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 CERTAIN DEFENDANTS' JOINT MOTION TO DISMISS FOR LACK OF PERSONAL JURISDICTION

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INTRODUCTION

The State of Delaware brought this action to vindicate injuries within its borders caused by Defendants'[1] decades-long campaign to discredit the science of global warming, to conceal the catastrophic dangers posed by their fossil fuel products, and to misrepresent their role in combatting the climate crisis. Each of the companies named in this suit, including each of the Moving Defendants, has ample contacts with Delaware to justify the non-resident exercise of personal jurisdiction: they currently distribute, market, advertise, promote, and supply fossil fuel products in Delaware, *see, e.g.*, Compl. ¶¶ 21(g), (j); 22(h)–(j); they have operated refineries and other fossil fuel infrastructure in Delaware, *see, e.g.*, *id.* ¶¶ 22(j); 28(i); they own or franchise gas stations in Delaware, *see, e.g.*, *id.* ¶ 24(l); and they have made material misstatements about their products and about climate change in Delaware.

Because the State "allege[s] that [it] suffered in-state injury because of [harmful] products [Defendants] extensively promoted [and] sold" in Delaware, "the connection between the [State's] claims and [Defendants'] activities in [Delaware]—or otherwise said, the 'relationship among the defendant, the foru[m],

[1] The Joint Motion to Dismiss for Lack of Personal Jurisdiction and the Joint Opening Brief filed in support thereof ("Motion" or "Mot.") was brought by seven of the Defendants. "The 24 other Defendants that do not challenge personal jurisdiction are incorporated in Delaware." Mot. 1. For clarity and ease of reference, the term "Defendants" is used herein to all Defendants, and the term "Moving Defendants" refers to the seven out-of-state defendants challenging personal jurisdiction. *See id.*

and the litigation'—is close enough to support specific jurisdiction." *Ford Motor Co. v. Mont. Eighth Jud. Dist. Ct.*, 141 S. Ct. 1017, 1032 (2021) (quoting *Walden v. Fiore*, 571 U.S. 277, 284 (2014)).

STATEMENT OF FACTS

For more than half a century, Defendants have known that their oil and gas products create greenhouse gas pollution that changes the planet's climate. Compl. ¶¶ 1, 7, 47–103. Starting as early as the 1950s, Defendants researched the link between fossil fuel consumption and global warming, amassing a remarkably comprehensive understanding of the adverse climate impacts caused by their fossil fuel products. *Id.* ¶¶ 62–103. Their own scientists predicted that the unabated consumption of fossil fuels would cause "dramatic environmental effects," warning that the world had only a narrow window of time to curb emissions and stave off "catastrophic" climate change. *E.g.*, *id.* ¶¶ 67, 76, 80, 85.

Defendants took these warnings 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.* ¶¶ 142–47. But when the public started to treat climate change as a grave threat that would necessitate major changes in the use of fossil fuels, Defendants embarked on a decades-long campaign of denial and disinformation about the science and consequences of global warming. *See id.*

¶¶ 104–41. Today, Defendants promote their gasoline products as "green" or "clean," while failing to warn that those very same products drive climate change. *Id.* ¶¶ 202–10. Consumers are therefore left with the false impression that purchasing Defendants' fossil fuel products will help combat climate change when, in fact, the environmental benefits are a mirage. These climate deception campaigns had both the purpose and the effect of inflating and sustaining the market for Defendants' fossil fuel products, and Defendants have profited immensely as a result. *See, e.g.*, *id.* ¶¶ 2, 37(b), 58, 162.

Defendants all have extensive business ties in Delaware related to their fossil fuel businesses. Each manufacturer defendant has spent millions of dollars on radio, television, and outdoor advertisements in the Delaware market related to its fossil fuel products. *Id.* ¶¶ 21(h); 22(i); 24(k); 28(h). The manufacturer defendants operate or license branded service stations in Delaware to sell retail fossil fuel to consumers, offer branded consumer promotions that direct consumers to their Delaware locations, and reward regular customers. *Id.* ¶¶ 21(i), (j); 22(j); 24(m); 28(i), (j). Chevron and Shell both operated refineries in Delaware, in Chevron's case for more than 30 years. *Id.* ¶¶ 22(j); 28(i). And the American Petroleum Institute ("API") has spent millions of dollars on television, newspaper, radio, and internet advertisements in the Delaware market over the last 15 years to increase consumers'

consumption of oil and gas, among other purposes related to supporting the fossil fuel industry in Delaware. *Id.* ¶ 37(c).

QUESTIONS INVOLVED

1. Do the State's claims relate to Moving Defendants' contacts with Delaware?

2. Is there a "clear notice" requirement for the exercise of personal jurisdiction, and did Moving Defendants have fair warning that their conduct could subject them to suit in Delaware?

3. Does Delaware have a clear and substantial interest in prosecuting this case in its own courts, and is exercising jurisdiction here within the bounds of constitutional reasonableness?

LEGAL STANDARD

The basic contours of personal jurisdiction jurisprudence are well-established. On a motion to dismiss under Superior Court Rule 12(b)(2), "Delaware courts will apply a two-prong analysis to the issue of personal jurisdiction over a nonresident." *AeroGlobal Cap. Mgmt., LLC v. Cirrus Indus., Inc.*, 871 A.2d 428, 438 (Del. 2005) (citing *LaNuova D & B, S.p.A. v. Bowe Co.*, 513 A.2d 764, 769 (Del. 1986)). "The court must first consider whether Delaware's Long Arm Statute is applicable, and next evaluate whether subjecting the nonresident to jurisdiction in Delaware violates the Due Process Clause of the Fourteenth Amendment (the so-called 'minimum

contacts' requirement)." *Id.* The Long Arm Statute "is to be broadly construed to confer jurisdiction to the maximum extent possible under the Due Process Clause." *Hercules Inc. v. Leu Tr. & Banking (Bahamas) Ltd.*, 611 A.2d 476, 480 (Del. 1992).

"[W]here, as here, no meaningful discovery has been conducted, [the plaintiff's] burden is a *prima facie* one." *Green Am. Recycling, LLC v. Clean Earth, Inc.*, 2021 WL 2211696, at *3 (Del. Super. June 1, 2021). "[A]llegations regarding personal jurisdiction in a complaint are presumed true, unless contradicted by affidavit, and, as with a motion to dismiss under Rule 12(b)(6), the court must construe the record in the light most favorable to the plaintiff." *Hartsel v. Vanguard Grp., Inc.*, 2011 WL 2421003, at *7 (Del. Ch. June 15, 2011), *aff'd*, 38 A.3d 1254 (Del. 2012).

ARGUMENT

All Moving Defendants are subject to personal jurisdiction in Delaware. Moving Defendants do not challenge the application of Delaware's Long Arm Statute here. *See* Mot. 9–10 (summarizing argument and asserting jurisdiction would be improper "even if Delaware's long-arm statute is satisfied").[2] The only

[2] The Complaint satisfies the Long Arm Statute in any event. Each Moving Defendant has allegedly "[c]ause[d] tortious injury in the State by an act or omission in this State," *see* 10 *Del. C.* § 3104(c)(3), and/or "[c]ause[d] tortious injury in the State or outside of the State by an act or omission outside the State [and] regularly does or solicits business, engages in any other persistent course of conduct in the State or derives substantial revenue," *id.* § 3104(c)(4). *See* Compl. ¶¶ 21(g)–(j)

question before the Court is thus whether it may exercise jurisdiction in accord with federal due process. It may indeed, because all the requirements for specific jurisdiction elucidated by the U.S. Supreme Court are satisfied. Each Defendant here purposefully availed itself of the privilege of conducting business in Delaware and assumed the attendant obligations of the State's sovereign authority.[3] Delaware's claims here relate to Moving Defendants' business contacts with the state, because they marketed, sold, and deceptively promoted substantial amounts of fossil fuels within the state, which conduct forms the alleged basis of liability. And exercising jurisdiction comes within the broad scope of constitutional reasonableness because Moving Defendants' business activity in the state is extensive, the State's interest in the litigation is substantial, and Moving Defendants will suffer no undue burden litigating here.

The U.S. Supreme Court has "recogniz[ed] two kinds of personal jurisdiction: general (sometimes called all-purpose) jurisdiction and specific (sometimes called case-linked) jurisdiction." *Ford*, 141 S.Ct. at 1024. "A state court may exercise general jurisdiction only when a defendant is 'essentially at home' in the State," *id.*,

(BP); 22(g)–(j) (Chevron); 24(g)–(m) (Exxon); 28(g)–(j) (Shell); 30(f)–(g) (Total); 37(b)–(d) (API).

[3] Defendants "accept as true for purposes of this Motion" that they "conducted business or promoted their products in Delaware," Mot. at 9, and thus do not contest that they have purposefully availed themselves of the benefits of the forum.

which the Motion concedes is true here of the non-moving Defendants.[4] *See* Mot. 1. Specific personal jurisdiction, by contrast, "covers defendants less intimately connected with a State, but only as to a narrower class of claims." *Ford*, 141 S. Ct. at 1024. Jurisdiction will attach "if the defendant has purposefully directed his activities at residents of the forum, and the litigation results from alleged injuries

[4] Defendants Chevron U.S.A. Inc., Exxon Mobil Corporation, ExxonMobil Oil Corporation, and American Petroleum Institute may be subject to general jurisdiction in Delaware because they are registered with the Secretary of State to do business as foreign corporations in the State. The United States Supreme Court recently reaffirmed in *Mallory v. Norfolk S. Railway Co.* that the traditional bases for exercising personal jurisdiction have not been abrogated, including consent to service within a state: "due process allows a corporation to be sued on any claim in a State where it has appointed an agent to receive whatever suits may come." No. 21-1168, 2023 WL 4187749, at *6 (U.S. June 27, 2023) (Gorsuch, J., plurality). Foreign corporations operating in Delaware are required to designate a registered agent, and "[a]ll process issued out of any court of this State . . . required to be served on any foreign corporation which has qualified to do business in this State may be served on the registered agent of the corporation designated." *See* 8 *Del.C.* §§ 371(b)–(c), 376(a). The Delaware Supreme Court has in turn held that "when [a corporation] qualifie[s] as a foreign corporation, pursuant to 8 *Del.C.* § 371, and appoint[s] a registered agent for the service of process, pursuant to 8 *Del.C.* § 376, [it] consent[s] to the exercise of general jurisdiction by the Courts of Delaware." *Sternberg v. O'Neil*, 550 A.2d 1105, 1116 (Del. 1988). The Court has more recently held that reading was no longer tenable "[i]n light of the U.S. Supreme Court's clarification of the due-process limits on general jurisdiction" in two other cases. *Genuine Parts Co. v. Cepec*, 137 A.3d 123, 148 (Del. 2016) (citing *Daimler AG v. Bauman*, 571 U.S. 117 (2014); *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915 (2011)). After *Mallory*, it is likely that interpreting §§ 371 & 376 to confer general jurisdiction over foreign corporations registered to do business within the State *does* comport with federal due process and that the moving Defendants registered under those statutes are therefore subject to this court's general jurisdiction. This Court can deny Defendants' Motion without resolving that issue, however, because all moving defendants are subject to specific personal jurisdiction.

that arise out of or relate to those activities." *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 472 (1985) (cleaned up); *accord, e.g.*, *Ford*, 141 S.Ct. at 1024–25; *Hepp v. Facebook*, 14 F.4th 204, 207 (3d Cir. 2021); *AeroGlobal*, 871 A.2d at 441. Finally, exercising jurisdiction must be "reasonable," meaning "[t]he relationship between the defendant and the forum must be such that it is reasonable to require the corporation to defend the particular suit which is brought there." *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 292 (1980) (cleaned up).

I. The State's Claims Relate to Moving Defendants' Contacts with Delaware

Moving Defendants' primary argument, that the State's claims do not "arise out of or relate to" Moving Defendants' contacts with Delaware, *see* Mot. 14, misrepresents both controlling law and the substance of the Complaint. As to the law, crucially, there is no requirement that a "plaintiff's alleged injuries must be *caused by the use and malfunction* of the defendant's products within the forum State" before jurisdiction can attach. Mot. 16. Moving Defendants' position cannot be correct, because the Supreme Court squarely held otherwise in *Ford*: "[W]e have never framed the specific jurisdiction inquiry as always requiring proof of causation—*i.e.*, proof that the plaintiff's claim came about because of the defendant's in-state conduct." 141 S. Ct. at 1026. It is instead sufficient that there is "an affiliation between the forum and the underlying controversy, principally, an

activity or an occurrence that takes place in the forum State and is therefore subject to the State's regulation." *Id.* at 1025 (cleaned up). The Complaint clears that bar.

As to the facts alleged in the complaint, Moving Defendants repeatedly and incorrectly insist that the State's "injuries are necessarily based on the cumulative emissions from fossil fuels across the world over many decades," Mot. 3–4, and therefore "personal jurisdiction is lacking irrespective of whether a defendant markets, advertises, and sells those products" in Delaware, *id.* at 24. Moving Defendants' line of reasoning contorts the Complaint to manufacture theories of liability and damages the State does not allege, namely that Defendants should be held strictly liable for all harms flowing from all greenhouse gas emissions anywhere, ever. The theory actually animating the State's causes of action is that Defendants are liable for injuries in Delaware attributable to their unlawful and deceptive conduct, aimed at consumers and the public concerning climate change, in Delaware as elsewhere, with the intent to expand and perpetuate the market for their fossil fuel products. The State's allegations with respect to that theory clearly "relate to" Moving Defendants' business and marketing conduct in Delaware, and the consequences thereof in Delaware.

A. *Ford* Explicitly Rejected a Causation Requirement for Personal Jurisdiction, and Delaware's Allegations Sufficiently Relate to Moving Defendants' Forum Conduct to Establish Jurisdiction

Moving Defendants' arguments against jurisdiction unite around a single, fatally flawed premise: they say, in various formulations, that they can only be subject to personal jurisdiction if the climate change injuries Delaware alleges were *caused by* Moving Defendants' fossil fuels being burned *in Delaware*.[5] That is not correct, as a straightforward reading of *Ford* confirms.

In *Ford*, residents of Montana and Minnesota sued Ford Motor Company in their respective home states for car accidents that occurred there. 141 S. Ct. at 1022. The plaintiffs' vehicles were not designed, manufactured, or originally sold in Montana or Minnesota, *id.*, and Ford argued that jurisdiction could not attach because its contacts with each state did not have a "causal" relationship to the plaintiffs' claims, *id.* at 1026. The Court explicitly rejected "Ford's causation-only approach," holding that the Fourteenth Amendment's requirement that a plaintiff's

[5] *See, e.g.*, Mot. at 18 ("*Ford Motor does require* that the alleged injury within the forum State result from use and malfunction of the defendant's product within the State.") (emphasis in original); *id.* at 21 ("Here, neither the events giving rise to Plaintiff's claims nor its alleged injuries resulted from the use of any of Defendants' products *in Delaware*, nor do they even allege some kind of malfunction of those products in Delaware.") (emphasis in original); *id.* at 23 ("Unlike in *Ford Motor*, Plaintiff's alleged injuries were not caused by the use, much less the malfunction, of Defendants' products in the forum.").

claims "arise out of *or* relate to" the defendant's forum contacts is truly disjunctive. *Id.*

"The first half of that standard asks about causation," the Court explained, "but the back half, after the 'or,' contemplates that some relationships will support jurisdiction without a causal showing." *Id.* A plaintiff's claims thus "relate to" a defendant's forum contacts when there is "an affiliation between the forum and the underlying controversy, principally, [an] activity or an occurrence that takes place in the forum State and is therefore subject to the State's regulation." *Id.* at 1025 (quoting *Bristol-Myers Squibb Co. v. Superior Ct.*, 582 U.S. 255, 262 (2017)). Even where a plaintiff's claims are not causally related to the defendant's in-state conduct, the forum "may yet have jurisdiction, because of another 'activity [or] occurrence' involving the defendant that takes place in the State" related to the plaintiff's claims. *Id.* at 1026. Because Ford "systematically served a market in Montana and Minnesota for the very vehicles that the plaintiffs allege malfunctioned and injured them in those States," there was a "strong relationship among the defendant, the forum, and the litigation," and jurisdiction was present. *Id.* at 1028 (quotation omitted).

The State's unrebutted allegations here easily satisfy *Ford*. Moving Defendants extensively sell and/or promote fossil fuel products throughout the State, have done so for many years, and have worked in concert together to do so through

API. Moving Defendants other than API own or license service stations where their products are sold. Two Moving Defendants, Chevron and Shell, operated refineries in the state. And Defendants have individually and together engaged in a disinformation campaign around fossil fuels and climate change that was and is directed to Delawareans (and many others). Just as in *Ford*, Moving Defendants have "continuously and deliberately exploited [Delaware's] market" for fossil fuel products, and as such "must reasonably anticipate being haled into [Delaware's] courts to defend actions based on products causing injury there." *See* 141 S. Ct. at 1027 (cleaned up).

1. Moving Defendants' Alternative Analysis Focused on the Location of Product Malfunction Seeks to Reestablish the Same Causal Requirement *Ford* Rejected

Moving Defendants contend that *Ford* means the opposite of what it says. They assert that for jurisdiction to attach in a case against a manufacturer, "the plaintiff's alleged injuries must be *caused by the use and malfunction* of the defendant's products within the forum State." Mot. 16 (emphasis in original). They say they cannot be subject to jurisdiction here because "[g]reenhouse gas emissions resulting from the use of oil and natural gas Defendants may produce, sell, or promote in Delaware (even assuming *arguendo* that such use was induced by Defendants' allegedly tortious marketing) thus make up, at most, a minuscule amount of the global greenhouse gas emissions that contribute to climate change,"

and therefore Delaware's "injuries could not have resulted from the use and malfunction of Defendants' oil and gas products in Delaware." Mot. 23.

The Supreme Court rejected an essentially identical argument in *Ford*. Ford asserted there that "the plaintiffs' claims would be precisely the same if Ford had never done anything in Montana and Minnesota," because "the company sold the specific cars involved in these crashes outside th[os]e forum States." 141 S. Ct. at 1029 (quotation omitted). Ford thus argued, as Moving Defendants do here in slightly different words, that there was no jurisdiction because its sales and business activities in the forum states could not have been a but-for cause of the plaintiffs' injuries. The Court held that argument "merely restate[d] Ford's demand for an exclusively causal test of connection," which the Court had "already shown is inconsistent with our caselaw." *Id.* Just as in *Ford*, Moving Defendants' insistence that jurisdiction can only attach if "the use of the defendant's product in the forum State injured the plaintiff in the forum State as a result of malfunctioning there," Mot. 16, describes a causation requirement the Supreme Court rejected.

The Hawai‘i Circuit Court also recently rejected the exact rule Defendants propose in a decision denying a motion to dismiss for lack of personal jurisdiction in *City of Honolulu v. Sunoco LP*, No. 1CCV-20-380, Dkt. 622 (Mar. 31, 2022). There, Hawai‘i local government plaintiffs brought state-law claims similar to the State's, alleging that the defendant oil and gas companies misled consumers and the

public about climate change and their products' relationship to it. As here, the plaintiffs alleged that the defendants' "fossil fuel marketing campaign was worldwide, including in Hawai'i, and that the tortious marketing and failure to warn helped drive fossil fuel demand worldwide, *including in Hawai'i*," and that "tortious marketing activity caused impacts in the forum state." *Id.*, slip op. at 3–4. The defendants moved to dismiss for lack of personal jurisdiction asserting, as Moving Defendants do here, that their marketing and sales in Hawai'i could not have caused the plaintiff's injury.

The court denied the motion, reasoning directly from *Ford*. The Hawai'i court held that "*Ford* does not establish any in-forum, geo-located 'causation' requirement" or "require that particular or proportional Hawai'i sales and emissions 'cause' harm to Hawai'i." *Id.*, slip op. at 4. To the contrary, the court held there was "little daylight between the forum and the underlying controversy," based on the defendants' alleged "long-time purposeful availment to market fossil fuels in the forum state, the allegedly tortious marketing and failure to warn in the forum state, and the related impacts in the forum state." *Id.* (quotation omitted). The State's allegations here are materially similar, and the result is the same—Moving Defendants' alleged misrepresentations in the forum are directly and closely related to the in-state marketing and sales allegations that Moving Defendants accept as true.

2. None of Moving Defendants' Cases Purport to Recognize the Place-of-Malfunction Test They Advocate

Moving Defendants argue that after *Ford,* courts have embraced a place-of-malfunction requirement, which they say is different from a causation requirement. None of the other cases Moving Defendants cite stand for that proposition. *See* Mot. 18–20, 20 n.6. The court in each case held that a defendant's forum conduct did not relate to the plaintiff's claims for various reasons, but none of them placed dispositive or even significant weight on whether the defendant's product "malfunctioned" within the forum.

First, Moving Defendants cite the Rhode Island Supreme Court's decision in *Martins v. Bridgestone Americas Tire Operations, LLC*, 266 A.3d 753 (R.I. 2022), which they say found jurisdiction lacking because "the plaintiff's claims did not arise from the use and malfunction of the [defendant's] product in Rhode Island." Mot. 19. That is not what the court held. In *Martins*, an allegedly defective tire failed on a tow truck driven by the decedent, causing a crash that led to the driver's death. 266 A.3d at 756. The tires were manufactured and installed in Tennessee, and the assembled truck was delivered directly to the decedent's towing business, a Massachusetts corporation doing business in Massachusetts. *Id.* at 755–56. The decedent later drove the truck from Massachusetts to Connecticut and struck a tree in Connecticut when the tire failed on his return trip. *Id.* at 756. The decedent suffered severe burns and was transported to a hospital in Rhode Island, where he

died three weeks later. *Id.* The *only* relevant connections between Rhode Island and the litigation were that "the decedent was a resident of Rhode Island whose death ultimately occurred in Rhode Island." *Id.* at 761. The court discussed *Ford* and its predecessor cases at length, and emphasized that "it was key in *Ford* that the injury also occurred in the forum state." *Id.* The court ultimately found jurisdiction lacking because "the injury allegedly caused by the tire"—injuries to the driver's person, namely the burns he suffered during the crash—"occurred in *Connecticut*," even though that injury culminated in the decedent's eventual death in Rhode Island. *Id.* at 760. The Rhode Island Supreme Court did *not* hold that jurisdiction would be proper in Rhode Island only if "use and malfunction" of the tire occurred in Rhode Island. *Compare id. with* Mot. 19.

Similarly, in *Wallace v. Yamaha Motors Corp., U.S.A.*, 2022 WL 61430 (4th Cir. Jan. 6, 2022) (unpublished), the Fourth Circuit held that a motorcycle company defendant's contacts with South Carolina did not relate to the plaintiff's claims where "[t]he motorcycle from the accident was designed elsewhere, manufactured elsewhere, distributed elsewhere, and sold elsewhere," and "[t]he accident that resulted in [the plaintiff's] injuries took place elsewhere," *id.* at *4, namely Florida, *id.* at *1. Like the Rhode Island Supreme Court in *Martins*, the Fourth Circuit reasoned that "[i]n *Ford*, the Court repeatedly emphasized that the *injuries* occurred in the forum states," and thus "[p]erhaps" jurisdiction could be proper in Florida. *Id.*

at *4 (emphasis added). But because "neither the injury in this case nor Yamaha's conduct related to the product that allegedly caused the injury took place in South Carolina," jurisdiction was lacking.

Finally, in *Luciano v. SprayFoamPolymers.com, LLC*, 625 S.W.3d 1 (Tex. 2021), the Texas Supreme Court held that jurisdiction was proper over an insulation manufacturer that allegedly sickened the owners of a home where the insulation was installed. *Id.* at 6. The court agreed with the plaintiffs' contention that the defendant's "sales and distribution efforts in Texas *relate to* a lawsuit involving a sale of an allegedly defective product in Texas, to Texas residents, that resulted in harm in Texas." *Id.* at 14. The court carefully analyzed *Ford* and found two factors critical in exercising jurisdiction: "First, the [plaintiffs'] suit arises from injuries sustained in their Texas home," and "[s]econd," the defendant "served a market in Texas for the very spray foam insulation" that caused the injury. *Id.* at 16–17 (cleaned up). "In light of the alleged *injury in Texas giving rise to the lawsuit* and evidence of additional conduct evincing an intent to serve the Texas market," the court held, the defendant "has sufficient minimum contacts to support specific jurisdiction in Texas." *Id.* at 17 (emphasis added). The court placed no emphasis on the location of the "use and malfunction."

Taken together, *Martins*, *Wallace*, and *Luciano* at most stand for the proposition that the place of injury is a relevant consideration in determining whether

a claim relates to a defendant's forum contacts, which was true before *Ford*. *See, e.g.*, *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915, 929 n.5 (2011) ("When a defendant's act outside the forum causes injury in the forum, . . . a plaintiff's residence in the forum may strengthen the case for the exercise of specific jurisdiction." (emphasis omitted)). The cases do not recognize a place-of-malfunction element, because requiring one "merely restates [a] demand for an exclusively causal test of connection—which [the Supreme Court] ha[s] already shown is inconsistent with [its] caselaw." *Ford*, 141 S.Ct. at 1029.

The Ninth Circuit's decision in *LNS Enterprises LLC v. Continental Motors, Inc.*, 22 F.4th 852 (9th Cir. 2022), provides Moving Defendants even less support. The "malfunction" at issue there *did* occur in the forum state, and the court did not consider that as a factor in its analysis, or even mention it—as Moving Defendants tacitly acknowledge. *See* Mot. 19–20.[6] The court held there that Arizona did not have jurisdiction over an aircraft manufacturer defendant in a case arising from a non-fatal plane crash, because the defendant "did not itself manufacture, design, or

[6] The parties' briefing describes Arizona as the location of the plane crash at issue. *See* Brief of Appellants, *LNS Enters. LLC v. Continental Motors, Inc.*, 22 F.4th 852 (9th Cir. Mar. 5, 2021) (No. 20-16897) 2021 WL 964285 at *20 (arguing Arizona had significant interest in litigation because "Arizona is the site of the crash"); Brief of Appellee Textron Aviation Inc., *LNS Enters. LLC v. Continental Motors, Inc.*, 22 F.4th 852 (9th Cir. May 5, 2021) (No. 20-16897), 2021 WL 1936059 at *1 (highlighting that the appellee did not manufacture or service "the aircraft that crashed in Arizona").

service the plaintiffs' aircraft in Arizona (or anywhere)." *LNS Enters.*, 22 F.4th at 864. And while the manufacturer "maintain[ed] a single service center in Arizona," the record lacked "any indication that this service center even service[d] the same type of [personal] aircraft at issue in this case." *Id.* None of the Ninth Circuit's holdings or analysis turned on where any alleged malfunction occurred.

Finally, Moving Defendants cite *Rotblut v. Terrapinn, Inc.* for the proposition that under Delaware law, jurisdiction only attaches when a plaintiff's injury results directly from the defendant's conduct in Delaware. 2016 WL 5539884, at *5 (Del. Super. Sept. 30, 2016) (unpublished). *Rotblut* is inapposite here for the simple reason that the case analyzed whether the plaintiff's allegations satisfied the Long Arm Statute, which Moving Defendants do not challenge here, not due process. In particular, the case analyzed 10 *Del. C.* § 3104(c)(3), which permits jurisdiction where a nonresident "[c]auses tortious injury in the State by an act or omission in this State." That section, consistent with its plain language and in the court's words, requires "a tortious injury in Delaware *and* [that] such injury was due to an act or omission by the defendant in Delaware." *Rotblut*, 2016 WL 5539884, at *5. This is distinct from § 3104(c)(4), "which does not require an act in Delaware." *Id.* (quotations omitted). The court explained that 10 *Del. C.* § 3104(c)(4) "is a general jurisdiction provision," *id.* at *4, and permits jurisdiction over a defendant who "regularly does or solicits business, engages in any other persistent course of conduct

in the State or derives substantial revenue," even if it did not conduct any case-related activities in Delaware. *Id.* at *2. The court emphasized the distinction because "[a]llowing the exercise of personal jurisdiction over a defendant merely because that defendant allegedly caused tortious injury in Delaware would eviscerate the difference between § 3104(c)(3) and § 3104(c)(4), which does not require an act in Delaware." *Id.* at *5 (quoting *Joint Stock Soc'y v. Heublein, Inc.*, 936 F. Supp. 177, 194 (D. Del. 1996)). Moving Defendants do not challenge satisfaction of the Long Arm Statute here, and *Rotblut* does not speak to the due process issues resolved in *Ford*.[7]

Rotblut is also distinguishable on its facts, because the defendants there neither engaged in allegedly tortious conduct in Delaware nor regularly conducted business here. The court held in relevant part that the plaintiffs had not satisfied Section (c)(3), because there was no showing the defendants' "targeted the [allegedly defamatory] contents of its website toward Delaware in a way to purposefully avail itself of doing business with Delaware specifically, rather than North America generally." *Id.* at *6, *7. And they had not satisfied Section (c)(4),

[7] In any event, to the extent *Rotblut* is inconsistent with *Ford* and requires a causal connection between a defendant's in-forum conduct and the plaintiff's claims, it is no longer good law. As already noted, the Long Arm Statute is "broadly construed to confer jurisdiction to the maximum extent possible under the Due Process Clause," *Hercules Inc.*, 611 A.2d at 480, and after *Ford* the Fourteenth Amendment definitively does not require a causal connection.

because there was no showing the Defendants regularly conducted any business in Delaware. *Id.* at *7, *8. The State alleges here, by contrast, and Defendants accept as true, that each Defendant regularly conducts business in the State and has engaged in tortious conduct in the State. *See* Compl. ¶¶ 21, 22, 24, 28, 37. Even if *Rotblut*'s reasoning were applicable to the Moving Defendants' due process challenge here, the Complaint meets its requirements.

B. Moving Defendants Have Not Contested Any Facts Alleged in the Complaint, and the State's Unrebutted Allegations Plainly Relate to Moving Defendants' Business Contacts with Delaware

Properly construed, the allegations in the Complaint easily satisfy the relatedness requirement described in *Ford*. Moving Defendants expressly "accept as true for purposes of this Motion" all allegations in the complaint, Mot. 2, and argue that even "assuming *arguendo* that [Delaware consumers' use of Defendants' products] was induced by Defendants' allegedly tortious marketing," *id.* at 23, the Complaint still does not relate to anything they said or did here. That argument fails.

The connection between the State's claims and Moving Defendants' undisputed contacts with Delaware is clear and direct. Plaintiffs assert claims for nuisance, trespass, failure to warn, and violations of the Consumer Fraud Act based on Moving Defendants' efforts to conceal the dangers associated with their fossil fuel products and their failures to warn about those known hazards. Compl. ¶¶ 234–80. Moving Defendants made representations and omissions in Delaware and sold

their products here, and that conduct, in combination with similar or identical conduct elsewhere, was a substantial factor in causing Delaware's injuries. Moving Defendants' contacts with Delaware and Delaware's claims have a direct connection to Moving Defendants' fossil fuel products and to Moving Defendants' sale, marketing, and promotion of those products. Moreover, the misrepresentations and omissions made by Moving Defendants had a direct impact on the consumption and use of their products, including in Delaware, as well as on Moving Defendants' operations in the state. These connections satisfy *Ford*.

II. There Is No "Clear Notice" Requirement for the Exercise of Personal Jurisdiction, and Moving Defendants Had Fair Warning That Their Conduct Could Subject Them to Suit in Delaware

Moving Defendants again misstate *Ford* and misconstrue the Complaint when they argue they lacked "clear notice" they could be subject to liability in Delaware for their long-running campaign to deceive consumers and the public, including in Delaware. Neither *Ford* nor any other case creates a separate "clear notice" requirement for personal jurisdiction. Moving Defendants cannot plausibly argue they lacked fair warning that, based on their extensive fossil fuel marketing and sales in Delaware, "the State may hold the compan[ies] to account for related misconduct." *Ford*, 141 S. Ct. at 1025. "Fair warning" is all the Constitution requires.

The Supreme Court in *Ford* stated that in the interest of "treating defendants fairly," specific jurisdiction rules arise from "an idea of reciprocity between a defendant and a State: When (but only when) a company 'exercises the privilege of conducting activities within a state'—thus 'enjoy[ing] the benefits and protection of [its] laws,'" the state may assert specific jurisdiction over claims alleging "related misconduct." 141 S. Ct. at 1025 (quoting *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 319 (1945)). The Court summarized that "our doctrine similarly provides defendants with 'fair warning'—knowledge that 'a particular activity may subject [it] to the jurisdiction of a foreign sovereign.'" *Id.* (quoting *Burger King*, 471 U.S. at 472). The Court used the phrase "clear notice" three times, in each instance quoting dicta from *World-Wide Volkswagen*: "When a corporation purposefully avails itself of the privilege of conducting activities within the forum State, it has clear notice that it is subject to suit there," 444 U.S. at 297 (cleaned up). *See Ford*, 141 S. Ct. at 1025, 1027, 1030. The Court never described "clear notice" as a separate requirement, in either *World-Wide Volkswagen* or in *Ford*. The Court in *Ford* instead held based on the facts before it that "as *World-Wide Volkswagen* described, ... [a]n automaker regularly marketing a vehicle in a State . . . has 'clear notice' that it will be subject to jurisdiction in the State's courts when the product malfunctions there." *Id.* at 1030. The "clear notice" afforded to Ford *surpassed* the constitutional minimum of due process because "conducting so much business in

Montana and Minnesota . . . . create[d] reciprocal obligations" that "cannot be thought surprising." *Id.* at 1029–30.

As in *Ford*, Moving Defendants have benefited from the "'protection of [Delaware's] laws'—the enforcement of contracts, the defense of property, the resulting formation of effective markets." *Id*. at 1029. The Complaint alleges that Moving Defendants failed to warn and deceptively marketed and promoted the sale and use of their oil and gas products, in Delaware and in many other fora, to obscure the climatic harms Moving Defendants knew their products would cause. Moving Defendants accept those allegations as true. *See* Mot. 2, 9. *Ford* does not hold that a state cannot exercise jurisdiction over a tortfeasor who has wrongfully promoted and profited from in-state commercial activities, just because the plaintiff's harms may be the result of the tortfeasor's wrongful conduct both inside and outside the forum. To the contrary, the lesson of *Ford Motor* is when a company "systematically serve[s] a market" in a forum, it can and should expect to be subject to the forum's jurisdiction in civil matters so long as there is an "affiliation" between the "forum and the underlying controversy." *Id.* at 1025, 1028.

Moving Defendants' related contention that they "had no way to anticipate that, by allegedly processing, marketing, or selling lawful fossil fuel products in Delaware, they could be subjected to retrospective liability for alleged local environmental injuries" related to those products, Mot. 25, is not credible and

misstates the substance of the Complaint. As discussed in detail herein, Delaware does not allege that Moving Defendants are liable for "injuries resulting from the undifferentiated conduct of countless individuals and entities who consumed fossil fuel products around the world." *Id*. Moving Defendants here are national and international fossil fuel companies with a longstanding and extensive presence in Delaware's fossil fuel market, and a trade organization that represents the industry's interests in the state. The Complaint alleges part of that presence included deceptively marketing and promoting the sale and use of their oil and gas products, while Moving Defendants were fully aware that the unabated use of their products would have disastrous consequences, particularly but by no means exclusively for coastal communities, including those in Delaware, but withheld that information and misled the public. *See* Compl. ¶¶ 21–37, 62–141, 161–218. Accepting those allegations as true, which Moving Defendants do and the Court must, Moving Defendants had fair warning that they could be haled into court here.

III. Delaware Has a Clear and Substantial Interest in Prosecuting This Case in Its Own Courts, and Exercising Jurisdiction Here Is Within the Bounds of Constitutional Reasonableness

Finally, exercising jurisdiction here would comport with constitutional minimum reasonableness. Moving Defendants have not made any serious argument they would be subject to undue burden litigating in Delaware, and there are no other countervailing considerations that would militate against exercising jurisdiction.

The State, on the other hand, has a strong and durable sovereign interest in remedying harms to the State and its citizens from unlawful business practices.

Delaware courts examine constitutional reasonableness using the factors the Supreme Court elucidated in *Burger King*, *World-Wide Volkswagen,* and subsequent cases. Relevant considerations include "the burden on the defendant," "the forum State's interest in adjudicating the dispute," "the plaintiff's interest in convenient and effective relief," "the interstate judicial system's interest in obtaining the most efficient resolution of controversies," and "the shared interest of the several States in furthering fundamental substantive social policies." *Diaz Cardona v. Hitachi Koki Co.*, 2019 WL 449698, at *7 (Del. Super. Feb. 5, 2019). Delaware law "is clear that the primary focus of the analysis when considering competing interests is on the burden that litigating in plaintiff's chosen forum would impose on the defendant." *EBP Lifestyle Brands Holdings, Inc. v. Boulbain*, 2017 WL 3328363, at *7 (Del. Ch. Aug. 4, 2017). The Supreme Court has nonetheless cautioned that "burden on the defendant, while always a primary concern, will in an appropriate case be considered in light of other relevant factors." *World-Wide Volkswagen*, 444 U.S. at 292.

Moving Defendants' lead contention is that this case would burden them "by interfering with the power of each Defendant's home jurisdiction over its corporate citizens." Mot. 27. It is at best dubious that it would burden *Moving Defendants* to "interfer[e] with the power" of their home jurisdictions, and Moving Defendants cite

no authority in support of that proposition. *Id.* Regardless, Moving Defendants' theory rests on a gross mischaracterization of the State's claims. The State does not "seek[] to advance" any "substantive social policies," such as "curbing energy production and the use of fossil fuels or allocating the downstream costs of consumer use to the energy companies to bear directly," in other states or nations. *Id.* at 29. It seeks instead to protect Delaware and its citizens from harms caused by Moving Defendants' deceptive commercial activities, which they conducted around the world—including in Delaware.

Moving Defendants relatedly argue that this case "implicate[s] the interests of numerous other States and nations," Mot. 30, and jurisdiction would be unreasonable because no single "State has a more significant interest in addressing climate change" than any other, *id.* at 28 (cleaned up). That theory, if accepted, would conveniently ensure no jurisdiction could redress the harms caused by Defendants' conduct. Whether any one jurisdiction has a more significant interest in addressing climate change is beside the point, however, because this case does not seek to "address climate change" writ large, but rather hold Moving Defendants accountable for torts committed in or aimed at Delaware. The relief requested is likewise limited to harms suffered in the state and attributable to the specific wrongful conduct alleged. Moving Defendants' further generic suggestion that they should not be subjected to "the burden of 'submitting to the coercive power' of a

court," Mot. 27 (quoting *Bristol-Myers*, 582 U.S. at 263), misrepresents the case on which it relies. The Supreme Court in *Bristol-Myers* stated that in addition to practical concerns, burden considerations "encompass[] the more abstract matter of submitting to the coercive power of a State that may have little legitimate interest in the claims in question." *Bristol-Myers*, 582 U.S. at 263. Here, no state or nation can claim stronger interest in protecting Delaware and its consumers from deceptive marketing, climate disinformation, or manufacturers' failure to warn, nor in obtaining relief for injuries suffered in Delaware, than the State of Delaware.

Apart from these generalized arguments about different jurisdictions' respective authorities, Moving Defendants do not seriously contend that they would suffer undue burden litigating in Delaware. Moving Defendants have ample resources to litigate in Delaware, especially given that all non-moving Defendants are incorporated here. There are no practical obstacles to proceeding in this forum that would make exercising jurisdiction constitutionally unreasonable. *See, e.g.*, *Core-Vent Corp. v. Nobel Indus. AB*, 11 F.3d 1482, 1489 (9th Cir. 1993) (finding "a large international corporation with worldwide distribution of its products" would not face an unreasonable burden defending in the forum); *Sinatra v. Nat'l Enquirer, Inc.*, 854 F.2d 1191, 1199 (9th Cir. 1988) (holding 35 years ago that "modern advances in communications and transportation have significantly reduced the burden of litigating in another country").

There is no undue burden Moving Defendants will face litigating in Delaware and no other reason why asserting jurisdiction would be unreasonable.

CONCLUSION

For these reasons, the Court should deny Moving Defendants' Joint Motion to Dismiss for Lack of Personal Jurisdiction.

Respectfully submitted,

DELAWARE DEPARTMENT OF JUSTICE

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