorp*, Plaintiffs' UTPA and breach of contract claims belong before this Court. Unlike in *Dreyer*, Plaintiffs' claims are not intertwined with complex ratemaking issues that the PUC is uniquely equipped to resolve. Plaintiffs do not argue that the rates in Schedule 400 are unlawful or that Northwest Natural Gas departed from them in billing Plaintiffs. This case is not about rates, period. Nor do Plaintiffs attack the substantive terms and conditions of the Smart Energy program related to billing, payment, and disbursement of funds. Instead, Plaintiffs contend that the program was deceptively marketed in violation of the UTPA, and that Northwest Natural Gas failed to deliver the product it promised. Whereas the PUC was a superior venue to fashion relief for violations

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of a utility base rate statute in *Dreyer*, 341 Or at 285, this Court is the *only* body (not just the superior one) that can grant Plaintiffs the standard legal remedies they seek in this case.

Northwest Natural Gas's arguments to the contrary are unavailing. At the outset, Defendants mistake the PUC's broad regulatory power over utilities for specialized expertise in the issues raised here. *See* Motion to Dismiss at 23–24 (citing statutes and cases that mention the PUC's general regulatory power over utilities or its broad ratemaking authority, including ORS 756.040 and ORS 757.210(1)(a); *Klamath*, 237 Or App at 443; *Pac. Nw. Bell Tel. Co. v. Sabin*, 21 Or App 200, 534 P2d 984 (1975); *Gearhart v. Pub. Util. Comm'n of Or.*, 255 Or App 58, 299 P3d 533 (2013), *aff'd*, 356 Or 216, 339 P3d 904 (2014); *Pac. Nw. Bell Tel. Co. v. Katz*, 116 Or App 302, 841 P2d 652 (1992); and *Multnomah Cnty. v. Davis*, 35 Or App 521, 581 P2d 968 (1978)). But primary jurisdiction was not at issue in *Sabin*, *Gearhart*, *Katz*, or *Davis*. And even *Dreyer*, also Northwest Natural Gas's authority, found primary jurisdiction based narrowly (and solely) on the issue of remedy. 341 Or at 282 (rejecting "argument that the circuit court is without jurisdiction to hear plaintiffs' claims because they necessarily involve ratemaking or pertain to utility regulation"); *see also Adamson*, 190 Or App at 223 (rejecting argument that PUC's generalized expertise in regulating telecommunications service providers gave it primary jurisdiction). The relevant question is not the scope of the agency's regulatory authority, but the scope of its specialized expertise.

Similarly, Northwest Natural Gas's cursory reference to the PUC's authority to inquire, investigate, and enforce utilities' compliance with law, Motion to Dismiss at 24 (citing ORS 765.070; ORS 765.515(1); ORS 756.160(1)), does not show that the PUC has specialized expertise over Plaintiffs' UTPA and breach of contract claims. That the PUC can enforce specific laws relating to public utilities does not give it authority—let alone the expertise—to enforce laws of general application. *See W. Radio Servs. Co. v. Centurytel of E. Or., Inc.*, 2011 WL 2971861, at *4 (D Or July 19, 2011), *aff'd*, 497 F App'x 700 (9th Cir 2012) (PUC lacked authority to enforce agreement under the Federal Communications Act between Oregon

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telecommunications carriers when Act was silent on PUC enforcement and ORS 756.160(1), ORS 756.180 (1), and ORS 756.500(1) granted PUC "no authority to enforce federal telecommunications law regarding interconnection").

Lastly, the PUC's authority under Senate Bill ("SB") 98 to promulgate regulations on utilities' procurement of RNG in no way supports Northwest Natural Gas's argument that the PUC is uniquely situated to decide the present matter. Motion to Dismiss at 25. Plaintiffs do not challenge Northwest Natural Gas's procurement of RNG for its own purposes under SB 98. And even if the PUC has some expertise in RNG generally, *id.* at 24, that expertise is not needed to aid this Court's determination of whether Northwest Natural Gas engaged in deceptive marketing or breached its contract with Smart Energy customers.

2. There is no concern about uniform resolution of issues.

Courts also consider the desirability of uniform resolution in determining whether to invoke primary jurisdiction. *Dreyer*, 341 Or at 284. This factor is satisfied when duplicative, parallel litigation of an identical legal issue before both a court and an administrative body threatens to create potentially conflicting rulings. *Id*. at. 286. When, for instance, in *Dreyer*, the PUC responded to prior circuit court decisions by instituting proceedings involving the same controversy, the same ratepayers, and the same effort to determine a remedy for PGE's collection of unlawful rates as the judicial case, the court found a strong need to avoid "conflicting or inconsistent" rulings, particularly on the remedies issue. *Id*. at 285–86.

That type of parallel adjudication is wholly absent here. Northwest Natural Gas's supposition that a customer might one day raise the issues Plaintiffs complain of before the PUC, Motion to Dismiss at 25, cannot trigger this factor. *See Portland Gen. Elec. Co. v. City of Glendale*, 2007 WL 1655545, at *7 (D Or June 1, 2007) ("[T]his court may not properly refrain from exercise of jurisdiction in favor of hypothetical FERC proceedings."). Even assuming the PUC had authority to resolve claims of deceptive advertising and breach of contract—which it does not, as noted above—any risk of inconsistent rulings is purely hypothetical. And the fact

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that in such a hypothetical PUC proceeding, the agency's declaratory rulings would, under ORS 756.610(1)(b), be subject to review by the Court of Appeals and not this Court, in no way supports Northwest Natural Gas's argument that the PUC has primary jurisdiction here. *See* Motion to Dismiss at 25.

Similarly unavailing is Northwest Natural Gas's concern for creating regulatory inconsistency between this Court's rulings related to Smart Energy and PUC rulings related to *other* programs of *other* utilities. *See* Motion to Dismiss at 25. First, Northwest Natural Gas has not identified any active PUC adjudication or ratemaking proceedings relating to other utilities' programs. But even if it had, it wouldn't be relevant; Plaintiffs' claims and requested relief do not concern other utilities' offerings. Northwest Natural Gas fails to explain how this Court's resolution of Plaintiffs' claims could have any impact on—let alone risk creating parallel inconsistent rulings with—the PUC's regulation of separate utilities' programs.[10]

3. Judicial resolution of this matter will not adversely impact the PUC's performance of its regulatory duties.

That judicial resolution of the issue would interfere with an agency's regulatory functions weighs in favor of abating the action, too, such as where judicial review would prevent an agency from fulfilling a legal duty to determine an issue that is before the court. *Dreyer*, 341 Or at 284–86 (finding contemporaneous judicial review would interfere with PUC's ability to "perfor[m] part of its regulatory function" by starting a proceeding to respond to remands on issues in the lawsuit). But here, the Court can adjudicate Plaintiffs' claims without encroaching on any PUC function, given the absence of any open issue, investigation, or complaint before the PUC regarding the central issues in this case, and the fact that, again, contrary to Defendants'

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[10] PGE's program appears to have little in common with Smart Energy. PGE's Green Future Choice Program is not advertised as providing carbon offsets, but instead purports to use customer payments to fund wind, solar, and hydroelectric projects in Oregon. *See* PGE, *Green Future Choice Renewable Power*, https://portlandgeneral.com/energy-choices/renewable-power/green-future-choice (last visited Mar 1, 2025).

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assertion (*see* Motion to Dismiss at 25), this case has nothing to do with the PUC's general oversight over distinct programs of other utilities. *Id.*

4. The PUC cannot provide Plaintiffs complete relief.

The PUC's inability to give Plaintiffs complete relief also weighs against primary jurisdiction—a factor Defendants ignore. *Duncan Weinberg*, 162 Or App at 280. Courts should not abate a case to an agency incapable of making the plaintiffs whole. *Id*. Because the PUC lacks general adjudication and enforcement authority for laws it is not explicitly authorized to administer, *W. Radio Servs. Co*., 2011 WL 2971861 at *4, including the UTPA, it cannot provide Plaintiffs the remedies they seek. Northwest Natural Gas offers no authority saying otherwise, and Plaintiffs are aware of none. Defendants' suggestion that the PUC can consider "whether and to what extent and in what form a remedy may be appropriate," Motion to Dismiss at 26, rings hollow.

5. Abatement would needlessly delay the resolution of this dispute.

Finally, courts also decline to abate an action to an agency when doing so would unduly delay resolution of the dispute. *Boise Cascade*, 325 Or at 192. Courts should not invoke primary jurisdiction where referral to an agency would significantly postpone a ruling that a court is otherwise competent to make. *Nicholson v. REI Energy, LLC*, 370 F Supp 3d 1199, 1205–06 (D Or 2019); *WaterWatch of Or. v. Winchester Water Control Dist*., 2021 WL 4317150, at *5–6 (D Or Sept 22, 2021). Abating Plaintiffs' claims would not only delay the resolution of this dispute—it would effectively end it. Because, as noted above, there is no pending proceeding relating to Smart Energy before the PUC and the agency lacks the authority to adjudicate Plaintiffs' UTPA and breach-of-contract claims, abatement would delay Plaintiffs' relief indefinitely.

This case is not about issues that "center on the implementation of Commission-approved Schedule 400 and associated rates and responsibilities," as Northwest Natural Gas erroneously claims. Motion to Dismiss at 26. Primary jurisdiction does not apply.

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E. Plaintiffs' complaint states facts sufficient to state a claim against Northwest Natural Holding Company.

Finally, Defendants contend that the Court should dismiss all of Plaintiffs' claims against Northwest Natural Holding Company on the ground that Plaintiffs' First Amended Complaint "alleges no individual and independent conduct by Northwest Natural Holding Co. at all, let alone any conduct that could serve as the basis of an actionable claim." Motion to Dismiss at 9. They note that Plaintiffs' complaint does not allege misconduct by Defendants generally, and instead alleges only misconduct by Defendant Northwest Natural Gas. *Id.*

Of course, Plaintiffs have not yet received discovery of the relationship between the two entities, and they are entitled to do so. Northwest Natural Holding Company has made clear in public statements, though, that customers of Northwest Natural Gas are its customers as well:

> "I'm proud to say we had a tremendous year again in 2023. We grew our customer base at our gas and water utilities, we began operation of our second renewable natural gas (RNG) facility under the landmark Oregon Senate Bill 98, we continued to study hydrogen technologies for the benefit of our gas utility customers, and we entered the water and wastewater operations and maintenance business."

Northwest Natural Holdings, Annual Report (2023).[11] In its Annual Report, it (Northwest Natural Holding Company) touts that it "added over 15,000 gas and water utility connections" in 2023; invested $327.3 million in "natural gas and water utility systems to support growth, enhance reliability and resiliency, and upgrade technology"; was "ranked * * * among the top two utilities" in the West, and "filed an Oregon general rate case for [Northwest Natural Gas] requesting a $154.9 million revenue requirement increase to support system investments and cost increases." *Id.* Northwest Natural Holding Company *is* Northwest Natural Gas; that being so, each and every one of the allegations as to Northwest Natural Gas applies equally to the holding

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[11] *Available at* https://s23.q4cdn.com/611156738/files/doc_financials/2023/ar/nwn_2023_annual_report_bmk.pdf (last visited Mar 4, 2025).

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company. To the extent that the Court rules otherwise, Plaintiffs respectfully seek leave to replead.

V. CONCLUSION

For the reasons set forth above, Plaintiffs respectfully urge the Court to deny Defendants' motion to dismiss. To the extent that the Court grants any portion of Defendants' motion, Plaintiffs respectfully seek leave to replead.

DATED this 10th day of March, 2025.

By: /s/ Nadia H. Dahab

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CERTIFICATE OF SERVICE

I hereby certify that I caused to be served the foregoing **PLAINTIFFS' RESPONSE IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS FIRST AMENDED COMPLAINT** on the following named person(s) on the date indicated below:

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DATED this 10th day of March, 2025.

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