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IN THE CIRCUIT COURT OF THE FIRST CIRCUIT

STATE OF HAWAII

CITY AND COUNTY OF HONOLULU, AND HONOLULU BOARD OF WATER SUPPLY, Plaintiffs,	CIVIL NO. 1CCV-20-0000380 (JPC) (Other Non-Vehicle Tort) **CHEVRON DEFENDANTS' REPLY IN SUPPORT OF SPECIAL MOTION TO**

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 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.

STRIKE AND/OR DISMISS THE COMPLAINT PURSUANT TO CALIFORNIA'S ANTI-SLAPP LAW; CERTIFICATE OF SERVICE

HEARING:
Date: August 27, 2021
Time: 8:30 a.m.
Judge: Honorable Jeffrey P. Crabtree

Trial Date: None

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I. INTRODUCTION

Just as Plaintiffs attempt to run away from their Complaint's actual allegations to claim this case is only about purported "misrepresentations" and not climate change caused by worldwide emissions, so Plaintiffs now try to run even further afield by pretending that the Complaint targets only "commercial speech" unprotected by the First Amendment. But Plaintiffs ignore the fact that, both generally and specifically, the Complaint's speech allegations focus on a supposed decades-long "public campaign" designed to derail or defeat "regulation of their business practices," Compl. ¶ 107, and "undermine national and international efforts to rein in greenhouse gas emissions," *id.* ¶ 92. Plaintiffs ignore their own representations to the federal district court, where they successfully argued for remand on the ground that the Complaint was based on a "'tortious campaign to mislead'" intended to thwart "'government regulation.'" Mot. at 7. Plaintiffs are, therefore, judicially estopped from taking a contrary position, *see id.* at 13, about which Plaintiffs have literally nothing to say. Thus, Plaintiffs' Opposition confirms that the claims against Chevron should be dismissed.

***First*, Plaintiffs fail to refute Chevron's showing that California's anti-SLAPP statute applies in this case.** As a threshold issue, Plaintiffs argue exclusively about what state's law governs *the claims* in this case, *see* Opp. at 4–6, but that is not the question. Hawai'i, like most U.S. jurisdictions, follows *dépeçage* (French for "dismemberment"), which subjects different *issues* in a case to different choice-of-law analyses. *See Jou v. Adalian*, 2018 WL 1955415, at *7 (D. Haw. Apr. 25, 2018); Mot. at 8. Under the proper choice-of-law inquiry—ignored and thus waived by Plaintiffs—concerning the anti-SLAPP immunity for claims burdening constitutionally protected speech, the defendant-speaker's domicile is the controlling fact. *See infra* at 3–5. Thus, because Chevron is headquartered in California—from where the Complaint expressly alleges Chevron controlled the relevant activities, Compl. ¶¶ 23(a) & (d)—California's anti-SLAPP law applies.

Plaintiffs' various other attempts to evade California's anti-SLAPP law also fail. Plaintiffs invoke the "commercial speech exemption" to the anti-SLAPP law, *see* Opp. at 9, but they cannot identify any "commercial" speech by Chevron (or anyone else) that would be entitled to more limited constitutional protection. In fact, the *only* Chevron advertising Plaintiffs identify in the Complaint is a single 2010 advertising run promoting Chevron's renewable energy efforts, but the exemption is intentionally narrow and applies only to "comparative advertising." *FilmOn.com Inc. v. DoubleVerify Inc.*, 7 Cal. 5th 133, 147, 439 P.3d 1156, 1163 (2019). As for the exemption for suits brought "in the name of the people of the State of California," Cal. Code. Civ. P. § 425.16(d), it would go at most to the claim for public nuisance, and in any event Plaintiffs all but admit that they are not entitled to it. Nor can Plaintiffs hide behind purported "factual issues" of their own making to avoid application of a law intended to shield defendants' speech from the costs of suit.

***Second*, Plaintiffs never even try to carry their burden to show that they are able to state a valid claim, particularly if the constitutionally protected speech is stricken.** Pursuant to well-settled Supreme Court precedent, tort claims cannot be based on speech on matters of public concern *unless* the plaintiff can show the speech (1) was knowingly false *and* (2) directly caused harm. *See* Mot. at 16–17. But Plaintiffs do not address these constitutional requirements *at all*, much less explain how any such speech caused their damages. In addition, Plaintiffs' claims are barred by the *Noerr-Pennington* doctrine, which protects "publicity campaign[s] directed at the general public"—even if statements made were allegedly false. *Manistee Town Ctr. v. City of Glendale*, 227 F.3d 1090, 1092 (9th Cir. 2000); *see also* Mot. at 17–20. Plaintiffs claim *Noerr-Pennington* does not apply because the speech alleged in their Complaint was purportedly motivated by the desire to keep the demand for fossil fuel products high. *See* Opp. at 15–18. But as the Ninth Circuit has held, it does not matter for *Noerr-Pennington* purposes whether the defendant's

"activities were designed only to promote [the defendant]'s own economic gain." *Kottle v. Nw. Kidney Ctrs.*, 146 F.3d 1056, 1059 n.3 (9th Cir. 1998). The Complaint should be dismissed.

II. <u>ARGUMENT</u>

A. Chevron Is Protected by California's Anti-SLAPP Immunity

1. Plaintiffs Fail to Address the Correct Choice-of-Law Analysis

Plaintiffs ignore the fact that Hawai'i (like many states) applies the principle of *dépeçage* to choice-of-law questions, which means that "different jurisdiction's laws can apply to different issues in the same case." *Jou*, 2018 WL 1955415, at *7; *see also In re WPMK Corp.*, 59 B.R. 991, 995 (D. Haw. 1986) (explaining "*Principles of Depecage*" in Hawai'i law). Under *dépeçage*, the choice-of-law test for a defendant's anti-SLAPP immunity differs from the choice-of-law inquiry for the plaintiffs' *substantive claims*. *See, e.g.*, *Intercon Sols., Inc. v. Basel Action Network*, 969 F. Supp. 2d 1026, 1035 (N.D. Ill. 2013), *aff'd*, 791 F.3d 729 (7th Cir. 2015) ("[P]laintiff's defamation claims and defendant's anti-SLAPP defenses need not be governed by the same state's laws.").

While the choice-of-law inquiry for substantive claims focuses on a variety of facts, the choice-of-law inquiry for anti-SLAPP focuses on *one* basic fact: the defendant's domicile. "This is because of a state's acute interest in protecting the speech of its own citizens, which counsels in favor of applying the anti-SLAPP statute of a speaker's domicile to his statements." *Underground Sols., Inc. v. Palermo*, 41 F. Supp. 3d 720, 725 (N.D. Ill. 2014). That is why numerous courts have held that the anti-SLAPP law of the defendant's domicile controls, *regardless* of where the plaintiff's injury is purportedly felt. *See, e.g.*, *Diamond Ranch Academy, Inc. v. Filer*, 117 F. Supp. 3d 1313, 1323 (D. Utah 2015) (defendant's California "place of residence" controlled anti-SLAPP inquiry, and the "the place where the injury occurred" has "little if any, relevance"); *Chi v. Loyola Univ. Med. Ctr.*, 787 F. Supp. 2d 797, 803 (N.D. Ill. 2011) (domicile of defendant governed anti-

SLAPP defense, even though plaintiff was injured elsewhere); *Glob. Relief Found. v. New York Times Co.*, 2002 WL 31045394, at *11 (N.D. Ill. Sept. 11, 2002) ("law of California will apply to defenses" like anti-SLAPP, even though "the injury occurred in Illinois"); *see also Sarver v. Chartier*, 813 F.3d 891, 898 (9th Cir. 2016) (holding that even if "New Jersey was [the plaintiff's] domicile," California's anti-SLAPP law controlled because "all of the corporate defendants other than Playboy Enterprises are incorporated and alleged to be conducting business in California").[1]

Plaintiffs completely ignore *dépeçage*, and act as if the choice-of-law question for anti-SLAPP is the *same* as the choice-of-law question for Plaintiffs' substantive claims. Plaintiffs argue that they are "Hawai'i public entities injured in Hawai'i, and there are . . . non-California Defendants." Opp. at 5. And Plaintiffs rely on cases where the place-of-injury was relevant to what law governed the *plaintiffs' substantive claim*. *Id.* at 5–6; *id.* at 9 (choice-of-law for "defamation"). But, as explained, *Plaintiffs'* place-of-injury is irrelevant to the question of what state's *anti-SLAPP law* protects the defendant-speaker *Chevron*. "This notion is dictated by the doctrine of *dépeçage*, which as noted above permits courts to separate individual issues within a case and subject each to a separate choice-of-law analysis." *Palermo*, 41 F. Supp. 3d at 725. "Because the anti-SLAPP question involves an issue of privilege and is thus treated separately from the question of whether a statement is defamatory, the cases [Plaintiffs] cite[] do not control this question." *Id.* at 725–26.

2. Plaintiffs' Suit Is Not on Behalf of the People of the State of California

Plaintiffs also argue that California's anti-SLAPP law should not apply in this case because

[1] Plaintiffs misconstrue the *Sarver* and *Diamond Ranch* cases, claiming those "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." Opp. at 8. But in *Sarver*, the key fact was the defendant's domicile: "[B]ecause the vast majority of the parties in this action are citizens of or do business in California, the parties' expectations likewise tilt in favor of California law." 813 F.3d at 900. And in *Diamond Ranch*, the court found California's anti-SLAPP applied because "California 'has a strong interest in having its own anti-SLAPP law applied to the speech of its own citizens.'" 117 F. Supp. 3d at 1323 (quoting *Chi*, 787 F. Supp. 2d at 803).

certain actions that can legally be brought "'in the name of the people of the State of California'" could be exempt from the anti-SLAPP law. Opp. at 7 (quoting Cal. Code. Civ. P. § 425.16(d)). This is a red herring. Plaintiffs obviously do not qualify for this exemption, which as they concede, "only applies to actions brought on behalf of the people of California, not Hawai'i," Opp. at 7 n.5, and nothing in the Complaint purports to vindicate rights on behalf of the people of the State of California. Had they so desired, Plaintiffs could have sued in California, but they still would not have been entitled to invoke this exemption, which would at all events go only to the public nuisance claim, as Plaintiffs concede.[2] California's Legislature created a narrow exemption for certain suits brought specifically "in the name of the people of the State of California," not on behalf of myriad other possible governmental entities—including other *California* governmental entities—much less those of other states. *See City of Montebello v. Vasquez*, 1 Cal. 5th 409, 419–20, 376 P.3d 624, 631 (2016) (holding action brought by a *California* city was *not* exempt). California's Legislature expressly provided that the anti-SLAPP exemptions were to be "narrowly construed," and "expansive interpretation of exemptions from the anti-SLAPP statute is inconsistent with the Legislature's express intent that the statute's core provisions 'shall be construed broadly.'" *Id.*

3. Plaintiffs Ignore Their Own Allegations on the Situs of Chevron's Speech

Plaintiffs do not address the fact that their own Complaint expressly locates corporate control over the actions for which Plaintiffs attempt to hold Chevron liable in California, *see* Compl. ¶ 23(a) & (d), and identifies only a *single* statement from Chevron: a 2010 advertisement launched on Chevron's website, *id.* ¶ 130 & n.110 (citing article that describes Chevron ad as "splashed across its website"). As multiple courts have held, it is reasonable to infer that a defendant's posts

[2] Opp. at 7 ("municipal public nuisance actions" are "exempt from anti-SLAPP immunity" because "City attorneys in California are … authorized to bring civil actions 'in the name of the people of the State of California to abate a public nuisance.'") (quoting Cal. Code Civ. P. § 731); *id.* at 7 n.5 (because no similar Hawai'i statute, Plaintiffs "cannot directly benefit from the exemption").

to its website originate from its home state. *See Diamond Ranch*, 117 F. Supp. 3d at 1323 ("[B]ecause Ms. Filer is a resident of California, it is logical to conclude that the website was created in California."); *Palermo*, 41 F. Supp. 3d at 725 ("One can reasonably" draw the conclusion that a defendant published content "from . . . his state of residence, via his website"). Plaintiffs here provide no colorable—much less compelling—reason to conclude otherwise.

Moreover, courts have rejected the argument "that a state's anti-SLAPP statute governs *only* in situations where a citizen of the state also performs a speech act within its borders." *Diamond Ranch*, 117 F. Supp. 3d at 1324 (quoting *Palermo*, 41 F. Supp. 3d at 725) (original emphasis). This is because "a state's acute interest in protecting the speech of its own citizens, . . . counsels in favor of applying the anti-SLAPP statute of a speaker's domicile to his statements"—even if the defendant gave "defamatory presentations in multiple other states." *Palermo*, 41 F. Supp. 3d at 725.

4. The "Commercial Speech Exemption" to Anti-SLAPP Does Not Apply

Plaintiffs next argue that even if California's anti-SLAPP law otherwise applied, their claims fall under its "'commercial speech' exemption." Opp. at 9. But this argument fails. As the California Supreme Court has held, "the language of [the commercial speech exemption] and subsequent case law indicate that the provision exempts 'only a subset of commercial speech'—specifically, comparative advertising." *FilmOn.com*, 7 Cal. 5th at 147, 439 P.3d at 1163 (quoting *All One God Faith, Inc. v. Organic & Sustainable Indus. Standards, Inc.*, 183 Cal. App. 4th 1186, 1217, 107 Cal. Rptr. 3d 861, 886 (2010)). Plaintiffs' claims are not based on "comparative advertising." Rather, the Complaint asserts that a public relations campaign in the mid-to-late 20th century—carried out by various trade groups—prevented fossil fuel regulation and thus contributed to climate change. *See* Compl. ¶¶ 92–117. In fact, Plaintiffs' Opposition describes the Complaint as based on a "scheme" to defeat regulatory restrictions: "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." Opp. at 10 (emphasis added). And, in any event, California courts have held that, pursuant to the statute's express terms, the commercial speech "exception does not apply" to speech by a "trade association" that "is not itself 'a person primarily engaged in the business of selling or leasing goods or services,'" even if the association's members are engaged in such business. *All One God*, 183 Cal. App. 4th at 1212, 1214, 107 Cal. Rptr. 3d at 882–84 (quoting Cal. Code. Civ. P. § 425.17(c)).

Plaintiffs' only response to this caselaw is to try to claim that they are not relying on the speech of trade organizations to support their claims, but rather on Chevron's "*own* statements." Opp. at 12–13. But across the entire Complaint, the *only* Chevron statement Plaintiffs identify is Chevron's "2010 advertising campaign promoting the company's move towards renewable energy." Compl. ¶ 130. This is not a comparative advertisement, but even if it were exempt "commercial speech" (it is not), Plaintiffs do not—and could not—show it *s*atisfies *any*, much less every, claim against Chevron. Indeed, as the next section shows, Plaintiffs have not even attempted this.

B. Plaintiffs' Opposition Does Not Even Attempt to Show That Plaintiffs Can Carry Their Burden Under the Anti-SLAPP Statute—or Under Rule 12(b)(6)

Because California's anti-SLAPP law applies, the burden shifts to Plaintiffs to establish that each speech-based claim is legally valid. Mot. at 16. The anti-SLAPP inquiry is generally identical to a Rule 12(b)(6) analysis, *see* Mot. at 10 & n.6, except that if an entire claim is not dismissed under the anti-SLAPP law, "particular allegations" based on speech should be struck—unless the plaintiffs can show that the speech is an actionable falsehood, *Bonni v. St. Joseph Health Sys.*, --- Cal. 5th ---, --- P.3d ---, 2021 WL 3201090, at *6 (Cal. July 29, 2021). But Plaintiffs make no effort to meet this burden, and their claims should be dismissed. *See* Mot. at 16–17.

1. Plaintiffs Have Not Even Attempted to Carry Their Burden to Show That the Complaint States a Valid Claim Against Chevron

Chevron's motion asks the Court to find that Chevron is protected by California's anti-SLAPP immunity, or, "[i]n the alternative . . . dismiss the complaint against Chevron for failure to state a claim." Mot. at 20 (citing H.R. Civ. P. 12(b)(6)). Plaintiffs spend their Opposition trying (unsuccessfully) to argue that California's anti-SLAPP law does not apply. But Plaintiffs do not even attempt to show that they have actually stated a claim against Chevron.

Plaintiffs acknowledge that—at a *minimum*—their Complaint must include allegations showing that Chevron is liable for each cause of action Plaintiffs have brought. *See Marsland v. Pang*, 5 Haw. App. 463, 475, 701 P.2d 175, 186 (1985); Opp. at 3 (acknowledging Rule 12(b)(6) standard). Yet Plaintiffs do not argue that they have pleaded allegations showing Chevron is liable under *any* of the theories raised in the Complaint. Although Plaintiffs say their lawsuit is based on an "industry-wide climate deception campaign," Opp. at 13, their Complaint is notably bereft of alleged statements *by Chevron* purportedly made in service of this "campaign," *see* Compl. ¶¶ 92–117. Rather, the Complaint is replete with allegations about statements made by *other* organizations—namely, trade associations that, according to Plaintiffs, advocated against regulation of fossil fuels. *See id.* ¶ 97 (alleging speech by "ICE"); *id.* ¶ 101 (discussing speech by "API"). But Plaintiffs do not dispute that Chevron cannot be held liable for speech by *other* organizations—indeed, Plaintiffs *expressly deny* that they are seeking to hold Chevron liable for the speech of the "trade associations" that purportedly organized the communication. *See* Opp. 12. Instead, Plaintiffs say that "Chevron's liability here is based on its *own* statements" in the "deception campaign," *id.* at 12–13, without identifying them or showing how they constitute a recognized Hawai'i tort.

2. Plaintiffs Fail to Satisfy Their Burden Under the First Amendment

Plaintiffs ignore the Supreme Court precedent that requires plaintiffs bringing tort claims

based on speech on matters of public concern to show *both* that (1) the speech they rely on constitutes knowingly false statements of fact, and (2) the false statements *caused* their injuries. Mot. at 16–17. Because Plaintiffs do not explain what knowingly false statements by Chevron they rely on to support their claims, nor how those statements caused their injuries, dismissal is required. *Id.*

3. Plaintiffs Cannot Overcome the *Noerr-Pennington* Bar to Their Claims

Plaintiffs' claims are also barred by the *Noerr-Pennington* doctrine, which protects "publicity campaign[s] directed at the general public and seeking government action" from liability—even if the campaign is allegedly misleading. *Manistee*, 227 F.3d at 1092; *see also* Mot. at 17–20. Plaintiffs argue that the speech in this case is somehow different, because it was made by trade organizations supposedly with a financial stake in the sale of fossil fuel products, and thus Plaintiffs' claims are insulated from *Noerr-Pennington* by the decision in *Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U.S. 492 (1988). *See* Opp. at 15–17. This argument is meritless.

Allied Tube merely held that the defendants' efforts to influence a *private organization*—in that case, the "National Fire Protection Association" or "NFPA"—were not constitutionally protected. *See* 486 U.S. at 506 ("Unlike the publicity campaign in *Noerr*, the activity at issue here did not take place in the open political arena, . . . but within the confines of a private standard-setting process."). And the Ninth Circuit has already rejected attempts like those by Plaintiffs to disqualify speech from *Noerr-Pennington* protection when the speaker has an economic motive. For example, in *Kottle* the plaintiff argued—exactly as Plaintiffs do here—that *Allied Tube* created "a distinction between 'political' and 'economic' lobbying activity," and thus "the *Noerr–Pennington* doctrine does not apply in this case because [the defendant]'s activities were designed only to promote [the defendant]'s own economic gain." 146 F.3d at 1059 n.3. The Ninth Circuit rejected this argument, noting that practically *all* corporate defendants engage in speech for "economic gain." *Id.* Rather,

Allied Tube "merely recogniz[es] the public/private distinction recognized in the Petition Clause"—i.e., that lobbying *private* entities (like NFPA) does not constitute petitioning. *Id.*[3]

In a last-ditch maneuver, Plaintiffs argue that whether *Noerr-Pennington* applies to the public relations campaign alleged in the Complaint is "a fact- and context-sensitive inquiry not appropriate for resolution on a motion to dismiss." Opp. at 19. Not so. Particularly in view of the anti-SLAPP statute's purpose of protecting defendants' exercise of their constitutional right to speak on issues of public importance without being subjected to meritless and burdensome litigation, it is the *plaintiff's* job to show at the outset that particular speech upon which it seeks to base liability is not protected by the Constitution: "In order not to chill legitimate lobbying activities, it is important that a plaintiff's complaint contain specific allegations demonstrating that the *Noerr–Pennington* protections do not apply." *Boone v. Redevelopment Agency of City of San Jose*, 841 F.2d 886, 894 (9th Cir. 1988). If there were some uncertainty about whether the speech alleged in the Complaint is protected, the Constitution demands that this uncertainty be resolved *in favor* of protection. *Id.* ("[O]ur responsibilities under the first amendment in a case like this one require us to demand that a plaintiff's allegations be made with specificity."). In any event, every identified statement in the "campaign" was allegedly directed at avoiding regulation and thus is protected. *See* Mot. at 19–20.

III. CONCLUSION

For the foregoing reasons, the Court should grant Chevron's special motion to strike, dismiss the case with prejudice, and award Chevron its attorney's fees. In the alternative, the Court should dismiss the complaint against Chevron for failure to state a claim. H.R. Civ. P. 12(b)(6).

[3] The only other authority Plaintiffs rely on is a Massachusetts trial-court decision, *Massachusetts v. Exxon Mobil Corp.*, No. 1984CV03333-BLS1 (Mass. Sup. Ct. June 23, 2021). Opp. at 16–17. But that decision is solely about whether Exxon's *securities disclosures* to *investors* were protected by Massachusetts's narrow anti-SLAPP statute. *See* Ex. A at 8. That decision does not say *anything* about public relations campaigns or the *Noerr-Pennington* doctrine, and is thus inapposite.

DATED: Honolulu, Hawaiʻi, August 18, 2021.

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IN THE CIRCUIT COURT OF THE FIRST CIRCUIT

STATE OF HAWAII

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 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.	CIVIL NO. 1CCV-20-0000380 (JPC) (Other Non-Vehicle Tort) **CERTIFICATE OF SERVICE**

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this date a copy of the foregoing document was duly served electronically through JIMS/JEFS and a copy sent via email to the following parties at their last known addresses:

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