IN THE SUPERIOR COURT FOR THE STATE OF DELAWARE

STATE OF DELAWARE, *ex rel.* KATHLEEN JENNINGS, Attorney General of the State of Delaware, Plaintiff, v. BP P.L.C., *et al.*, Defendants.	Civil Action No. N20C-09-097 MMJ CCLD

DEFENDANT AMERICAN PETROLEUM INSTITUTE'S MEMORANDUM IN SUPPORT OF ITS MOTION TO STRIKE AND/OR DISMISS THE COMPLAINT UNDER THE DISTRICT OF COLUMBIA'S ANTI-SLAPP STATUTE

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INTRODUCTION

The State of Delaware ("State") claims that the American Petroleum Institute ("API") violated the Delaware Consumer Fraud Act ("DCFA") by expressing API's views about anthropogenic climate change. That claim expressly (and exclusively) targets API's conduct in furtherance of its right of advocacy on issues of public interest—it is the quintessential "Strategic Lawsuit Against Public Participation." It has no chance of succeeding on the merits, and thus it cannot survive the District of Columbia's Anti-SLAPP statute, D.C. Code §§ 16-5501, *et seq.*, which applies to API, a D.C. domiciliary, under Delaware's choice of law rules. The State's claim against API should be dismissed and API awarded the fees incurred in defending against this lawsuit.[1]

ARGUMENT

The State's lengthy Complaint boils down to the basic assertion that API, because of its speech about climate change, bears responsibility for alleged harms Delaware faces from climate change. That assertion directly implicates D.C.'s anti-SLAPP protections, which cover D.C. residents like API under Delaware's choice

[1] API does not waive any right, defense, affirmative defense, or objection, including its objection to personal jurisdiction. API does not believe that a ruling on its anti-SLAPP motion before the Court rules on the Joint Motion to Dismiss for Lack of Personal Jurisdiction would result in waiver. *See Walker* v. *FedEx Office & Print Services, Inc.*, 123 A.3d 160, 163 (D.C. 2015). If the Court disagrees, API respectfully asks the Court to address that jurisdictional motion first.

of law framework. And the State cannot carry its burden of showing it is likely to succeed on the merits of its DCFA claim. This Court should therefore dismiss that claim and award API attorney's fees.

I. The District of Columbia's Anti-SLAPP statute applies to its domiciliary API.

Delaware's choice of law rules require applying D.C.'s anti-SLAPP law to the State's claim against API.

"Under Delaware's choice-of-law approach, a court conducts a two-part inquiry." *Laugelle v. Bell Helicopter Textron, Inc.*, No. 10C–12–054, 2013 WL 5460164, at *2 (Del. Super. Ct. Oct. 1, 2013). The Court first asks whether there is an actual conflict between the competing laws—that is, whether applying the "competing laws yield the same result." *Id.* Second, if an actual conflict exists, the Court determines "which state has the most significant relationship to the claim[]." *Stillwater Mining Co. v. Nat'l Union Fire Ins. Co. of Pittsburgh, Pa*, 289 A.3d 1274, 1283 (Del. 2023) (citation omitted).

At the inquiry's first step, Delaware and D.C. law directly conflict. Delaware's anti-SLAPP statute applies only to actions "involving public petition and participation," defined as those "brought by a public applicant or permittee" that are "materially related to any efforts of the defendant to report on, rule on, challenge or oppose such application or permission." 10 Del. C. § 8136(a)(1). "Public applicant or permittee," in turn, means someone who "applied for or obtained a permit, zoning

change, lease, license, certificate or other entitlement for use or permission to act from any government body." *Id.* § 8136(a)(4). The statute's text reflects "a narrow purpose," *Agar v. Judy*, 151 A.3d 456, 475 (Del. Ch. 2017), and does not encompass the action here. D.C.'s broad anti-SLAPP law, in contrast, plainly covers this action because it is not limited to suits involving public applicants or permittees—it instead allows a "special motion to dismiss *any* claim arising from an act in furtherance of the right of advocacy on issues of public interest." D.C. Code § 16-5502(a) (emphasis added). If Delaware's law were to apply, API would not be able to invoke anti-SLAPP protection; if D.C.'s law applies, API can pursue an anti-SLAPP motion to dismiss. These opposing results establish an actual conflict.

Because there is an actual conflict, the law of the state with the most significant relationship to the claim applies. D.C. has the most significant relationship here under the Restatement (Second) of Conflicts' test. *Travelers Indem. Co. v. Lake*, 594 A.2d 38, 40 (Del. 1991) (adopting test). The Restatement lays out the factors and contacts relevant to determining the applicable law, which should be "evaluated according to their relative importance with respect to the particular issue"—here, which anti-SLAPP law should apply. Restatement (Second) of Conflicts § 145(2); see *id.* § 6.

Given that "[t]he purpose behind an anti-SLAPP law is to encourage the exercise of free speech, . . . the place where the allegedly tortious speech took place

and the domicile of the speaker are central to the choice-of-law analysis on this issue." *Chi v. Loyola Univ. Med. Ctr.*, 787 F. Supp. 2d 797, 803 (N.D. Ill. 2011); *see O'Gara v. Binkley*, 384 F. Supp. 3d 674, 682 (N.D. Tex. 2019) ("[I]n the anti-SLAPP context, courts typically consider the place where the allegedly tortious conduct occurred and the speaker's domicile in determining what state's law to apply."). Indeed, courts frequently give the speaker's domicile controlling weight. *See, e.g.*, *GOLO, LLC v. Higher Health Network, LLC*, No.: 3:18-cv-2434, 2019 WL 446251, at *13 (S.D. Cal. Feb. 5, 2019) (applying California anti-SLAPP law to suit originally filed in Pennsylvania against California speaker "because of a state's acute interest in protecting the speech of its own citizens"); *Underground Sols., Inc. v. Palermo*, 41 F. Supp. 3d 720, 726 (N.D. Ill. 2014) (applying Tennessee anti-SLAPP law to Illinois suit against Tennessee defendant based on "the importance of a speaker's domicile in a court's decision on which state's anti-SLAPP law to apply").

These dispositive factors show that D.C. has the most significant relationship to the claim. API is domiciled in the District of Columbia. *See* Compl. ¶ 37(a) (alleging API "is a nonprofit corporation based in the District of Columbia"); Restatement (Second) of Conflicts § 145(2)(c) (treating domicile as equivalent to "place of incorporation and place of business"). The State bases its DCFA claim entirely on a handful of public policy campaigns that API broadcast nationwide on television, radio, and the internet. Compl. ¶¶ 200-201. Given that API is "based in"

D.C., the Complaint necessarily alleges that API broadcast these advertisements from D.C., meaning the alleged misconduct occurred in D.C. rather than in Delaware (or any other state). *Id.* ¶ 37(a). D.C. thus has the strongest interest in having its anti-SLAPP law apply to (and protect) its own citizen's conduct in D.C. *See* Restatement (Second) of Conflicts § 6 ("the relative interests" of the states is relevant choice of law consideration). And Delaware's choice of law rules therefore require applying D.C.'s anti-SLAPP law in this action.

II. The District of Columbia's Anti-SLAPP statute bars the claim against API.

D.C.'s anti-SLAPP statute, D.C. Code § 16-5502(a), authorizes filing "a special motion to dismiss any claim arising from an act in furtherance of the right of advocacy on issues of public interest." Once the movant makes a *prima facie* showing that the claim arises from such an act, the burden shifts to the plaintiff to show that its claim is likely to succeed on the merits. *Id.* § 16-5502(b). API easily carries its burden here, but the State cannot do the same. This Court should thus grant API's special motion to dismiss.

A. The State's DCFA claim arises from speech protected by the D.C. Anti-SLAPP Act.

The State's claim against API focuses entirely on API's "act[s] in furtherance of its rights of advocacy on issues of public interest." *Id.* § 16-5502(a). The anti-SLAPP law broadly defines "acts" to include a "written or oral statement" made

publicly "in connection with an issue of public interest" as well as "[a]ny other expression or expressive conduct that involves . . . communicating views to members of the public in connection with an issue of public interest." *Id.* § 16-5501(1). In turn, "issues of public interest should be liberally interpreted." *Saudi Am. Pub. Rels. Affs. Comm. v. Inst. for Gulf Affs.*, 242 A.3d 602, 611 (D.C. 2020). The term encompasses "matter[s] of public significance" such as "health or safety; environmental, economic, or community well-being." D.C. Code § 16-5501(3)..

The DCFA claim stems directly from API's public speech on issues of immense public significance—namely, climate change and its implications across our society and environment. The State premises its claim on messages API communicated to the American public, through varying mediums, commenting on the environment, community well-being, and the role of oil and gas products in both. The Complaint points to API's "Power Past Impossible" campaign that "told Americans that the petroleum industry could help them 'live better lives'"—a public statement about "community well-being." Compl. ¶¶ 198, 227. The Complaint also highlights API's internet messaging describing "5 Ways We're Helping to Cut Emissions" and "4 Ways We're Protecting Wildlife"—public commentary on "health or safety" and the environment. *Id.* ¶¶ 200, 203-04. And the Complaint faults API's statements on Facebook that the oil and gas industry has reduced emissions and "can tackle climate change and meet the world's energy needs by

embracing new innovations together"—more public expression about environmental and societal issues. *Id.* ¶ 201.

All the conduct the State uses to support its claim against API thus qualifies as "acts" through which API furthered its rights of advocacy on issues of public interest. Indeed, courts rightly "acknowledg[e] that environmental harm is a matter of public interest for the purposes of anti-SLAPP," as are "global warming" and "climate change."[2] *Resolute Forest Prods., Inc. v. Greenpeace Int'l*, 302 F. Supp. 3d 1005, 1026 (N.D. Cal. 2017); *see Bikkina v. Mahadevan*, 193 Cal. Rptr. 3d 499, 509-10 (Cal. Ct. App. 2015). Though the State may claim these statements had some vague link to the commercial interests of API's *members*—not to API's, because API does not itself produce or sell any fossil fuels—their purpose was to comment on matters of public significance. *Saudi Am. Pub.*, 242 A.3d at 611 ("Section 16-5501(3) expansively defines an '[i]ssue of public interest' to encompass issues that 'relate[ ] to' a set of wide-ranging, and somewhat nebulous, categories . . . [and] intermixing public and private interests is not disqualifying.").

[2] Enacted in 2011, D.C.'s anti-SLAPP statute is relatively new, and few cases have interpreted it. But the statute is similar to California's law, which has a far more robust body of anti-SLAPP caselaw, so the D.C. Court of Appeals looks to "California" precedent when applying D.C.'s "similar" statute. *Am. Stud. Ass'n v. Bronner*, 259 A.3d 728, 746 (D.C. 2021); *Competitive Enter. Inst. v. Mann*, 150 A.3d 1213, 1236 n.30 & n.32 (D.C. 2016) (similar).

The State's allegations reflect this fact. The State asserts that its state and its residents will be harmed by the effects of global climate change because of API's public speech about global climate change and related issues. *See*, *e.g.*, Compl. ¶ 277 (alleging API and co-defendants "intended to mislead the public, consumers, and the State through this campaign of deception to prevent them from uncovering the truth . . . about the harmful effects of the use of their fossil fuel products"). It is hard to imagine a matter of greater public significance. API thus carries its burden to establish a prima facie case under the anti-SLAPP statute.

B. The State cannot establish a likelihood of success on the merits of its claim.

The State cannot carry its burden of showing it is likely to succeed on its DCFA claim. When a court grants a motion to dismiss "because no relief can be granted on a claim as a matter of law, the plaintiff cannot show a likelihood of success on the merits of that claim for the purposes of the anti-SLAPP motion." *Am. Stud. Ass'n*, 259 A.3d at 741; *see Sliney v. New Castle Cty.*, No. N19C-05-061, 2019 WL 7163356, at *1 (Del. Super. Ct. Dec. 23, 2019) (Delaware Superior Court Rule 12(b)(6) motion should be granted when "the plaintiff could not prove any set of facts that would entitle [the plaintiff] to relief.").

As API's Motion to Dismiss and Defendants' Joint Motion to Dismiss lay out in greater detail, which arguments this Motion fully incorporates, the State lacks a viable DCFA claim against API. The claim is preempted by federal law because

through it, the State seeks to regulate the national (indeed, international) issue of global climate change. State law cannot constitutionally apply to such an interstate dispute. *See City of New York v. Chevron Corp.*, 993 F.3d 81, 91 (2d Cir. 2021); *see also* Defs. Joint Mot. Dismiss, at 12-31. The State's claim against API also fails for the many other reasons discussed in Defendants' Joint Motion to Dismiss. *See* Defs. Joint Mot. Dismiss, at 31-38, 57-67.

And the State's application of the DCFA fails as a matter of pleading. The DCFA only covers alleged misrepresentations made "in connection with the sale, lease or advertisement of any merchandise." 6 Del. C. § 2513. But none of the statements on which the State premises its claims were connected to the "sale, lease or advertisement of" any particular good or product that API sold. Indeed, API does not sell fossil fuels anywhere, let alone in Delaware. The Complaint alleges that API's members sell fossil fuels, but such an attenuated relationship to any consumer or merchandise (none of it API's) does not suffice under the DFCA. *See Thomas v. Harford Mut. Ins. Co.*, No. 01C-01-046, 2003 WL 21742143, at *1 (Del. Super. Ct. July 25, 2003) (a relationship that is "not that of a consumer to vendor" is "too attenuated to support a CFA claim"); *Pennsylvania Employee Benefit Trust Fund v. Zeneca, Inc.*, No. Civ. 05–075, 2005 WL 2993937, at *1 n.3 (D. Del. Nov. 8, 2005), *aff'd sub nom. Pennsylvania Emps. Ben. Tr. Fund v. Zeneca Inc.*, 499 F.3d 239 (3d Cir. 2007), *cert. granted, judgment vacated on other grounds*, 556 U.S. 1101 (2009)

(rejecting DCFA claim premised on alleged fraudulent statement in pharmaceutical report where report was not "used in the sale or advertisement of [the drug] to consumers"); *see also* API's Mot. Dismiss, at 2-4.

Even if the statute covered API's alleged conduct, and it does not, that application would violate API's First Amendment rights. The State targets API's fully protected noncommercial speech on a matter of immense public importance. And it does so because of that speech's content. Yet it cannot justify that content-based discrimination with any compelling state interest, nor is its use of the DCFA narrowly tailored to any such interest. *See Bruni v. City of Pittsburgh*, 941 F.3d 73, 83-84 (3d Cir. 2019) (content-based restrictions are subject to strict scrutiny); *see also Madsen v. Women's Health Ctr.*, 512 U.S. 753, 763 (1994) ("The government may not regulate [speech] based on hostility—or favoritism—towards the underlying message expressed.") (citation omitted). And even if API's speech were commercial—it is not—the State's effort to impose content- and viewpoint-based restrictions on that speech remains impermissible and unjustified. *See* API's Mot. Dismiss, at 4-14. Finally, the State's claim violates API's protected petitioning activity and therefore fails as a matter of law under the *Noerr-Pennington* doctrine. *See Prof'l Indus. Est. Investors, Inc. v. Columbia Pictures Indus., Inc.*, 508 U.S. 49, 56 (1993); *United Mine Workers of Am. v. Pennington*, 381 U.S. 657, 670 (1965); *E.R.R. Presidents Conference v. Noerr Motor Freight, Inc*., 365 U.S. 127, 136

(1961); *see also* API's Mot. Dismiss, at 12-14. The State's DCFA claim against API thus creates a paradigmatic strategic lawsuit against public participation that lacks any showing of a likelihood of success.

C. API is entitled to fees incurred in defending against this lawsuit.

Because API should prevail on its special motion to dismiss, it should also receive attorney's fees. This "court may award a moving party who prevails, in whole or in part, on a motion brought under § 16-5502 or § 16-5503 the costs of litigation, including reasonable attorney fees." D.C. Code § 16-5504(a). Given the costly and time-consuming efforts that API has incurred, not only in defending against this lawsuit but also in preparing this Anti-SLAPP motion, API moves for an award of fees. If this Court grants API's Special Motion to Dismiss, API will file a separate motion setting forth the fees and costs incurred.

CONCLUSION

For these reasons, the Court should grant API's Motion, strike and/or dismiss the State's claim against API under the Delaware Consumer Fraud Act, and award API the attorney's fees incurred in defending against this litigation and drafting this Motion.

Dated: May 18, 2023

Respectfully submitted,

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