IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

STATE OF DELAWARE, *ex rel.* KATHLEEN JENNINGS, Attorney General of the State of Delaware,	)	
Plaintiff,	)	C.A. No. N20C-09-097 MMJ CCLD
v.	)	**TRIAL BY JURY OF 12 DEMANDED**
BP AMERICA INC., *et al.*,	)	
Defendants.	)	

PLAINTIFF'S ANSWERING BRIEF IN OPPOSITION TO DEFENDANTS CHEVRON CORPORATION AND CHEVRON U.S.A. INC.'S ANTI-SLAPP SPECIAL MOTION TO DISMISS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

INTRODUCTION

The State of Delaware sued Chevron Corporation and Chevron U.S.A. Inc. (collectively, "Chevron") in Delaware court for deceiving consumers and the public about their products' damaging effects on the Earth's climate. Faced with internal reports warning that unabated fossil fuel consumption would cause irreversible and calamitous damage, Chevron hid that research and helped wage sophisticated disinformation campaigns to prevent consumers from recognizing or acting on fossil fuels' latent hazards. Chevon is not entitled to lie about its products, and cannot escape liability simply because those lies obscured dangers grave enough to provoke widespread public concern.

Chevron's Anti-SLAPP Special Motion to Dismiss ("Motion" or "Mot.") proposes a tortuous analysis to dismiss the State's claims pursuant to California law. But the Motion fails at every step. First, neither Delaware's nor California's anti-SLAPP statute protects Chevron's conduct. Second, even if California's statute does protect Chevron, Delaware's anti-SLAPP law applies to this Motion under Delaware's choice-of-law rules. Delaware clearly has the "most significant relationship" to the parties and the subject matter of this Motion. All three parties have extensive contacts with Delaware, all the relevant injuries occurred in Delaware, the parties' relationship is centered in Delaware, and a substantial portion of Chevron's illegal conduct was targeted at Delaware. Additionally, interstate

comity and judicial efficiency favor applying Delaware law because Delaware legislative policy excludes claims like the State's from the heightened pleading standard Chevron seeks to invoke, and because importing California law would unnecessarily complicate administration of this action. Therefore, Delaware's anti-SLAPP law applies, and as Chevron concedes, it does not bar the State's claims. *See* Mot. 16–17. Third, even if California law could apply, it would not bar the State's claims because they possess at least the "minimal merit" necessary to survive anti-SLAPP scrutiny.

Finally, Chevron's alternative argument under the *Noerr-Pennington* doctrine fails because the Complaint does not seek to impose liability for Chevron's genuine petitioning activity. The State targets Chevron's efforts to mislead *consumers* and the *public* about the effects of consuming its products in order to increase sales. *Noerr-Pennington* does not protect this deceptive commercial activity, even if it had a political impact.

For these reasons, the Court should deny Chevron's Motion.

BACKGROUND

A. The State's Allegations

The State alleges that Chevron for decades has deceived consumers and the public about the dangers of fossil fuel use. Chevon and its co-Defendants have known for more than sixty years that fossil fuels, when used as intended, create

greenhouse gas pollution that warms the oceans and atmosphere, alters climate patterns, increases storm frequency and intensity, and causes sea levels to rise. *See* Compl. ¶¶ 62–103. Defendants took this information seriously: they began evaluating the impacts of climate change on their fossil fuel infrastructure, investing to protect assets from rising seas and deadlier storms, and patenting technologies that would allow them to profit in a warmer world. *See id.* ¶¶ 96, 100, 101, 142–47.

Despite their knowledge, Defendants buried these facts and leapt into a sophisticated public relations offensive designed to prevent consumers and the public from recognizing or acting on the looming consequences of fossil fuel use. *See id*. ¶¶ 104–41. For 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 "reposition[ing] global warming as theory (not fact)." *Id.* ¶ 114. 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." *Id.* ¶¶ 114–16 & n.99. ICE newspaper advertisements similarly compared global warming to "Chicken Little's hysteria about the sky falling," asserting that "evidence the Earth is warming is weak," and "[p]roof that carbon dioxide has been the primary cause is non-existent." *Id.* ¶ 116 & n..99. To

ensure the public internalized this false message, Defendants flooded the nation with deceptive newspaper ads, radio commercials, and mailers; bankrolled fringe scientists whose views contradicted Defendants' own research; and funded bogus think tanks, front groups, and foundations that discredited the science of climate change from putatively independent perches. *See id*. ¶¶ 109–118, 121–131, 134–36.

The industry memorialized its aims in the American Petroleum Institute's ("API") "Global Climate Science Communications Action Plan," which Chevron staff helped write. *Id.* ¶ 122–24 & n.108. "Victory will be achieved," the plan declared, "when . . . average citizens 'understand' (recognize) uncertainties in climate science; [and when] recognition of uncertainties becomes part of the 'conventional wisdom.'" *Id.* ¶ 124 n.108. By "concealing, discrediting, and/or misrepresenting information" that raised concerns about the dangers of runaway fossil fuel consumption, Chevron and its co-Defendants sought to "influence consumers to continue using [their] fossil fuel products" in order to "increase sales and protect profits." *Id*. ¶¶ 109, 110. Indeed, Chevron continues its deception today by "fail[ing] to disclose the extreme safety risk associated with the use of [its] dangerous fossil fuel products," and by disseminating advertisements "designed to deceive consumers about Chevron's products and its commitment to address climate change." *Id*. ¶¶ 163, 188. Defendants' disinformation campaigns have significantly increased greenhouse gas pollution by driving up and maintaining profligate

consumption of fossil fuels, and thereby have substantially contributed to climate change and its adverse effects in Delaware. *Id*. ¶ 12.

The State of Delaware now bears the enormous costs of Chevron's illegal conduct. *E.g.*, *id*. ¶¶ 12, 228. The State will need to spend billions of dollars to protect its residents, infrastructure, and natural resources from these and other local harms caused by Defendants' deceptive promotion of fossil fuels. *See id*. ¶¶ 228(b), 231. To remedy these localized injuries, the State sued Defendants in this Court, pleading claims under Delaware law for nuisance, negligent failure to warn, trespass, and violations of the Delaware Consumer Fraud Act ("CFA"). *See id.* ¶¶ 234–80. The State principally seeks (1) damages for injuries already sustained as a result of Defendants' deception campaigns, and (2) penalties for each instance where Defendants willfully violated the CFA.

B. Delaware's Anti-SLAPP Statute

Delaware's anti-SLAPP statute protects defendants sued by "public applicant[s] or permittee[s]" for speech related to land-use disputes. 10 *Del. C.* § 8136(a). The law's text and legislative history confirm that the Legislature chose to adopt a "relatively narrow focus on traditional SLAPP scenarios." *Agar v. Judy*, 151 A.3d 456, 474, 476 (Del. Ch. 2017) (quotations and citation omitted); *see id*. at 475–77 (floor debates in both House of Representatives and Senate "focused exclusively on SLAPPs relating to land use"). Accordingly, the statute's

"heightened standard to survive a motion to dismiss," *id*. at 470, only applies to speech-based claims arising from land-use disputes. *Id*. at 474–75. Superior Court Civil Rule 12(b)(6) remains the pleading standard in Delaware courts for all other speech-based claims. Chevron concedes that Delaware's anti-SLAPP statute does not apply here. *See* Mot. 16–17.

C. California's Anti-SLAPP Statute

In contrast to Delaware's narrow approach, the California legislature chose to enact a broad anti-SLAPP statute. California's law covers claims arising from "any act . . . in furtherance of [a] person's right of petition or free speech . . . in connection with a public issue." Cal. Civ. Proc. Code § 425.16(b)(1). Claims that fall within the statute are subject to its heightened pleading standard. *See Varian Med. Sys., Inc. v. Delfino*, 106 P.3d 958, 966 (Cal. 2005).

The California legislature has exempted certain commercial speech from its anti-SLAPP law to curb the "disturbing abuse" of the statute by "commercial defendants . . . claiming [that] their advertising impacted the public interest,". *Metcalf v. U-Haul Int'l, Inc.*, 13 Cal. Rptr. 3d 686, 691 (Ct. App. 2004). *See* Cal. Civ. Proc. Code § 425.17(c). This commercial speech exemption applies where a claim meets three conditions. First, the claim arises from the "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)(1). Second, the statement or conduct

consists of "representations of fact about that person's or a business competitor's business operations, goods, or services . . . for the purpose of . . . promoting, or securing sales [of] the person's goods or services." *Id.* § 425.17(c)(1). And third, those representations are addressed to "actual or potential buyer[s] or customer[s], or a person likely to repeat the statement to, or otherwise influence, [] actual or potential buyer[s] or customer[s]." *Id.* § 425.17(c)(2). The exemption is a "threshold issue"; where it applies, the "speech or conduct" at issue "is entirely exempt from anti-SLAPP protection *even if*" it "concerns an important public issue." *Xu v. Huang*, 288 Cal. Rptr. 3d 558, 562 (Ct. App. 2021) (cleaned up) (emphasis in original).

Even if no exemption applies, the statute's pleading standard is satisfied upon a showing that a claim displays at least "minimal merit." *Navellier v. Sletten*, 52 P.3d 703, 712–13 (Cal. 2002). "The plaintiff need not prove her case to the court" to establish a probability of prevailing. *Wilson v. Cable News Network, Inc.*, 444 P.3d 706, 718 (Cal. 2019). Instead, she need only make a "prima facie factual showing sufficient to sustain a favorable judgment," which will permit her claims to proceed unless the defendant proffers evidence that "defeats the plaintiff's claim as a matter of law." *Id.* This standard accomplishes the statute's purpose to "end meritless suits targeting protected speech, [but] *not* to abort potentially meritorious claims due to a lack of discovery." *Id.* (cleaned up) (emphasis in original).

QUESTIONS INVOLVED

1. Does either Delaware's or California's anti-SLAPP law protect Chevron's commercial conduct?
2. Does Delaware or California have the "most significant relationship" to the State's lawsuit?
3. Do the State's claims possess "minimal merit"?
4. Does the Complaint allege that Chevron engaged in deceptive commercial activity, which is not immunized by the *Noerr-Pennington* doctrine?

LEGAL STANDARD

Delaware's choice-of-law analysis proceeds in two stages. "[F]irst, the court determines whether there is an actual conflict of law between the proposed jurisdictions." *Bell Helicopter Textron, Inc. v. Arteaga*, 113 A.3d 1045, 1050 (Del. 2015). If a conflict exists, the court then determines which state "has the most significant relationship to the occurrence and the parties under the principles stated in § 6" of the Restatement. *Travelers Indem. Co. v. Lake*, 594 A.2d 38, 47 (Del. 1991) (quoting Restatement (Second) of Conflict of Laws § 145).[1] Four contacts

[1] The § 6 principles are: "(a) the needs of the interstate and international systems; (b the relevant policies of the forum; (c) the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue; (d) the protection of justified expectations; (e) the basic policies underlying the particular field of law; (f) certainty, predictability and uniformity of result; and (g) ease in the determination and application of the law to be applied."

guide this determination: "(1) the place where the injury occurred; (2) the place where the conduct causing the injury occurred; (3) the domicile, residence, nationality, place of incorporation and place of business of the parties; and (4) the place where the relationship, if any, between the parties is centered." *Bell Helicopter*, 113 A.3d at 1050 (quoting Restatement (Second) of Conflict of Laws § 145). The Restatement approach is "flexib[le]" and "requires that each case be decided on its own facts," rather than by applying rigid generalizations. *Travelers*, 594 A.2d at 48. Delaware courts often decline to apply another jurisdiction's law "when that law is clearly repugnant to the settled public policy of Delaware." *Sinnott v. Thompson*, 32 A.3d 351, 357 (Del. 2011) (cleaned up); *accord Travelers*, 594 A.2d at 48 (declining to apply Quebec law where "unlike Quebec, Delaware generally does not endorse a no-fault system of tort law").

ARGUMENT

Chevron's Motion fails at each step. First, there is no "actual conflict" between Delaware and California law, as neither anti-SLAPP statute protects Chevron. *Bell Helicopter*, 113 A.3d at 1050. Second, even if a conflict exists, Delaware law applies because Delaware has the "most significant relationship" to this litigation and any anti-SLAPP protections that may apply. *Id*. Third, even if California's anti-SLAPP statute could apply, the State's claims satisfy the "minimal merit" threshold to withstand dismissal. *Navellier*, 52 P.3d at 712–13. Finally, the

Noerr-Pennington doctrine does not immunize Chevron's deceptive commercial activity.

I. Neither Delaware Nor California Law Protects Chevron

Chevron's Motion fails at the outset because neither Delaware's nor California's anti-SLAPP statute protects Chevron's conduct. As Chevron concedes, Delaware's anti-SLAPP law provides no protection because the State's claims do not arise from a land-use dispute. *See Agar*, 151 A.3d at 474–76; Mot. 16–17. And as explained below, California's law does not protect Chevron either because the State's claims fall within the statute's commercial speech exemption. Because "the result would be the same under both Delaware and [California] law," this Court "should avoid the choice-of-law analysis altogether" and deny Chevron's Motion. *Deuley v. DynCorp Int'l, Inc.*, 8 A.3d 1156, 1161 (Del. 2010).

Claims that fall within the California statute's commercial speech exemption are "entirely exempt" from anti-SLAPP scrutiny. *Xu*, 288 Cal. Rptr. 3d at 562. The State's claims satisfy all three statutory conditions.

First, Chevron is "primarily engaged in the business of selling or leasing goods or services," namely an extensive variety of fossil fuel products and related services. *See id.* § 425.17(c); Compl. ¶ 22 (summarizing Chevron's business activities). Second, the Complaint alleges Chevron made "representations of fact about [its] or [its] competitor's business operations, goods, or services," and did so

"for the purpose of obtaining approval for, promoting, or securing sales or leases of, or commercial transactions in, [its] goods or services." Cal. Civ. Proc. Code § 425.17(c)(1). Chevron repeatedly stated that there was no established scientific link between its fossil fuel products and climate change; it did so through many tactics, including by funding think tanks, front groups, and scientists whose views contradicted what Chevron knew to be true. Compl. ¶¶ 109–141. It made those representations in order to "accelerate [its] business practice of exploiting fossil fuel reserves." *Id.* ¶ 109; *see also id.* ¶¶ 108, 128, 140, 150. Third, "[t]he intended audience" for those representations was "actual or potential buyer[s] or customer[s], or [people] likely to repeat the statement to, or otherwise influence, an actual or potential buyer or customer." Cal. Civ. Proc. Code § 425.17(c). For example, API's 1998 Communications Plan, which a Chevron representative co-wrote, sought to make "average citizens 'understand' (recognize) uncertainties in climate science" and make "recognition of uncertainties . . . part of the 'conventional wisdom.'" Compl. ¶¶ 124, 122; *see, e.g., id.* ¶ 141 (Chevron's efforts deceived "reasonable consumers"), ¶ 162 ("In connection with selling gasoline and other fossil fuel products to consumers . . ."). The Complaint focuses on prototypical examples of commercial speech: Chevron made factual representations about the qualities of its fossil fuel products and their associated risks, to keep its clients purchasing its goods and services, and those representations are the alleged basis for liability.

Chevron's attempts to avoid the commercial speech exemption are unconvincing. First, Chevron argues that the exemption only applies to "comparative advertising between competitors." Mot. 24–25 (quotations and citations omitted). But neither the text of the statute nor cases interpreting it support that conclusion. The exemption plainly extends to "representations of fact about *that person's or* a business competitor's business operations, goods, or services." Cal. Civ. Proc. Code § 425.17(c)(1) (emphasis added). Although "[t]he exempted speech has been referred to as 'comparative advertising'" in some cases, that case law applies the exemption as written to situations "where a speaker who is part of a business makes factual representations to potential customers about the business or a competitor's business, for the purpose of gaining sales." *Muddy Waters, LLC v. Superior Ct.*, 277 Cal. Rptr. 3d 204, 213 (Ct. App. 2021) (quoting *Benton v. Benton*, 252 Cal. Rptr. 3d 118, 121 (Ct. App. 2019). Chevron cites no case—and the State is aware of none—limiting the exemption to comparative advertising. Rather, the cases relied on by Chevron emphasize and apply the plain language of the statute to particular circumstances. *See FilmOn.com Inc. v. DoubleVerify Inc.*, 439 P.3d 1156, 1163–64 (Cal. 2019) (not applying the commercial speech exemption); *Indus. Waste & Debris Box Serv., Inc. v. Murphy*, 208 Cal. Rptr. 3d 853, 856–57, 866–67 (Ct. App. 2016) (finding exemption inapplicable to defendant's statements about plaintiff because defendant was not plaintiff's competitor or an agent of its

competitor). Chevron's factual misrepresentations about *its own* fossil fuel products clearly fall within the exemption.

Second, Chevron argues that the exemption does not apply to statements made by trade associations. *See* Mot. 25. A lawsuit brought against a trade association usually falls outside the exemption because a trade association is not "a person primarily engaged in the business of selling or leasing goods or services." Cal. Civ. Proc. Code § 425.17(c); *see All One God Faith, Inc. v. Organic & Sustainable Indus. Standards, Inc*., 107 Cal. Rptr. 3d 861, 882–83 (Ct. App. 2010). But the State is suing Chevron, which *is* "primarily engaged in the business of selling or leasing goods or services." The State brings suit based on Chevron's own statements and its own role funding, organizing, and implementing industry-wide deception campaigns. *See*, *e.g.*, Compl. ¶¶ 122, 124, 135, 161.

Thus, Chevron receives no anti-SLAPP protection under California law because the State's claims are exempt from the California statute. Neither Delaware nor California law protects Chevron here, and this Court can deny Chevron's Motion on that basis alone.

II. Delaware Law Applies Under Delaware's Choice-of-Law Rules

Even if Delaware and California law do conflict, Delaware law applies because Delaware has the "most significant relationship" to this litigation and to any special speech protections Chevron might invoke. Each relevant factor weighs in

favor of applying Delaware law: both the State and Chevron have extensive contacts with Delaware, all the alleged injuries are located in Delaware, Chevron directed a substantial portion of its tortious conduct at Delaware, and the parties' relationship is centered in Delaware. Moreover, considerations of interstate comity and judicial efficiency further illustrate that Delaware has the greatest interest in having its own law govern any anti-SLAPP protections that may apply. Accordingly, Delaware's anti-SLAPP statute applies. *See Travelers*, 594 A.2d at 48 (applying Delaware law where plaintiff was a resident of Delaware, defendant "conduct[ed] substantial business" in Delaware, the lawsuit "involve[d] issues of vital importance to all Delaware citizens," and Quebec policy on the issue was inconsistent with Delaware policy). And as Chevron concedes, Delaware's anti-SLAPP law provides no protection here, so Chevron's Motion fails. *See* Mot. 16–17.

A Hawai‘i court ruling on a nearly identical motion has reached the same conclusion. *See generally*, *City & Cnty. of Honolulu v. Sunoco LP*, No. 1CCV-20-0000380 (Haw. First Cir. Ct. Aug. 27, 2021) ("*Honolulu*"), Dkt. 585 (Attach. A). The *Honolulu* court denied Chevron's special motion to strike an analogous climate-deception complaint under California's anti-SLAPP law, finding that Hawai‘i had the "most significant relationship to the parties and subject matter." *Honolulu* at ¶ A. Specifically, several features of the litigation favored applying Hawai‘i law, including:

- The plaintiff public entities' domicile in Hawai'i, *id*. at ¶ B;
- The plaintiffs' "obviously . . . specific, enduring, and substantial attachments to Hawai'i," *id*. at ¶ C;
- The in-state location of the alleged damages, such as "harm to the shoreline, infrastructure, buildings, and economy of Hawai'i," *id*. at ¶ E;
- Hawaii's "own anti-SLAPP law . . . which is more limited than California's version," showing that "Hawai'i's legislative policy does not favor the protection sought by this motion," *id*. at ¶ F; and
- The "public policy in California that public enforcement actions should not be overly constrained by the anti-SLAPP protections" of its statute, *id*. at ¶ G.

The court held that California's purported interest in protecting Chevron's speech—an interest which "[was] not dispositive" of Hawai'i's "flexible" choice-of-law inquiry, *id*. at ¶¶ I, A—was outweighed by Hawai'i's more significant relationship to the lawsuit and to the scope of any possible anti-SLAPP protections.

Delaware's choice-of-law analysis, like Hawai'i's, examines the locations of the parties, the injuries, the challenged conduct, and the parties' relationship, as well as any public policy principles at stake. *Bell Helicopter*, 113 A.3d at 1050. Here, as in *Honolulu*, California's limited contacts are dwarfed by Delaware's extensive contacts with and paramount interests in this action. Delaware, a sovereign state litigating in its own courts to remedy wholly in-state injuries to its residents, infrastructure, and natural resources, has the "most significant relationship" to this litigation and any anti-SLAPP protections that may apply.

A. Each Restatement Factor Favors Applying Delaware Law

Location of the Parties. Both parties' extensive Delaware ties favor applying Delaware law. The State plainly has countless, enduring, and essential contacts with Delaware. There can be no closer relationship between a party and a state than Delaware's relationship to the state it governs. The State brings this action in its "sovereign," "proprietary," "*parens patriae*," and "police power" capacities, Compl. ¶ 16, to protect its residents and natural resources from climatic injuries caused by Chevron's deceptive conduct. *See id.* ¶¶ 1–15. Given the State's fundamental attachments to Delaware, and because those attachments underlie the State's interest in these claims, Delaware law should determine the scope of any anti-SLAPP protection here. *See Travelers*, 594 A.2d at 48 (applying Delaware law where the plaintiff was a Delaware resident and the lawsuit "involve[d] issues of vital importance to all Delaware citizens").

Chevron's robust Delaware ties also favor applying Delaware law. Chevron Corporation is incorporated in Delaware, which "has an overriding interest in regulating the conduct of its citizens." *Sinnott*, 32 A.3d at 357; *see* Compl. ¶ 22(a). When Chevron Corporation "decided to incorporate in Delaware . . . to benefit from the laws of this forum," it "also accept[ed] the responsibilities imposed upon [it]" by Delaware law. *Cervantes v. Bridgestone/Firestone N., Tire Co., LLC*, 2010 WL 431788, at *3 (Del. Super. Feb. 8, 2010). Delaware's "overriding interest" in

regulating Chevron Corporation's conduct supports applying Delaware law and opposes Chevron Corporation's attempt to evade liabilities imposed under Delaware law. Chevron U.S.A. Inc. also has significant ties to Delaware, as it is registered to do business in Delaware and has a registered agent for service of process in Wilmington. *See* Compl. ¶ 22(e). Moreover, a substantial portion of Chevron's production and sales of fossil fuels has been conducted in Delaware or directed at Delaware residents. *See* Compl. ¶ 22(j); *Travelers*, 594 A.2d at 48 (applying Delaware law where defendant "conduct[ed] substantial business" in Delaware). And Chevron has "spent millions of dollars on radio, television, and outdoor advertisements in the Delaware market related to its fossil fuel products," much of it replete with the "false or misleading statements, misrepresentations, and/or material omissions" that form the basis for the State's claims. Compl. ¶ 22(i).

The State's and Chevron's extensive Delaware ties show that Delaware law should govern any anti-SLAPP protections that may apply in this action. *See Soterion Corp. v. Soteria Mezzanine Corp.*, 2012 WL 5378251, at *12–13 (Del. Ch. Oct. 31, 2012) (applying Delaware law where "[t]wo of the five parties—a plurality—are Delaware entities" and "one of the allegedly harmful acts . . . took place in Delaware").

Location of Injuries. All the injuries the State seeks to redress are located in Delaware. *See* Compl. ¶¶ 226–33. This factor strongly supports applying Delaware

law because Delaware has the "most significant interest in applying its law" where "the consequences of [a] tortfeasor's conduct are suffered in Delaware . . . ." *State Farm Mut. Auto. Ins. Co. v. Patterson*, 7 A.3d 454, 459 (Del. 2010). *See also Emmons v. Tri Supply & Equip., Inc.*, 2012 WL 5432148, at *3 (Del. Super. Oct. 17, 2012) (applying Delaware law where plaintiff "lives with the consequences of his injury in Delaware, where he resides, and he is being treated in Delaware"). *Cf. Laugelle v. Bell Helicopter Textron, Inc.*, 2013 WL 5460164, at *4 (Del. Super. Oct. 1, 2013) (applying Massachusetts law where decedent's family "experience[d] . . . the suffering his loss has visited upon them" in Massachusetts). Delaware's interest is especially compelling here because applying California law could hinder the State's ability to redress significant injuries suffered by Delawareans in Delaware. *See Patterson*, 7 A.3d at 459 (Delaware law governs tortious conduct that caused injury in Delaware where "what is at stake is the right of the injured Delaware citizen to recover the full amount of his or her actual damages.").

Chevron contends this factor should be afforded little weight because "the site of Plaintiff's injury is merely fortuitous." Mot. 14. But that is not true. The location of an injury is fortuitous where "there is no other significant contact with the site other than the injury itself." *Bell Helicopter*, 113 A.3d at 1053 (citation omitted). As discussed above, the State and Chevron both have extensive contacts with Delaware, not least that Chevron directed at Delaware residents a substantial portion

of the deceptive conduct that underlies the State's claims. *See* Compl. ¶ 22(i). And Chevron's deceptive conduct directed at Delaware "caused harm [Chevron] knew was likely to be incurred in Delaware." *Id*. ¶ 45. Therefore, it was predictable and foreseen, not fortuitous, that Chevron's behavior would cause injury in Delaware. *See Ison v. E.I. DuPont de Nemours & Co*., 729 A.2d 832, 844 (Del. 1999).

Relationship of the Parties. The relationship between the State and Chevron is centered in Delaware. Chevron Corporation is incorporated in Delaware, and Chevron U.S.A., Inc. is registered to do business in Delaware and maintains a registered agent in Wilmington. *See* Compl. ¶¶ 22(a), (e). A significant amount of Chevron's production, marketing, and sales operations—both historically and presently—have been conducted in Delaware or directed at Delaware residents. *See id*. ¶¶ 22(h), (i), (j). And Chevron's efforts to conceal from and misrepresent the dangers of fossil fuel use to Delawareans, among others, are the subject of the State's lawsuit. *See id*. ¶ 22(i). This factor, too, favors applying Delaware law here. *See Patterson*, 7 A.3d at 457–58 (applying Delaware law where "the parties' relationship and dispute are centered in Delaware").

Location of Challenged Conduct. A substantial portion of Chevron's actionable misstatements and omissions, which deceptively induced consumers to continue purchasing fossil fuels, were transmitted in Delaware. Over the past several decades, Chevron has "spent millions of dollars on radio, television, and outdoor

advertisements in the Delaware market related to its fossil fuel products," much of it containing the "false or misleading statements, misrepresentations, and/or material omissions" that form the basis for the State's claims. Compl. ¶ 22(i). For that reason, this factor supports applying Delaware law. *See Liggett Grp. Inc. v. Affiliated FM Ins. Co.*, 788 A.2d 134, 143 (Del. Super. 2001) (recognizing a state's interest in "applying its law to govern the conduct of parties within its borders.").

To avoid this conclusion, Chevron insists that its deceptive speech "necessarily . . . emanated from its California headquarters." Mot. 19. But the Complaint does not so allege, and, to the contrary, its allegations indicate that much of Chevron's deceptive conduct may have originated outside of California. For example, the Complaint alleges that Chevron employees—along with representatives from API and Exxon—developed a "multi-million-dollar, multi-year plan" to "convince the public that the scientific basis for climate change was in doubt." Compl. ¶ 123. There is no reason to assume that speech "necessarily" emanated from California, instead of from the home states of Exxon or API.

B. Interstate Comity and Judicial Efficiency Favor Applying Delaware Law

Delaware's Relevant Policies. Delaware has a "paramount" interest in "applying its law and policies to those who seek relief in its courts." *Sinnott*, 32 A.3d at 357 (citation omitted). This interest underlies Delaware law's "presume[ption] that a law is not intended to apply outside the territorial jurisdiction

of the State in which it is enacted." *Focus Fin. Partners, LLC v. Holsopple*, 250 A.3d 939, 970 (Del. Ch. 2020) (cleaned up). Consistent with these principles, Delaware courts routinely give overriding weight to Delaware's interest in having Delaware law apply in Delaware courts. *See, e.g.*, *Emmons*, 2012 WL 5432148, at *3 ("Delaware's strong public policy interest of applying the law of comparative negligence rather than Maryland's application of contributory negligence is a paramount reason for finding that Delaware has a more significant relationship than Maryland."); *Jackson v. Bridgestone Americas Tire Operations, LLC*, 2015 WL 13697682, at *6 (Del. Super. Nov. 24, 2015) ("[I]f a Delaware citizen comes to a Delaware court seeking redress for a tort . . . it seems simply wrong to apply a more restrictive law for her remedies than is available under Delaware law.").

That interest weighs against importing California's anti-SLAPP statute here. Applying California law would jettison the "notice pleading" standard that Delaware law applies to claims like the State's. *VLIW Tech., LLC v. Hewlett-Packard Co.*, 840 A.2d 606, 611 (Del. 2003). By enacting a "narrow" anti-SLAPP statute, the Delaware legislature did not "s[eek] to create an expansive shield" for defendants sued because of their speech. *Agar*, 151 A.3d at 474. "If [it] had," the legislature "would have used more sweeping language," for which "California's anti-SLAPP statute provides a model." *Id*. Importing California's "far more sweeping" statute

thus would controvert Delaware legislative policy, which excludes the State's claims from anti-SLAPP scrutiny. Mot. 17 (cleaned up).

That concern is especially acute here, as "[i]t is doubtful whether California's [anti-SLAPP] policies were intended to have a substantive effect on potential abuses of the judicial process in other states." *Schering Corp. v. First DataBank Inc.*, 2007 WL 1176627, at *5 (N.D. Cal. Apr. 20, 2007). Delaware has "decide[d] for [itself]" how to address SLAPP suits in its courts, so "California's legislative policies designed to deter baseless tort actions should have no bearing on actions filed in [Delaware]." *Id*. at *6.

California's Relevant Policies. Applying California law also would frustrate California's policy goals. California's anti-SLAPP statute exempts "any enforcement action brought in the name of the people of the State of California by the Attorney General." Cal. Civ. Proc. Code § 425.16(d). This public enforcement exemption reflects California policy against the use of its anti-SLAPP law to obstruct enforcement actions brought by public officials. That is precisely what Chevron attempts to do here. If the California Attorney General had brought claims under California law analogous to those Delaware asserts here, Chevron could not invoke

California's anti-SLAPP statute. Importing it here therefore controverts California policy.[2] *See Honolulu* (Attach. A) at ¶ G.

Chevron's central choice-of-law argument is that California law applies because California has an "overriding interest in applying its anti-SLAPP" law to California residents. Mot. 18. But the primary case Chevron relies on does not stand for this sweeping proposition. *See Sarver v. Chartier*, 813 F.3d 891 (9th Cir. 2016). To the contrary, it performs the same type of balancing required by the Restatement. Chevron's domicile is one relevant factor, and nothing more.

In *Sarver*, the plaintiff (Sarver) sued several California-based defendants for reputational injuries caused by the movie *The Hurt Locker*, which he contended was based on his life. *Id*. at 896. On appeal from dismissal pursuant to California's anti-SLAPP statute, the Ninth Circuit analyzed whether California or New Jersey law governed the motion. *Id*. at 897. The court applied the Restatement test and considered multiple relevant factors. *See id.* at 897–900. The court noted that "[t]he conduct causing the alleged injury . . . took place in California," "all of the corporate

[2] If the Court decides to apply California law, the State respectfully requests that it also conclude that the State satisfies the statute's public enforcement exemption. To do otherwise would inequitably permit Chevron to invoke the protective aspects of California anti-SLAPP policy without being constrained by the built-in safeguards meant to exempt public enforcement lawsuits like the State's. The California legislature surely did not intend for its statute to infringe its co-sovereigns' litigation prerogatives in the way Chevron attempts here.

defendants other than [one] are incorporated and alleged to be conducting business in California," and it was "difficult to identify" the place of injury based on the complaint's allegations. *Id.* at 898–99. Moreover, the court noted that "interstate comity" favored applying California law because "California has expressed a strong interest in enforcing its anti-SLAPP law" whereas New Jersey had no anti-SLAPP statute. *Id.* at 899. "Taken together," the court "conclude[d] that California ha[d] the most significant relationship to th[e] litigation. *Id.* at 900. The court did not give outsized or "dispositive" weight to the defendants' domicile, Mot. 14, either on the facts of that case or as a general rule.

In any case, *Sarver* is easily distinguishable here. First, the State's relationship to Delaware is far closer than Sarver's relationship to New Jersey. Whereas there was "little basis to conclude that New Jersey was indeed [Sarver's] legal domicile*," id*. at 898, the State plainly has innumerable, essential contacts with Delaware, which motivate this action. Second, Sarver's reputational injuries "would most likely have occurred in multiple states," *id*. at 899, whereas the injuries here occur entirely inside Delaware. Third, Delaware—unlike New Jersey—has enacted a narrow anti-SLAPP law that does not heighten the pleading standard for claims like the State's. Delaware thus would "object strongly" on "interstate comity" grounds to importing a broad anti-SLAPP scheme to short-circuit claims vital to Delaware's interests. *Id.* Fourth, "the vast majority of the parties in [*Sarver*] [were]

citizens of or d[id] business in California" but not in New Jersey, which favored applying California law. *Id*. at 900. Here, by contrast, the Chevron entities have significant ties to Delaware. *See supra* § II.A. Under *Sarver*'s approach, therefore, Delaware has the most significant relationship to the scope of Chevron's anti-SLAPP protection.

The other cases Chevron cites are all part of the same line of federal district court cases, half of which are located in one Illinois jurisdiction, and which contain little or no substantive analysis. In *Global Relief v. New York Times Co.*, 2002 WL 31045394, at *11 (N.D. Ill. Sept. 11, 2002), for example, the court stated, without any citation or discussion, that California's "great interest" in protecting its speakers meant California "ha[d] the most significant relationship" to the defendant's anti-SLAPP protections. The court examined no other factors, and its analysis would not suffice under Delaware's Restatement approach. Similarly, in *Chi v. Loyola University Medical Center*, 787 F. Supp. 2d 797, 803 (N.D. Ill. 2011), the court cited only *Global Relief*'s conclusory reasoning to decide that Illinois's anti-SLAPP statute applied to "[d]efendants [who] are citizens of Illinois." In *Diamond Ranch Academy, Inc. v. Filer*, 117 F. Supp. 3d 1313, 1323 (D. Utah 2015), in turn, the court cited only *Chi* to conclude that the "place where the allegedly tortious speech took place and the domicile of the speaker are central to the choice-of-law analysis" on anti-SLAPP matters. The same is true of *Underground Solutions, Inc. v. Palermo*,

41 F. Supp. 3d 720, 726 (N.D. Ill. 2014), which cites only *Chi* for "the importance of a speaker's domicile in a court's decision on which state's anti-SLAPP law to apply." The courts' decisions in *GOLO, LLC v. Higher Health Network, LLC*, 2019 WL 446251, at *13 (S.D. Cal. Feb. 5, 2019), and *O'Gara v. Binkley*, 384 F. Supp. 3d 674, 682 & n.5 (N.D. Tex. 2019), follow the same pattern, citing *Chi*, *Diamond Ranch*, *Palermo*, and *Global Relief*.

Because the courts considered only one factor—the defendant's domicile—in deciding which state's law to apply, these cases are not persuasive with respect to Delaware's choice-of-law rules. *See Travelers*, 594 A.2d at 43–47 (abandoning rigid rule that law of location of injury applies to tort suits, in favor of "the Restatement's flexible" multi-factor approach); *Bell Helicopter*, 113 A.3d at 1053–1060 (analyzing and balancing all Restatement factors in deciding that Mexican law applies). And even if California has an interest in applying its anti-SLAPP law in Delaware courts, that interest is eclipsed by the parties' and the occurrence's extensive ties to Delaware. *See* § II.A, *supra*.

Ease of Determination. Examining "the ease in determination and application of the law to be applied" is an "essential" component of Delaware's choice-of-law approach. *Cervantes*, 2010 WL 431788, at * 4. Applying California law here would make this action unnecessarily complicated to administer. California's anti-SLAPP statute imposes several pleading stage procedures that

Delaware law does not countenance.[3] Following them would depart from the procedural rules that govern all other motions to dismiss before the Court. Granting Chevron an immediate right of appeal, for example, would burden the Delaware Supreme Court with responding to an appeal not authorized under Delaware law—and one the Supreme Court may be ill-positioned to decide. *See Holsopple*, 250 A.3d at 973. And determining whether and when Chevron is entitled to use these procedural mechanisms is a morass into which the Court need not wade. The imperative to keep legal rules "simple and easy to apply" thus favors applying Delaware law here.[4] Restatement (Second) of Conflict of Laws, § 6 cmt. j. *See Ortega v. Yokohama Corp. of N. Am.*, 2010 WL 1534044, at *4 (Del. Super. Mar. 31, 2010) (applying Virginia law because applying Mexican law "could be more costly and complicated for both the parties and the Court").

Uniformity of Result. Applying the anti-SLAPP law of each Defendant's home jurisdiction likely would result in applying different pleading standards to the claims against each Defendant. That quagmire not only would prove difficult to

[3] The statute automatically stays discovery upon filing, creates an immediate right of appeal, and requires a hearing within thirty days of filing. *See* Cal. Civ. Proc. Code § 425.16(f), (g), (i). These mechanisms do not exist under Delaware's anti-SLAPP law.

[4] Chevron touts the "robust and well-developed" caselaw interpreting California's anti-SLAPP law. Mot. 21–22. But California courts interpreting a California statue are ill-equipped to provide useful guidance about when and whether a Delaware court should apply out-of-state procedures not authorized under Delaware law.

administer, but also would create inconsistent outcomes. Predictability and uniformity of result favor applying Delaware law to all invocations of special speech protection sought by Defendants in this action. *See Thornton v. Boswell*, 1995 WL 656807, at *4 (Del. Super. Nov. 6, 1995) ("Uniformity of result would favor the application of Delaware law because of the strong ties to Delaware" of the parties and occurrence.).

III. The State Can Establish a Probability of Prevailing on Its Claims

Even if California's anti-SLAPP statute applies, Chevron's Motion still fails because the State's claims display at least "minimal merit." *Navellier*, 52 P.3d at 712–13.

Citing extensive reporting and public documents, the State alleges that Chevron and its predecessors played a key role in organizing, funding, and implementing the industry's efforts to conceal and misrepresent the connection between its fossil fuel products and climate change. *See* Compl. ¶¶ 104–05 (Defendants, including Chevron, could have but did not act on their superior knowledge to warn the public about the climatic dangers of fossil fuels); ¶¶ 114–16 (Chevron predecessor created and funded Information Council for the Environment's climate denialist advertorials); ¶ 122 (Chevron representatives helped create API's Global Climate Science Communications Team); ¶¶ 123–24 (Chevron staff helped develop industry-wide "multi-million-dollar, multi-year plan"

to "plant doubt about the reality of climate change"); ¶ 135 (Defendants "have funded dozens of think tanks, front groups, and dark money organizations pushing climate change denial"); ¶¶ 188–95 (Chevron's recent greenwashing advertisements). This concealment and misrepresentation of fossil fuels' known dangers, along with Defendants' "simultaneous promotion of their unrestrained use," "drove consumption, and thus greenhouse gas pollution, and thus the climate crisis" and its local effects in Delaware. *Id*. ¶ 12. These allegations more than suffice to establish Chevron's liability.[5] And they show that Chevron badly misreads the Complaint when it insists the State does not identify any deceptive speech for which Chevron is liable. *See* Mot. 26.

Continuing to mischaracterize the Complaint, Chevron next argues that the First Amendment bars liability. *See* Mot. 26–27. Both of its arguments fail. First, *Philadelphia Newspapers, Inc. v. Hepps* only says that in a defamation case, the plaintiff must bear the burden to show falsity as well as fault. 475 U.S. 767, 776 (1986). But this is not a defamation case, and the State's claims only require showing that Chevron's speech was deceptive or misleading (although much of it *was* false). Regardless, the State's allegations do establish both falsity and fault.

[5] Chevron also argues that it cannot be held liable for its greenwashing advertisements. Mot. 28. But for the reasons stated in the State's Answering Brief in Opposition to BP P.L.C. and BP America Inc.'s Motion to Dismiss for Failure to State a Claim, those deceptive statements are actionable under the CFA, and it is for a jury to resolve whether Chevron's statements were misleading.

The Complaint alleges that Chevron deceptively represented that there was no established scientific link between its fossil fuel products and climate change. *See* Compl. ¶¶ 47–61 (facts about climate change), 108–110, 114–16, 118, 105–09, 122–31, 161–62 (campaigns of deception). Chevron knew its representations were untrue, having received many reports from industry scientists detailing the reality and severity of climate change, and having relied upon that information to steer its business operations. *Id.* ¶¶ 62–72, 78–80, 84, 87, 90, 92, 100, 104, 142, 144–45, 152–53. Even if the legal standard for defamation somehow applies here, the State's allegations satisfy it.

Second, the State's claims do not hold Chevron liable merely for "being associated with a group that engaged in speech." Mot. 27 (quotations omitted). Instead, the Complaint alleges that Chevron funded, supported, and authorized the climate deception campaigns run through industry groups, think tanks, and dark money organizations. *See, e.g.*, Compl. ¶¶ 37(b), 39, 135. Chevron's freedom of association does not immunize its control over and support of these entities' deceptive activities. *See Holder v. Humanitarian L. Project*, 561 U.S. 1, 39–40 (2010) (distinguishing "being a member" of a group from "giving material support" to it); *Scott v. Ross*, 140 F.3d 1275, 1283 (9th Cir. 1998) (upholding liability based on acts of defendant's agent).

IV. The *Noerr-Pennington* Doctrine Does Not Apply

In the alternative, Chevron contends that the *Noerr-Pennington* doctrine absolutely bars the State's claims because Defendants' deception campaigns sometimes reached regulators in addition to consumers and the public. *See* Mot. 29–33. This argument misstates the law and mischaracterizes the State's allegations.[6]

"Because the *Noerr–Pennington* doctrine grows out of the Petition Clause," it "applies only to what may fairly be described as *petitions*," not to any and all conduct that may have a political or legal component. *Freeman v. Lasky, Haas & Cohler*, 410 F.3d 1180, 1184 (9th Cir. 2005). In this context, petitioning means "efforts seeking governmental, not private, action." *Bobcat N. Am., LLC v. Inland Waste Holdings, LLC*, 2019 WL 1877400, at *14 (Del. Super. Apr. 26, 2019). Contrary to Chevron's suggestion, then, *Noerr-Pennington* does not "characterize (and therefore immunize) every public relations campaign as 'petitioning' of the government." *United States v. Philip Morris USA, Inc.*, 337 F. Supp. 2d 15, 26 (D.D.C. 2004). Instead, a lawsuit permissibly targets non-petitioning activity if the charged conduct "can 'more aptly be characterized as commercial activity with a political impact'

[6] The State's full explanation of why the *Noerr-Pennington* doctrine does not require dismissing this lawsuit appears in Section III of the State's Opposition to API's individual Motion to Dismiss. The State incorporates those arguments by reference here.

than as political activity with commercial impact." *Ticor Title Ins. Co. v. FTC*, 998 F.2d 1129, 1138 (3d Cir. 1993) (cleaned up).

That describes the State's lawsuit here. Chevron's liability rests on its deceptive marketing of fossil fuels to consumers. The Complaint explains that Defendants' deception campaigns comprised a "long-term pattern of direct misrepresentations and material omissions to consumers, as well as a plan to influence consumers indirectly by affecting public opinion through the dissemination of misleading research to the press, government, and academia." Compl. ¶ 110. The campaigns were commercially motivated, as they "focused on concealing, discrediting, and/or misrepresenting information that tended to support restricting consumption of (and thereby decreasing demand for) Defendants' fossil fuel products." *Id.* ¶ 109. *See also, e.g.*, *id.* ¶ 110 (goal was to "increase sales and protect profits" by "influenc[ing] consumers to continue using Defendants' fossil fuel products"); ¶ 122 (Global Climate Science Communications Team "sow[ed] doubt and confusion about climate change in order to further Defendants' business interests"); ¶ 131 (Defendants funded fringe scientists "intend[ing] for the research . . . to be distributed to and relied on by consumers when buying Defendants' products"). Because these activities "are in essence commercial activities," *Noerr-Pennington* does not immunize them. *Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U.S. 492, 507 (1988). That is true even if Chevron's deceptive marketing

campaigns "ha[d] a political impact," *id.*, and even if the "subjective intent" of those campaigns was "to seek favorable legislation or to influence governmental action," *Pro. Real Est. Invs., Inc. v. Columbia Pictures Indus., Inc.*, 508 U.S. 49, 59 (1993).

Eastern R. R. Presidents Conference v. Noerr Motor Freight, Inc. does not compel a contrary conclusion. 365 U.S. 127 (1961). In that case, the railroads' publicity campaign merited immunity because the economic injury it inflicted was merely the "incidental effect" of a "genuine effort to influence legislation and law enforcement practices." *Id.* at 143, 144. But whereas "no one denie[d]" the campaign in *Noerr* was "designed to foster the adoption and retention of laws," *id.* at 144, 129, Chevron's deception targeted consumers to persuade them to "continue purchasing and using . . . fossil fuels without altering their behavior," Compl. ¶ 272.

Nor does *Noerr-Pennington* require dismissal at the pleading stage simply because a complaint references petitioning activity. "[W]hile 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.*, 156 Cal. Rptr. 3d 90, 104 (Ct. App. 2013); *see also United Mine Workers of Am. v. Pennington*, 381 U.S. 657, 670 n.3 (1965) (similar). To the limited extent the Complaint references Chevron's efforts to stop climate regulation, those references simply illustrate Chevron's intent to conceal and misrepresent the climate impacts of fossil fuels. *See In re Tylenol (Acetaminophen) Mktg., Sales Pracs. &*

Prod. Liab. Litig., 181 F. Supp. 3d 278, 306 (E.D. Pa. 2016) (petitioning activity was admissible to "show [the defendants'] knowledge, state of mind, or intent").

In any event, a motion to dismiss is not the vehicle for drawing lines between Chevron's commercial and petitioning activities. The application of *Noerr-Pennington* "varies with the context and nature of the activity." *Allied Tube*, 486 U.S. at 499. Accordingly, "determin[ing] whether the challenged predicate acts are acts of petitioning is a fact-intensive inquiry" best left for trial. *United States v. Philip Morris Inc.*, 304 F. Supp. 2d 60, 73 (D.D.C. 2004). Indeed, the *Honolulu* court rejected Chevron's analogous motion to dismiss for that reason, holding that it was premature to determine whether "all or most of the alleged tortious conduct is actually 'petitioning.'" *See Honolulu* (Ex. A) at ¶ L. This Court should do the same. *See In re Warfarin Sodium Antitrust Litig.*, 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").

CONCLUSION

For all these reasons, Chevron's Motion should be denied.

Respectfully submitted,

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