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IN THE CIRCUIT COURT OF THE FIRST CIRCUIT
STATE OF HAWAI'I

CITY AND COUNTY OF HONOLULU and HONOLULU BOARD OF WATER SUPPLY, Plaintiffs, vs. SUNOCO LP; ALOHA PETROLEUM, LTD.; ALOHA PETROLEUM LLC; EXXON MOBIL CORP.; EXXONMOBIL OIL CORPORATION; ROYAL DUTCH SHELL PLC; SHELL OIL COMPANY; SHELL OIL PRODUCTS COMPANY LLC; CHEVRON CORP; CHEVRON USA INC.; BHP GROUP LIMITED; BHP GROUP PLC; BHP	CIVIL NO. 1CCV-20-0000380 (JPC) (Other Non-Vehicle Tort) **PLAINTIFFS' OPPOSITION TO CHEVRON DEFENDANTS' SPECIAL MOTION TO STRIKE AND/OR DISMISS PURSUANT TO CALIFORNIA'S ANTI-SLAPP LAW; EXHIBIT A** Hearing Date: August 27, 2021 Hearing Time: 8:30 AM (HT) The Honorable Jeffrey P. Crabtree Courtroom/Division: First Circuit 6th Division Trial Date: None.

HAWAII INC.; BP PLC; BP AMERICA INC.; MARATHON PETROLEUM CORP.; CONOCOPHILLIPS; CONOCOPHILLIPS COMPANY; PHILLIPS 66; PHILLIPS 66 COMPANY; AND DOES 1 through 100, inclusive,

Defendants.

PLAINTIFFS' OPPOSITION TO CHEVRON DEFENDANTS' SPECIAL MOTION TO STRIKE AND/OR DISMISS PURSUANT TO CALIFORNIA'S ANTI-SLAPP LAW

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I. INTRODUCTION

Plaintiffs City and County of Honolulu and Honolulu Board of Water Supply have alleged that Chevron, along with its co-Defendants, worked for decades to mislead its consumers and the public about the objective qualities of its products and the effects those products have had and will have on Earth's climate. The purpose and effect of Chevron's factual misstatements was to convince the public that climate change was an unproven and speculative theory, and that Chevron's fossil fuel products generally posed no threat to the environment—which Chevron and the other Defendants knew to be false. Chevron is not entitled to lie about its products, and cannot defeat the Plaintiffs' allegations simply because the lies it told were on important subjects.

Chevron's Special Motion to Strike and/or Dismiss the Complaint Pursuant to California's Anti-SLAPP Law (Dkt. 349) ("Motion" or "Mot.") should be denied for multiple reasons. First, there is no basis to apply California's anti-SLAPP law. The state with the greatest interest in this dispute is Hawai‘i, where the Plaintiffs, multiple Defendants, and the alleged injury are situated. The Hawai‘i legislature has restricted the availability of anti-SLAPP immunity to testimony before a government body, and Plaintiffs' Complaint alleges misstatements made to consumers, scientists, and the public, not to the government. California's policy interest would not support application of the California statute here, moreover, because if similarly situated public entity plaintiffs brought identical public nuisance claims *in California*, they would fall within the statute's "public enforcement" exemption. And even if California's anti-SLAPP law could apply, the conduct Plaintiffs allege falls within the statute's "commercial speech" exemption.

Chevron's alternative argument under the *Noerr-Pennington* doctrine should also be rejected because the Complaint does not seek to impose liability for genuine petitioning activity. That doctrine protects individuals' right to petition the government, and the conduct alleged in the

complaint is neither "petitioning" nor "incidental to" petitioning. Plaintiffs focus on Chevron's efforts to mislead *consumers* and the *public* about its products to increase sales. *Noerr-Pennington* does not protect "commercial activity with a political impact," *Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U.S. 492, 507 (1988), which is exactly what Plaintiffs allege.

II. BACKGROUND

Defendants have known for more than 60 years that their fossil fuel products, when used as intended, create greenhouse gas pollution that warms the oceans and atmosphere, alter climate patterns, increase storm frequency and intensity, and cause sea levels to rise. First Amended Complaint ¶¶ 1, 5, 7, 49–87.[1] Despite their knowledge, Defendants, including Chevron, engaged for decades in a coordinated, multi-front effort to conceal and dispute these truths, and mislead consumers and the public about their products' known, inevitable, and harmful effects. Starting in 1988, Defendants launched multi-million-dollar public relations campaigns to deny the existence and consequences of global warming, and create a false "controversy" surrounding facts their internal communications demonstrate they accepted as scientific reality. ¶¶ 88–117.

As one example, in 1991 the Information Council for the Environment ("ICE"), formed in part by the Chevron predecessor Pittsburg and Midway Coal Mining company, launched a national climate change science denial campaign, with full-page newspaper ads, radio commercials, and a public relations tour with the goal of repositioning global warming as theory, not fact. ¶ 97. Radio commercials placed during the campaign told listeners: "Stop panicking! I'm here to tell you that the facts simply don't jibe with the theory that catastrophic global warming is taking place."[2] Print

[1] Unless otherwise indicated, all citations using only a paragraph symbol are to paragraphs in the Plaintiffs' First Amended Complaint.

[2] *See* ¶¶ 98–99, *citing* Information Council for the Environment Radio and Print Advertisement Copy at 12 ("ICE Advertisement Documents"), available at

advertisements similarly compared global warming to "Chicken Little's hysteria about the sky falling," stating that "evidence the Earth is warming is weak," and "[p]roof that carbon dioxide has been the primary cause is non-existent." ¶ 99; ICE Advertisement Documents at 48. A primary, explicit goal of the campaign was to "positively change the opinions of a selected population" of the public "regarding the validity of global warming." *Id.* at 26. Chevron staff also participated in drafting the American Petroleum Institute's ("API") 1998 "Global Climate Science Communications Action Plan." ¶ 105 & n.5. The plan stated that "[v]ictory will be achieved when . . . average citizens 'understand' (recognize) uncertainties in climate science; [and when] recognition of uncertainties becomes part of the 'conventional wisdom.'" *Id.* Defendants' campaign, "which focused on concealing, discrediting, and/or misrepresenting information that tended to support restricting consumption of (and thereby decreasing demand for) Defendants' fossil fuel products," was intended "to accelerate their business practice of exploiting fossil fuel reserves, and concurrently externalize the social and environmental costs" of their products. ¶ 93.

III. LEGAL STANDARDS

A. A Motion to Dismiss Should Not Be Granted Unless It Is Beyond Doubt That No Set of Facts Can Support the Plaintiff's Claims.

Chevron has not stated what standard it believes the Court should apply to its Motion, but the standard of decision for motions to dismiss under HRCP 12(b) is clear. "Hawai'i is a notice-pleading jurisdiction," and thus "a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his or her claim that would entitle him or her to relief." *Bank of Am., N.A. v. Reyes-Toledo*, 143 Hawai'i 249,

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https://www.ucsusa.org/sites/default/files/attach/2015/07/Climate-Deception-Dossier-5_ICE.pdf. The Court may consider documents referenced in the Complaint without converting a Rule 12(b)(6) motion into a motion for summary judgment. *See, e.g.*, *Rohrer v. Hoyte*, 145 Hawai'i 262 (App. 2019); *Thomas v. Sterns*, 129 Hawai'i 294 (App. 2013).

257, 259 (2018). Courts must "view a plaintiff's complaint in a light most favorable to him or her in order to determine whether the allegations contained therein could warrant relief under any alternative theory." *In re Estate of Rogers*, 103 Hawai'i 275, 280 (2003) (citation omitted).

B. Hawai'i Law Presumptively Applies to All Issues.

Where a question of law "is a substantive rather than a procedural matter," courts are not "obliged to apply the law of Hawai'i if [its] conflict-of-laws analysis" shows that another state's law should govern the issue in dispute. *Peters v. Peters*, 63 Haw. 653, 660 (1981). Hawai'i courts follow a "flexible approach looking to the state with the most significant relationship to the parties and subject matter." *Mikelson v. United Servs. Auto. Ass'n*, 107 Hawai'i 192, 198 (2005) (citation omitted). Courts begin with "a presumption that Hawai'i law applies unless another state's law would best serve the interests of the states and persons involved." *Arrowood Surplus Lines Ins. Co. v. Paul Ryan Assocs., Inc.*, No. CV 13-00505 LEK-KSC, 2014 WL 12597419, at *2 (D. Haw. Oct. 31, 2014) (quoting *Mikelson*, 107 Hawai'i at 198).

To determine whether that presumption has been overcome, courts consider factors including "(1) where relevant events occurred, (2) the residence of the parties, and (3) whether any of the parties had any particular ties to one jurisdiction or the other." *Hamby v. Ohio Nat'l Life Assur. Corp.*, No. CIV. 12-00122 JMS, 2012 WL 2568149, at *3 (D. Haw. June 29, 2012); *see also Roxas v. Marcos*, 89 Hawai'i 91, 117 n. 16 (1998). "[T]he preferred analysis" makes "an assessment of the interests and policy factors involved with a purpose of arriving at a desirable result in each situation." *Mikelson*, 107 Hawai'i at 201 (cleaned up).

IV. ARGUMENT

A. The Plaintiffs' Complaint Should be Judged Under Hawai'i Law, Not California's Anti-SLAPP Statute.

As noted above, Hawai'i choice of law analysis begins with the presumption that Hawai'i

law applies unless Chevron can show that California has a greater interest in seeing its law applied. *Arrowood Surplus Lines Ins. Co.*, 2014 WL 12597419, at *2. Hawai‘i, not California, has the greater interest in seeing its law applied to this action, which is based in Hawai‘i tort and has been brought by Hawai‘i public entities to remedy injuries suffered in Hawai‘i. *See Roxas*, 89 Hawai‘i at n. 16. Moreover, if similarly situated public entity plaintiffs in California brought the same nuisance claims under California law that Plaintiffs have asserted here, they would come within the statute's "public enforcement" exemption to the anti-SLAPP statute. Applying California law would thus frustrate the policy goals of both California and Hawai‘i.[3]

1. Hawai‘i Has a Clear and Direct Interest in Applying Its Own Law Here.

There is no reason to apply California law because Hawai‘i has a stronger "relationship to the parties and subject matter" than California. *Hamby*, 2012 WL 2568149, at *3. First, the injuries to Plaintiffs' shoreline, facilities, public infrastructure, and economy have occurred and will occur in Hawai‘i, because of Chevron's deceitful fossil fuel misinformation campaigns, which included targeting consumers in Hawai‘i. *See* ¶¶ 10–12. Second, the residence of the parties weighs in favor of applying Hawai‘i law; Plaintiffs bring this case on their own behalf as Hawai‘i public entities injured in Hawai‘i, and there are multiple Hawai‘i and non-California Defendants other than Chevron. *See Hamby*, 2012 WL 2568149, at *3. Chevron relies heavily on its California domicile, but a defendant's domicile is not dispositive under any choice of law approach, and Chevron cites no Hawai‘i case suggesting otherwise. *See* Mot. at 8. A defendant's domicile is one factor Hawai‘i courts consider, and Hawai‘i law is routinely applied to out-of-state defendants. *See, e.g.*,

[3] The parties appear to agree that Chevron has no defense under *Hawai‘i's* anti-SLAPP statute, which protects "oral or written testimony submitted or provided to a governmental body during the course of a governmental proceeding" from liability. Hawai‘i Revised Statutes § 634F-1 (2014). Courts have interpreted the statute narrowly. *See, e.g.*, *Perry v. Perez-Wendt*, 129 Hawai‘i 95, 101–02 (App. 2013) (complaint filed with Office of Disciplinary Counsel not protected "testimony"). Chevron has no plausible argument under Hawai‘i's anti-SLAPP statute.

Mikelson, 107 Hawai‘i at 198 (California defendant); *Arrowood Surplus Lines Ins. Co*., 2014 WL 12597419, at *1 (California and New Hampshire defendants). Third, the Plaintiffs have clear "particular ties" to the state as public agencies.

There could be no closer relationship between Hawai‘i's interest in applying its own law to a matter involving one of its own counties and the Board of Water Supply as Plaintiffs, on the one hand, and Plaintiffs' interest in pursuing a remedy for their injuries in Hawai‘i state court pursuant to Hawai‘i law, on the other. *Compare Servco Pac., Inc. v. SkyBridge Glob., Inc*., No. 16-00266 DKW-KSC, 2016 WL 6996987, at *5 (D. Haw. Nov. 29, 2016) (Georgia forum selection clause was unenforceable because "Hawaii has the most significant relationship to the parties and the subject matter"), *with Jou v. Adalian*, No. CV 15-00155 JMS-KJM, 2018 WL 1955415, at *6 (D. Haw. Apr. 25, 2018) (finding California had more significant relationship to litigation in part because "[t]here is no indication that any alleged [relevant events] occurred in Hawaii.").[4]

2. California's Interest is Indirect and Attenuated, and Its Anti-SLAPP Statute Would Not Fully Protect Chevron in California Courts.

Even if California had a significant interest in seeing its anti-SLAPP statute applied here, it would be insufficient to overcome the presumption the Hawai‘i law should apply. Chevron argues that "[a]lthough Hawai‘i has its own anti-SLAPP statute," California's should apply because "the defendant's home state has the strongest interest in seeing its anti-SLAPP immunity

[4] Similarly, the District of Massachusetts applied that state's narrower anti-SLAPP statute in a choice of law analysis against California's broader statute in *Ayyadurai v. Floor64, Inc*., 270 F. Supp. 3d 343 (D. Mass. 2017). In finding that both parties had an interest in seeing their home-states' statute apply, the court nevertheless found that "Massachusetts . . . has an interest in protecting its citizens from tortious conduct. By enacting an anti-SLAPP statute that applies only to claims involving a person's exercise of his or her right of petition, and not to claims involving a person's exercise of free-speech rights more generally, Massachusetts has attempted to balance the encouragement of protected speech with the desire to protect those who are harmed by defamatory statements . . . That interest would be disserved by applying California law and striking the complaint. Under the circumstances presented here, there is no reason to favor California's policy over that of Massachusetts." *Id*. at 354.

applied to claims based on its citizen's speech." Mot. at 8. But any interest California might have in seeing its anti-SLAPP statute enforced in this case is both lesser and more attenuated than the direct and pressing interest Hawai'i has in seeing its law applied to this matter, brought by Hawai'i public entities to address harm suffered in Hawai'i. *See, e.g.*, *Arrowood*, 2014 WL 12597419, at *4 ("Although . . . there is some connection between the dispute and California, [the court] disagrees with Defendants that this interest outweighs Hawaii's interest in applying its own law."); *Lewis v. Lewis*, 69 Haw. 497, 499–500 (1988) ("Hawaii has the stronger and primary interest in seeing its laws applied to this case" because it will be "most directly affected by the" outcome.).

Moreover, California's anti-SLAPP statute likely would not protect Chevron from liability for identical public nuisance claims *in California*. That statute expressly does "not apply to any enforcement action brought in the name of the people of the State of California by the Attorney General, district attorney, or city attorney, acting as a public prosecutor." Cal. Civ. Proc. Code § 425.16(d). City attorneys in California are in turn authorized to bring civil actions "in the name of the people of the State of California to abate a public nuisance." *Id.* § 731; *see also* Cal. Civil Code § 3480 (defining public nuisance). The California Supreme Court has thus acknowledged that municipal public nuisance actions on behalf of the people are exempt from anti-SLAPP immunity. *See City of Montebello v. Vasquez*, 376 P.3d 624, 631 & n.9 (Cal. 2016). If Plaintiffs were California municipal entities pursuing their public nuisance claims in California, the exemption would clearly apply to defeat Chevron's Motion, at least as to those claims.[5] Under "an assessment of the interests and policy factors involved," *Mikelson*, 107 Hawai'i at 201, it would

[5] Plaintiffs have brought public nuisance causes of action here, but cannot directly benefit from the exemption because there is no equivalent Hawai'i statute delegating authority to city attorneys to bring a nuisance action on behalf of the people, and in any event the exemption only applies to actions brought on behalf of the people of California, not Hawai'i.

make no sense to apply California's anti-SLAPP law here in a way that would afford Chevron *more* protection than it would enjoy *in California*. California courts have repeatedly held that "[t]he State does not lose its power to regulate commercial activity deemed harmful to the public whenever speech is a component of that activity," *People v. ConAgra Grocery Products Co.*, 17 Cal. App. 5th 51, 92 (2017) (citation omitted), and the public enforcement exemption advances California's interest in regulating precisely the kind of conduct alleged here. The policies of California and Hawai'i both weigh heavily against applying California law.

Chevron relies on inapposite cases with fundamentally different underlying facts, from jurisdictions with different choice of law approaches. The District of Utah in *Diamond Ranch Acad., Inc. v. Filer*, 117 F. Supp. 3d 1313 (D. Utah 2015), and the Ninth Circuit in *Sarver v. Chartier*, 813 F.3d 891 (9th Cir. 2016), each applied the four-factor test described at § 145 of Second Restatement Conflict of Laws, which Hawai'i has *not* adopted.[6] *See* Restatement (Second) of Conflict of Laws § 145(2) (AM. LAW INST. 1971); *Mikelson*, 107 Hawai'i at 199 n.6 (explaining that Restatement § 145 "was not adopted as Hawai'i's approach to conflict of law matters."). Moreover, the *Diamond Ranch* and *Sarver* courts applied California anti-SLAPP law not only because defendants were domiciled in California, but, critically, because significant events relating to the litigation took place in California such that the parties and litigation were both entwined

[6] Chevron additionally cites *GOLO, LLC v. Higher Health Network, LLC*, No. 3:18-cv-2434-GPC-MSB, 2019 WL 446251 (S.D. Cal. Feb. 5, 2019) for the proposition that a "defendant's domicile is controlling in the anti-SLAPP choice of law analysis." Mot. at 11. Though the *GOLO* case was originally filed in Pennsylvania advancing a claim for trade libel under Pennsylvania common law, the transferee court—Southern District of California—used California's choice of law rules per Ninth Circuit precedent to apply California anti-SLAPP law to a California speaker. *See id*. at *9 (citing *Muldoon v. Tropitone Furniture Co.*, 1 F.3d 964, 967 (9th Cir. 1993)). There is no transferee choice of law issue here.

with California. There are no similar facts here linking this litigation and to California.[7]

Finally, Chevron's argument that California law must apply because all its allegedly tortious conduct "would have emanated from its California headquarters," Mot. at 12, is baseless. There is no factual basis, in the complaint or otherwise, to attribute all of Chevron's speech as originating from its headquarters. And in any event, Chevron cites no authority for the proposition that speech "emanating" from a corporate headquarters must be governed by the law of the situs of the headquarters; to the contrary, in the defamation context for example, claims are frequently judged in the courts of, and under the laws of, the state where the allegedly defamatory statement was *published*. *See, e.g.*, *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 776 (1984) (applying New Hampshire libel law in defamation case against Ohio corporation with principal place of business in California where publication and injury occurred in New Hampshire).

B. Even if California's Anti-SLAPP Law Applied Here, It Would Not Bar the Plaintiffs' Claims, Which Target Conduct Within the Commercial Speech Exemption to California's Anti-SLAPP Statute.

Even if any aspect of the Plaintiffs' claims were controlled by California law, they would not be subject to dismissal because they fall within the California anti-SLAPP statute's "commercial speech" exemption. That exemption applies where three conditions exist: First, the claim must arise from "any statement or conduct" of "a person primarily engaged in the business of selling or leasing goods or services." Cal. Civ. Proc. Code § 425.17(c). Second, the conduct

[7] In *Diamond Ranch*, the Utah Supreme Court concluded that California anti-SLAPP law applied because "[defendant's] California residence, California's strong interest in protecting its citizens' free speech activities, and the court's conclusion that the record, fairly construed, shows that much of the speech likely originated in California, all weigh strongly in favor of applying California's, not Utah's, anti-SLAPP law." 117 F. Supp. 3d at 1324. In *Sarver*, the Ninth Circuit applied California anti-SLAPP law to a false light suit involving the film industry, finding that California contacts predominated because (1) the production of the film at issue took place in California; (2) all the defendants except one were domiciled in California; and (3) all parties conducted business there. 813 F.3d, at 898–99. Additionally, that the alleged injury took place in every state where the film was shown weighed against applying New Jersey law. *Id.*

must consist of "representations of fact about that person's or a business competitor's business operations, goods, or services that is made for the purpose of . . . promoting, or securing sales [of] the person's goods or services." *Id.* § 425.17(c)(1). And third, "the intended audience [must be] an actual or potential buyer or customer, or a person likely to repeat the statement to, or otherwise influence, an actual or potential buyer or customer." *Id.* § 425.17(c)(2). All three are satisfied here.

First, Plaintiffs' claims arise from the statements and conduct of Chevron, a person primarily engaged in the business of selling and leasing goods and services. Chevron is a multi-national, vertically integrated energy and chemicals company primarily engaged in the manufacturing and marketing of commodity petrochemicals, plastics for industrial uses, and fuel and lubricant additives. ¶ 23(a)–(b). Plaintiffs' claims arise from Chevron's sustained participation in an industry-wide effort to conceal, discredit, and misrepresent information that tended to support restricting consumption of Defendants' fossil fuel products. ¶ 93.

Second, the Complaint alleges that Chevron has made false "representations of fact" about its products for commercial purposes. Cal. Civ. Proc. Code § 425.17(c)(1). Defendants, including Chevron, repeatedly averred that there was no sound scientific basis for concluding that its fossil fuel products contribute to the climate crisis, which Chevron knew to be false. *See, e.g.*, ¶¶ 93–114. Defendants "bankroll[ed] scientists who . . . held fringe opinions" on climate science, and whose conclusions contradicted those reached by Defendants' own researchers. ¶ 109. Groups that Chevron participated in and led "distributed misleading material to generate public uncertainty around the climate debate," despite internally acknowledging that it did not "offer convincing arguments against the conventional model of greenhouse gas emission-induced climate change." ¶ 108. Chevron made those false representations to "maximize continued dependence on their products" and "accelerate their business practice of exploiting fossil fuel reserves." ¶ 92–93.

Third, the intended audience of Chevron's deception campaign is the public that consumes its products—comprising millions of "actual or potential buyer[s]". Cal. Civ. Proc. Code § 425.17(c)(2). API's 1998 Communications Plan, written in part by a Chevron representative, declared that "[v]ictory will be achieved when . . . average citizens 'understand' (recognize) uncertainties in climate science; [and when] recognition of uncertainties becomes part of the 'conventional wisdom.'" ¶105. More recently, Chevron has made misleading statements to the public purporting that the company has "substantially invested in lower carbon technologies and renewable energy sources." ¶ 137. Chevron touted "profitable renewable energy" as part of its business plan for several years and launched a 2010 advertising campaign to promote the move toward renewable energy. ¶ 130. Despite these representations, Chevron only spent 0.2% of its total capital expenses on low carbon energy sources between 2010 and 2018. ¶ 142.

Chevron advances two arguments against applying the commercial speech exemption. Both fail. First, Chevron's argument that the exemption only covers a business's statements about a competitor's products or services defies both the statutory text and authoritative precedent. *See* Mot. at 14–15. The commercial speech exemption encompasses a speaker's "representations of fact about *that person's* ***or*** *a business competitor's* operations, goods, or services," Cal. Civ. Proc. Code § 425.17(c)(1) (emphasis added), and the Plaintiffs' claims are plainly within the ambit of the statute. *See Simpson Strong-Tie Co. v. Gore*, 230 P.3d 1117, 1129 (Cal. 2010) (confirming statute exempts any cause of action arising from "representations of fact about that person's or a business competitor's business operations, goods, or services"). Chevron's contention to the contrary misconstrues a quotation from *Waste & Debris Box Serv., Inc. v. Murphy*, 4 Cal. App. 5th 1135 (2016), divorced from its factual context. In that case, the court analyzed a defamation claim against a consultant who had been commissioned by the plaintiff's competitor to write a report

evaluating the plaintiffs' business operations. The consultant's report was not a statement about its own services, so the plaintiff could only claim anti-SLAPP protection if the consultant were the plaintiff's "business competitor." Cal. Civ. Proc. Code § 425.17(c)(1). The court held that the exemption was "limited to statements *by* one business competitor about the products or services of another," and did not exempt statements by the competitor's consultant. *Murphy*, 4 Cal. App 5th at 1152 (emphasis added). The court correctly noted, however, that the exemption generally covers a person's "representations of fact about its own 'or a business competitor's business operations, goods, or services.'" *Id.* (quoting Cal. Civ. Proc. Code § 425.17(c)(1)).[8] The commercial speech exemption is plainly not limited to statements about a competitor.

Second, Chevron's argument that the commercial speech exemption does not cover speech by trade associations mistakes the underlying basis of Plaintiffs' causes of action. *See* Mot. at 15 (citing *All One God Faith, Inc. v. Organic & Sustainable Indus. Standards, Inc.*, 183 Cal. App. 4th 1186 (2010)). Plaintiffs' claims here arise from conduct and speech by Chevron itself. In *All One God*, plaintiffs sued a cosmetics trade association to enjoin it from issuing an organics standard that would benefit the plaintiffs' competitors. The court refused to extend the exemption to causes of action brought against "'someone acting on behalf of' a person primarily engaged in the business of selling or leasing goods or services." *Id.* at 1213. In contrast, Chevron's liability here

[8] Chevron cites *Dean v. Friends of Pine Meadow*, 21 Cal. App. 5th 91, 105 n.5 (2018), to suggest that the commercial speech exception only applies to "false advertising claims." Mot. 14. What that case actually says is that the exemption "was drafted to track constitutional principles governing regulation of commercial speech based upon guidelines" developed in the California case law, "focusing on the speaker, the content of the message, and the intended audience." *Id.* at 105 (cleaned up). It then notes in dicta that the drafters of the section believed the legislation was "aimed squarely at false advertising claims," even though its scope was not expressly or implicitly limited to such claims. *Id.* at 105 n.5.

is based on its *own* statements, as well as its *own* active role funding, organizing, and implementing the industry-wide climate deception campaign. *See* ¶¶ 105, 108, 112, 114.

C. Chevron's Alleged False and Misleading Statements to Consumers, Scientists, and the Public Are Not Immunized Under *Noerr-Pennington*.

The *Noerr–Pennington* doctrine, which is grounded in the First Amendment's protection of free speech and the right of petition, holds that "[t]hose who petition government for redress are generally immune from antitrust liability." *Pro. Real Estate Invs., Inc. v. Columbia Pictures Indus., Inc.*, 508 U.S. 49, 56 (1993). Defendants' argument that *Noerr-Pennington* provides unqualified immunity from all liability because some of its activities were directed at the government is wrong on the law, and misstates the Complaint's allegations. *Noerr-Pennington* does not provide a basis to dismiss or strike any claims in the Plaintiffs' complaint, for at least two reasons.

First, Chevron's contention that any false or misleading statement it ever made is protected from liability so long as it had a political component is incorrect. Defendants' misleading commercial statements, educational materials, and other related efforts identified in the Complaint are not protected by the *Noerr-Pennington* doctrine because they are not "petitioning." Despite Chevron's mischaracterization of the Complaint as purely targeting "speech directed to policy makers, regulators, and the public advocating against 'regulation' of the oil and gas industry," Mot. at 1, the crux of Plaintiffs' allegations is that Chevron and the other Defendants embarked on a long-running project to mislead the public about the qualities of their products, *so that consumers would continue to buy them*. Chevron's and Defendants' attempts to mislead the scientific, industry, journalistic, and consumer communities simply do not constitute protected petitioning.

Second, even if some of the conduct alleged in the Complaint were potentially entitled to *Noerr-Pennington* protection, that issue could not be resolved at this stage of the litigation. The Supreme Court has long held that whether a particular action constitutes petitioning depends on

the facts and circumstances of the conduct, and disputed factual issues are not appropriate for resolution on the pleadings. *Noerr-Pennington* does not impose a heightened pleading standard, especially where the petitioning character of the alleged conduct is in dispute, and Chevron has not shown beyond doubt that Plaintiffs cannot prevail on any theory of liability.

1. The *Noerr–Pennington* Doctrine Only Protects "Petitioning" Activity.

The *Noerr–Pennington* doctrine arose in the context of antitrust law, but the Supreme Court and the federal courts of appeals have extended the doctrine to provide immunity against most other statutory causes of action, including claims under federal anti-discrimination laws, the civil RICO statute, and 28 U.S.C. § 1983. *See, e.g.*, *Sosa v. DIRECTV, Inc.*, 437 F.3d 923, 929–31 (9th Cir. 2006). Hawai'i courts have not determined whether the doctrine even applies to the kinds of common law torts alleged in the Plaintiffs' Complaint.[9]

"Because the *Noerr–Pennington* doctrine grows out of the Petition Clause, its reach extends only so far as necessary to steer the Sherman Act [and other covered laws] clear of violating the First Amendment. Immunity thus applies only to what may fairly be described as *petitions*," and not all conduct with a political or legal component. *Freeman v. Lasky, Haas & Cohler*, 410 F.3d 1180, 1184 (9th Cir. 2005). Even where a party believes its otherwise unlawful conduct will lead to some government action it desires, "[t]he validity of such efforts, and thus the applicability of *Noerr* immunity, varies with the context and nature of the activity." *Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U.S. 492, 499 (1988). The doctrine does not allow

[9] Some courts, including the Ninth Circuit, have extended the doctrine's coverage to certain non-statutory claims relating to competition, including tortious interference with prospective economic advantage. *See Theme Promotions, Inc. v. News Am. Mktg. FSI*, 546 F.3d 991, 1007 (9th Cir. 2008). Chevron's quote to *White v. Lee*, 227 F.3d 1214, 1231 (9th Cir. 2000), for the proposition that the doctrine "applies equally in *all* contexts" misconstrues that decision. *See* Mot. at 19. The court in *White* observed only that *Noerr-Pennington* is no longer limited to legislative petitioning in the antitrust context, but also extends to petitioning "courts and administrative agencies" and creates "immun[ity] from liability for statutory violations" outside the antitrust context. *Id.* at 1231.

defendants to "immunize otherwise unlawful [conduct] by pleading a subjective intent to seek favorable legislation or to influence governmental action." *Pro. Real Est. Invs.*, 508 U.S. at 59.

2. The Tortious Conduct Alleged in the Complaint Is Not Protected Petitioning Activity.

Chevron's argument is based on the premise that *all* false and misleading speech, made to anyone, enjoys unqualified protection from liability under *Noerr-Pennington* so long as the conduct had a political component. Mot. at 17–19. That is incorrect. The Supreme Court has long held that "there can be no constitutional objection to the suppression of commercial messages that do not accurately inform the public about lawful activity," and that to warrant First Amendment protection, commercial speech "at least must . . . not be misleading." *Cent. Hudson Gas & Elec. v. Pub. Serv. Comm'n*, 447 U.S. 557, 563, 566 (1980); *Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio*, 471 U.S. 626, 638 (1985) (governments may restrict "false, deceptive, or misleading" commercial speech). The conduct alleged here falls squarely into this category.

The Supreme Court's decision in *Allied Tube* illustrates why *Noerr-Pennington* does not apply. In that case, a manufacturer of PVC electrical conduit tubing sued a steel conduit manufacturer under the Sherman Act. *Allied Tube*, 486 U.S. at 497–98. The PVC conduit manufacturer had initiated a proposal with the National Fire Protection Association ("NFPA") to have PVC conduit approved in the National Electrical Code, a private industry-standards document. *Id.* at 495. The document is "the most influential electrical code in the nation," and a "substantial number of state and local governments routinely adopt the Code into law with little or no change." *Id.* Alarmed that PVC "might pose a competitive threat to steel conduit," the defendant steel manufacturer "pack[ed] the upcoming [NFPA] annual meeting with new Association members whose only function would be to vote against the [PVC] proposal," preventing its adoption. *Id.* at 496. The district court granted judgment to the defendant after trial, finding that

the defendant's otherwise anti-competitive conduct was immune under *Noerr* because it was "genuinely intended to influence the [NFPA] with respect to the National Electrical Code, and to thereby influence the various state and local legislative bodies which adopt the [Code]." *Id.* at 498.

The Supreme Court reversed. It began with the proposition that "[t]he scope of [*Noerr's*] protection depends . . . on the source, context, and nature of the anticompetitive restraint at issue." *Id.* at 499. The Court expressly rejected the defendant's "absolutist position that the *Noerr* doctrine immunizes every concerted effort that is genuinely intended to influence governmental action," which would, for example, allow any antitrust defendant to "claim immunity for boycotts or horizontal output restrictions on the ground that they are intended to dramatize the plight of their industry and spur legislative action." *Id.* at 503. To the contrary, the Court held that "the antitrust laws should not necessarily immunize what are in essence commercial activities simply because they have a political impact." *Id.* at 507. It held that because the purpose and effect of the defendant's actions were to influence the NFPA, "the validity of those efforts must, despite their political impact, be evaluated under the standards of conduct set forth by the antitrust laws that govern the private standard-setting process," *id.* at 509, and held conduct was not protected.

Performing a similar analysis, the Suffolk County Superior Court recently denied Exxon Mobil Corp.'s motion to dismiss Massachusetts's climate-related consumer and investor fraud claims under that state's anti-SLAPP statute. *Massachusetts v. Exxon Mobil Corp.*, No. 1984CV03333-BLS1, slip op. at 7 (Mass. Sup. Ct. June 23, 2021), attached as Ex A. The Massachusetts anti-SLAPP statute, like *Noerr-Pennington*, is tailored to protect "a party's exercise of its right to petition," which includes "statements made to influence, inform, or at the very least, reach governmental bodies—either directly or indirectly," and allows dismissal of claims arising "solely" from petitioning conduct. *Id.* at 2 (citation omitted). The state alleged that Exxon misled

consumers and investors by "fail[ing] to disclose material facts regarding systemic climate change risks," misrepresenting "the purported environmental benefit" of two of their fossil fuel products, and promoting "'greenwashing' campaigns designed to convey a false impression that [Exxon] is more environmentally responsible than it really is." *Id.* at 3–4 (cleaned up). Exxon argued all those statements were intended to reach and influence "regulators and members of the public wishing to weigh in on climate policy." *Id.* at 4. The court denied the motion, finding that the alleged statements "appear[ed] to be directed at influencing investors to retain or purchase Exxon's securities or inducing consumers to purchase Exxon's products and thereby increase its profits," and Exxon had not shown "it made any of th[o]se statements solely, or even primarily, to influence, inform, or reach any governmental body." *Id.* at 7–8.

The false and misleading statements Plaintiffs allege here are not protected petitioning activity for the same reason the activities in *Allied Tube* and *Massachusetts* were not. Chevron and the other Defendants have worked for decades "to misinform and confuse the public and obscure the role of Defendants' products in causing global warming and its associated impacts," ¶ 9, as part of "campaigns to promote the ever-increasing *use* of their products at ever-greater volumes," ¶ 8 (emphasis added). The Complaint's central theory of liability is that "Defendants embarked on a concerted public relations campaign to cast doubt on the science connecting global climate change to fossil fuel products and greenhouse gas emissions, in order to influence public perception of the existence of anthropogenic global warming . . . *to influence consumers to continue using Defendants' fossil fuel products*." ¶ 94 (emphasis added).

The API Global Climate Science Communications Plan provides a clear example. Although the plan was drafted in response to the United States' potential ratification of the Kyoto Treaty, many of the actions described in the plan cannot "fairly be described as *petitions*," or

activity incidental to petitioning. *See Freeman*, 410 F.3d at 1184. The plan proposed to "[d]evelop and implement a program to inject credible science and scientific accountability into the global climate debate, thereby raising questions about and undercutting the 'prevailing scientific wisdom,'" including by "[i]dentifying and establishing cooperative relationships with all major scientists whose research in this field supports our position."[10] The plan proposed to "inform and educate . . . industry leadership, and school teachers/students about uncertainties in climate science," including by "[d]istribut[ing] educational materials directly to schools and through grassroots organizations of climate science partners." API Communications Plan at 7–8. The same is true of the ICE 1991 campaign. Planning documents discuss influencing consumers' beliefs regarding "the proper role of government" in responding to global warming, *see* ICE Advertisement Documents at 16, but the clear purpose of the messaging was to convince the public that "evidence the Earth is warming is weak," and "[p]roof that carbon dioxide has been the primary cause is non-existent." ICE Advertisement Documents at 49.

Just as in *Allied Tube*, even if the drafters of the 1998 API plan or the 1991 ICE campaign genuinely believed that misleading the public was "the most effective means of influencing legislation," that does not confer *Noerr-Pennington* immunity. *Allied Tube*, 486 U.S. at 502. Instead, misleading statements to prevent the public from understanding the dangers posed by fossil fuels may "more aptly be characterized as commercial activity with a political impact." *Id.* at 507. The Complaint does not allege any misstatements to Congress or the EPA, or to any other specific legislative or regulatory body, precisely because Plaintiffs do not seek to impose liability for petitioning activity or conduct incidental to petitioning.

[10] *See* ¶ 105, *citing* E-mail to Global Climate Science Team, attaching the Draft Global Science Communications Plan at 6–7 ("API Communications Plan"), available at https://s3.documentcloud.org/documents/784572/api-global-climate-science-communications-plan.pdf.

3. Factual Questions About the Applicability of the *Noerr-Pennington* Doctrine May Not Be Resolved on the Pleadings.

To the extent this Court finds there is a question whether Chevron's commercial speech qualifies as petitioning, that is a fact- and context-sensitive inquiry not appropriate for resolution on a motion to dismiss. *See Allied Tube*, 486 U.S. at 499. That is especially so because *Noerr-Pennington* does not establish an evidentiary rule. Protected petitioning activity may be introduced for other reasons: "while a corporation's petitioning of government officials may not itself form the basis of liability, evidence of such petitioning activity may be admissible if otherwise relevant . . . ." *Hernandez v. Amcord, Inc.*, 215 Cal. App. 4th 659, 679 (2013). The Supreme Court explained in *United Mine Workers of Am. v. Pennington* itself that it is "within the province of the trial judge to admit this evidence" of petitioning, "if it tends reasonably to show the purpose and character of the particular transactions under scrutiny." 381 U.S. 657, 670 n.3 (1965). Any question about whether Chevron's activity counts as petitioning may not be resolved at this stage.

None of Defendants' arguments warrant dismissal of any of Plaintiffs' claims. The Supreme Court of Hawai'i reaffirmed dismissal is proper only where "it appears beyond doubt that the plaintiff can prove no set of facts in support of his or her claim that would entitle him or her to relief." *Reyes-Toledo*, 143 Hawai'i at 257. Because "[t]he validity of" conduct that purportedly constitutes protected petitioning "and thus the applicability of *Noerr* immunity, varies with the context and nature of the activity," *Allied Tube*, 486 U.S. at 499, courts routinely treat the issue of "whether the challenged [wrongful] acts are acts of petitioning [a]s a fact-intensive inquiry" that cannot be resolved on the pleadings, *United States v. Philip Morris Inc.*, 304 F.Supp.2d 60, 73 (D.D.C. 2004); *In re Warfarin Sodium Antitrust Litig.*, No. 97-659, 1998 WL 883469, at *9–10 (D. Del. Dec. 7, 1998), *rev'd in part on other grounds*, 214 F.3d 395 (3d Cir. 2000) (court could not "infer at this stage of the proceedings that the totality of defendant's public statements were

'part and parcel' of its efforts to secure more stringent [regulatory] standards" for competitor's product). Here, the issue cannot and should not be resolved on a motion to dismiss.

The cases where claims have been dismissed at the pleading stage under *Noerr-Pennington* are distinguishable in that they turned entirely on conduct that clearly constituted petitioning. In *Manistee Town Center v. City of Glendale*, 227 F.3d 1090, 1095 (9th Cir. 2000), for example, the plaintiff alleged that certain city officials "orchestrated a publicity and lobbying campaign to convince the County not to lease" certain property to the plaintiff. The direct and indirect efforts to convince the County not to lease the property clearly constituted petitioning, and the plaintiff only argued (unsuccessfully) that government officials do not enjoy *Noerr-Pennington* protection when petitioning a different government. *Id.* at 1094. Likewise in *Sosa v. DIRECTV, Inc.*, 437 F.3d 923, 934 (9th Cir. 2006), the only challenged conduct was the defendant's delivery of pre-litigation settlement demand letters to potential members of a pending proposed class action. No other conduct was alleged, and the court found those demand letters sufficiently incidental to litigation that claims based solely on them could not survive *Noerr-Pennington*. *Id.* at 936.

The facts alleged in the Complaint span a wide array of statements in newspapers, trade publications, pamphlets, and communications with consumers, trade organizations, scientists, and the public at large, over a period of more than 50 years. Whether any of that conduct is protected under *Noerr-Pennington*—let alone all of it—cannot be established "beyond doubt" such that the Plaintiffs "can prove no set of facts in support of [its] claim[s]." *Reyes-Toledo*, 143 Hawai'i at 257.

V. CONCLUSION

For all these reasons, Chevron's Motion must be denied in its entirety.

Respectfully submitted,

CORPORATION COUNSEL FOR PLAINTIFFS AND COUNTY OF HONOLULU AND THE HONOLULU BOARD OF WATER SUPPLY

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Dated: July 19, 2021

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EXHIBIT A

06/22 43

NOTIFY

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

SUPERIOR COURT
CIVIL ACTION
NO. 1984CV03333-BLS1

Notice Sent
06.23.21
TCF
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COMMONWEALTH OF MASSACHUSETTS

vs.

EXXON MOBIL CORPORATION

MEMORANDUM OF DECISION AND ORDER ON DEFENDANT'S SPECIAL MOTION TO DISMISS THE AMENDED COMPLAINT

The Commonwealth of Massachusetts, by its Attorney General ("Commonwealth"), sued Exxon Mobil Corporation ("Exxon") for alleged violations of G.L. c. 93A. The Commonwealth claims that Exxon has violated c. 93A by: (1) misrepresenting and failing to disclose material facts regarding systemic climate change risks to Massachusetts investors (Count I); (2) misrepresenting the purported environmental benefit of using its Synergy™ and Mobil 1™ products and failing to disclose the risks of climate change caused by its fossil fuel products to Massachusetts consumers (Count II); and (3) promoting false and misleading "greenwashing" campaigns to Massachusetts consumers (Count III).

The matter is now before me on Exxon's Special Motion to Dismiss pursuant to the anti-SLAPP ("Strategic Litigation against Public Participation") statute, G.L. c. 231, § 59H. After a hearing and for the reasons that follow, Exxon's motion is **DENIED**.

DISCUSSION

The Massachusetts Legislature enacted the anti-SLAPP statute to counteract "SLAPP" suits, defined broadly as "lawsuits brought primarily to chill the valid exercise of the constitutional rights of freedom of speech and petition for the redress of grievances." *Duracraft Corp.* v. *Holmes Prods. Corp.*, 427 Mass. 156, 161 (1998) (objective of SLAPP suit is not to

win, but to use litigation to intimidate opponents' exercise of rights of petitioning and speech). Generally, a SLAPP suit has no merit. See *Cadle Co.* v. *Schlichtmann*, 448 Mass. 242, 248 (2007).

The anti-SLAPP statute protects "a party's exercise of its right of petition." G.L. c. 231, § 59H. In relevant part, it provides:

> In any case in which a party asserts that the civil claims, counterclaims, or cross claims against said party are based on said party's exercise of its right of petition under the constitution of the United States or of the commonwealth, said party may bring a special motion to dismiss.

That definition makes clear that "'the statute is designed to protect overtures to the government by parties petitioning in their status as citizens .... The right of petition contemplated by the Legislature is thus one in which a party seeks some redress from the government.'" *Fustolo* v. *Hollander*, 455 Mass. 861, 866 (2010), quoting *Kobrin* v. *Gastfriend*, 443 Mass. 327, 332-333 (2005). The anti-SLAPP statute defines "a party's exercise of its right to petition" as:

> [1] any written or oral statement made before or submitted to a legislative, executive, or judicial body, or any other governmental proceeding; [2] any written or oral statement made in connection with an issue under consideration or review by a legislative, executive, or judicial body, or any other governmental proceeding; [3] any statement reasonably likely to encourage consideration or review of an issue by a legislative executive, or judicial body or any other governmental proceeding; [4] any statement reasonably likely to enlist public participation in an effort to effect such consideration; or [5] any other statement falling within constitutional protection of the right to petition government.

G.L. c. 231, § 59H. For the purposes of § 59H, "[p]etitioning includes all 'statements made to influence, inform, or at the very least, reach governmental bodies—either directly or indirectly.'" *North American Expositions Co. Ltd. Partnership* v. *Corcoran*, 452 Mass. 852, 862 (2009), quoting *Global NAPS, Inc.* v. *Verizon New England, Inc.*, 63 Mass. App. Ct. 600, 605 (2005).

As the moving party, Exxon, which alleges it has been the target of a SLAPP suit, first must show, by a preponderance of the evidence, that each claim it challenges is "solely based on

[Exxon's] own petitioning activities." *Blanchard* v. *Steward Carney Hosp., Inc.*, 483 Mass. 200, 203 (2019); *Duracraft Corp.*, 427 Mass. at 167-168 (moving party must show that claims against it are based on its petitioning activities alone and have no substantial basis other than or in addition to petitioning activities); *Blanchard* v. *Steward Carney Hosp., Inc.*, 477 Mass. 141, 148 (2017) (as part of threshold burden, moving party must show that conduct complained of constitutes exercise of its right to petition). If Exxon fails to show that the only conduct about which the Commonwealth complains is petitioning activity, the court must deny the special motion to dismiss. See *Benoit* v. *Frederickson*, 454 Mass. 148, 152 (2009).[1]

If Exxon satisfies its threshold burden, then the burden shifts to the Commonwealth to demonstrate that G.L. c. 231, § 59H does not require dismissal of its claims. See *477 Harrison Ave., LLC* v. *JACE Boston, LLC*, 483 Mass. 514, 516 (2019). The Commonwealth can do so in one of two ways. First, it can establish, by a preponderance of the evidence, that "[Exxon's] exercise of its right to petition was devoid of any reasonable factual support or any arguable basis in law and ... [its] acts caused actual injury to the [Commonwealth]." G.L. c. 231, § 59H. Alternatively, it can establish, "such that the motion judge can conclude with fair assurance," that each of the Commonwealth's claims is not a "'meritless'" SLAPP suit, *i.e.*, that it is both colorable and non-retaliatory. *477 Harrison Ave., LLC*, 483 Mass. at 516, 518-519, citing *Blanchard*, 477 Mass. at 159-160. If the Commonwealth does not meet its burden, the court must grant the special motion to dismiss. G.L. c. 231, § 59H.

In Count I, the conduct complained of is Exxon's alleged misrepresentation of and failure to disclose material facts regarding systemic climate change risks to Massachusetts investors. In

[1] Contrary to the Commonwealth's suggestion, *see* Commonwealth's Opposition at page 11, I may not "pass over" this threshold inquiry. A court should apply the augmented *Duracraft* framework sequentially. *477 Harrison Ave., LLC* v. *JACE Boston, LLC*, 483 Mass. 514, 515, 519 (2019).

Count II, it is Exxon's alleged misrepresentation of the purported environmental benefit of consumer use of its Synergy™ and Mobil 1™ products and failure to disclose the risks of climate change caused by its fossil fuel products to Massachusetts consumers. Count III complains of Exxon's promotion of allegedly false and misleading "greenwashing" campaigns designed to "convey a false impression that [it] is more environmentally responsible than it really is, and so to induce consumers to purchase its products." Amended Complaint, ¶ 540.

Exxon argues that its statements to investors constitute petitioning activity because they "'were issued in a manner that was likely to influence or, at the very least, reach' regulators and 'members of the public wishing to weigh in' on climate policy." Motion, page 14, quoting *Blanchard*, 477 Mass. at 151. Exxon also contends that its public statements regarding its Synergy™ and Mobil 1™ products constitute petitioning activity because, "at a minimum, this speech was intended and reasonably likely to 'enlist the participation of the public' in the [climate] policy debate at the heart of the Attorney General's lawsuit." Motion, page 15. Finally, Exxon argues that the statements the Commonwealth labels as "greenwashing" are actually its "advocacy of climate policy choices under consideration by various government and regulating bodies." Motion, page 16.[2]

Exxon has failed to meet its threshold burden of showing that the Commonwealth's claims are based *solely* on Exxon's petitioning activities.[3] As an initial matter, Exxon has

[2] Exxon does not specify in its papers which definition of § 59H applies to qualify its statements as "exercise[s] of its right of petition." When asked to do so during the hearing, Exxon responded that it relies on all of them.

[3] The parties disagree whether the anti-SLAPP statute applies to civil enforcement actions brought by the Attorney General on the Commonwealth's behalf. Because Exxon has not met its initial burden of showing that the Commonwealth's claims against it are based solely on its petitioning activities, I need not reach this issue.

entirely failed to explain how any of the omissions alleged by the Commonwealth as violating c. 93A qualify as petitioning protected by § 59H, which applies only to "statements."[4]

With respect to statements on which the Commonwealth relies, the mere fact "[t]hat a statement concerns a topic that has attracted governmental attention, in itself, does not give that statement the [petitioning] character contemplated by the statute." *Global NAPs, Inc.*, 63 Mass. App. Ct. at 605. Further, although a commercial motive may not preclude a finding that speech constitutes protected petitioning activity, it "may provide evidence that particular statements do not constitute petitioning activity." *Fustolo*, 455 Mass. at 870 & n.11, citing *North Am. Expositions Co. Ltd. Partnership*, 452 Mass. at 863. For example, speech that is intended to achieve a purely commercial result, such as increasing demand for one's products or services, is not protected petitioning activity. See *Cadle Co.*, 448 Mass. at 250-254 (defendant lawyer's publication of statements on website, allegedly to share with public information about company's allegedly unlawful business practices, which he previously provided to regulatory officials and courts, did not constitute petitioning activity where he "created the Web site, at least in part, to generate more litigation to profit himself and his law firm"); *Ehrlich* v. *Stern*, 74 Mass. App. Ct. 531, 540-542 (2009). The court considers statements in the context in which they were made in determining whether they are protected petitioning. See *Wynne* v. *Creigle*, 63 Mass. App. Ct. 246, 253 (2005).

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[4] In its complaint, the Commonwealth alleges not only misrepresentations by Exxon, but also failures to disclose information that the Commonwealth contends would be relevant to Massachusetts investors and consumers. For example, ¶ 18 of the Amended Complaint states: "In its communications with investors, including [Exxon's] supposed disclosures about climate change, ... ExxonMobil has failed to disclose the full extent of the risks of climate change to the world's people, the fossil fuel industry, and [Exxon]." Further, "[i]n its marketing and sales of ExxonMobil products to Massachusetts consumers, ... ExxonMobil likewise has failed ... to disclose in those advertisements and promotional materials that the development, refining, and normal consumer use of ExxonMobil fossil fuel products emit large volumes of greenhouse gases, which are causing global average temperatures to rise and destabilizing the global climate system." *Id.* at ¶ 33; see also ¶ 538.

Climate change indisputably is a topic that has attracted governmental attention. And, indeed, some Exxon statements referenced in the complaint constitute protected petitioning within the scope of § 59H because they were made "in connection with an issue under consideration or review by a legislative, executive, or judicial body" and/or "to encourage consideration or review of an issue by a legislative executive, or judicial body or any other governmental proceeding." However, Exxon cannot "obtain dismissal through an anti-SLAPP motion just because *some* of the allegations in the complaint are directed at conduct by the defendants that constitutes petitioning activity." *Haverhill Stem LLC* v. *Jennings*, 99 Mass. App. Ct. 626, 634 (2021). Rather, Exxon must show "that the complaint, fairly read, is based *solely* on petitioning, and to that end the allegations need to be carefully parsed even within a single count." *Id.* (emphasis in original). It is apparent from the context in which they were made that many Exxon statements referenced in the complaint are not protected. See *Cadle Co.*, 448 Mass. at 250 (attorney published statements "not as a member of the public who had been injured by … alleged practices, but as an attorney advertising his legal services").[5]

Review of a just a few of the Commonwealth's allegations suffices to demonstrate that each of its claims is not based *solely* on Exxon's petitioning activities. First, with respect to Count I, the Commonwealth alleges that Exxon has consistently represented *to investors* that it will "face virtually no meaningful transition risks from climate change because aggressive regulatory action is unlikely, renewable energy sources are uncompetitive, and fossil fuel demand and investment will continue to grow." Amended Complaint, ¶ 497. As an example,

[5] As an example, Exxon's "lobbying efforts" are arguably protected petitioning activities. But the anti-SLAPP inquiry produces an all or nothing result as to each count of the complaint. *Ehrlich*, 74 Mass. App. Ct. at 536. "Either [a] count survives the anti-SLAPP inquiry or it does not, and the statute does not create a process for parsing counts to segregate components that can proceed from those that cannot." *Id.* (citations omitted).

the Commonwealth alleges that, in its 2019 Energy and Carbon Summary issued *to investors*, Exxon modeled a scenario where global temperatures would increase by 2 degrees Celsius. Amended Complaint, ¶ 506. Exxon stated:

> [b]ased on currently anticipated production schedules, we estimate that by 2040 a substantial majority of our year-end 2017 proved reserves will have been produced. Since the 2°C scenarios average implies significant use of oil and natural gas through the middle of the century, we believe these reserves face little risk from declining demand.

Amended Complaint, ¶ 510. In the same document, Exxon claimed that its "actions to address the risks of climate change ... position ExxonMobil to meet the demands of an evolving energy system." Amended Complaint, ¶ 606. One of those "actions" is "[p]roviding products to help [Exxon's] customers reduce their emissions," including its Synergy™ fuels, which "yield better gas mileage, reduce emissions and improve engine responsiveness." *Id.*

Second, as to Count II, the Commonwealth alleges that Exxon markets its Synergy™ brand fuels *to consumers*, on *its promotional website*, as being "engineered for [b]etter gas mileage" and "[l]ower emissions." *Id.* at ¶ 595. For example, Exxon promotes its "Synergy Diesel Efficient™" fuel *to consumers* as the "latest breakthrough technology," and the "first diesel fuel widely available in the US" that helps "increase fuel economy" and "[r]educe emissions and burn cleaner," and represents that it "was created to let you drive cleaner, smarter and longer." *Id.* at ¶ 593. Finally, in support of Count III, the Commonwealth alleges that Exxon's "Protect Tomorrow. Today," *marketing campaign* amounts to deceptive "greenwashing" because Exxon falsely states that "Protect Tomorrow. Today" "defines [its] approach to the environment." *Id.* at ¶¶ 633, 639, 643.

Exxon has not shown, by a preponderance of the evidence, that it made any of these statements solely, or even primarily, to influence, inform, or reach any governmental body,

directly or indirectly. Instead, the statements appear to be directed at influencing investors to retain or purchase Exxon's securities or inducing consumers to purchase Exxon's products and thereby increase its profits. Compare *Cadle Co.*, 448 Mass. at 252 ("palpable commercial motivation behind" defendant's creation of website "so definitively undercuts" petitioning character of statements published on website) with *Cardno ChemRisk, LLC* v. *Foytlin*, 476 Mass. 479, 485-486 (2017) (activists' blog highlighting deceptive practices of company that reported on oil spill was protected petitioning activity, "implicit[ly] call[ing] for its readers to take action" to influence government). Because neither such statements nor the omissions alleged by the Commonwealth are protected under G.L. c. 59H, Exxon's special motion to dismiss must be denied.

ORDER

For the reasons stated above, it is hereby **ORDERED** that Exxon's Special Motion to Dismiss the Amended Complaint pursuant to the anti-SLAPP statute, G.L. c. 231, § 59H, is **DENIED**.

/s/ Karen F. Green
Karen F. Green
Associate Justice of the Superior Court

Dated: June 22, 2021