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Case No. N20C-09-097 MMJ CCLD

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

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

PLAINTIFF'S ANSWERING BRIEF IN OPPOSITION TO DEFENDANT AMERICAN PETROLEUM INSTITUTE'S MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM

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TABLE OF CONTENTS

INTRODUCTION...1

QUESTIONS INVOLVED...2

ARGUMENT...3

I. The Complaint States a Claim Under the CFA....................................3

II. The First Amendment Does Not Bar the State's Claim........................8

A. The First Amendment Does Not Protect API's Deceptive Commercial Speech 8

B. API's First Amendment Defense Involves Questions of Fact That Cannot Be Resolved at the Pleading Stage...............14

III. *Noerr-Pennington* Does Not Bar the State's Claim............................16

CONCLUSION..19

TABLE OF AUTHORITIES

Page(s)

Cases

Allied Tube & Conduit Corp., v. Indian Head Inc.,
486 U.S. 492 (1988) 17, 19

Ariix, LLC v. NutriSearch Corp.,
985 F.3d 1107 (9th Cir. 2021) 2

Arnold v. State,
49 A.3d 1180 (Del. 2012) 5

Ass'n of Nat'l Advertisers, Inc. v. Lungren,
44 F.3d 726 (9th Cir. 1994) 12

Bates v. State Bar of Ariz.,
433 U.S. 350 (1977) 8, 11, 14

Bd. of Trustees of State Univ. of N.Y. v. Fox,
492 U.S. 469 (1989) 12

Bobcat N. Am., LLC v. Inland Waste Holdings, LLC,
2019 WL 1877400 (Del. Super. Apr. 26, 2019) 16

Bolger v. Youngs Drug Prods. Corp.,
463 U.S. 60 (1983) .... *passim*

Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y.,
447 U.S. 557 (1980) 9

Eastern R. R. Presidents Conference v. Noerr Motor Freight, Inc.,
365 U.S. 127 (1961) 17

Eastman Chem. Co. v. Plastipure, Inc.,
775 F.3d 230 (5th Cir. 2014) 13

Freeman v. Lasky, Haas & Cohler,
410 F.3d 1180 (9th Cir. 2005) 16

Gordon & Breach Science Publishers S.A. v. Am. Inst. of Physics,
859 F. Supp. 1521 (S.D.N.Y. 1994) 13

Grand Ventures, Inc. v. Whaley,
632 A.2d 63 (Del. 1993) 7

Greater Baltimore Ctr. for Pregnancy Concerns, Inc. v. Mayor & City Council of Baltimore,
721 F.3d 264 (4th Cir. 2013) 9, 15, 16

Hernandez v. Amcord, Inc.,
156 Cal. Rptr. 3d 90 (Ct. App. 2013) 18

In re Orthopedic Bone Screw Prods. Liability Litig.,
193 F.3d 781 (3d Cir. 1999) 15, 16

In re Tylenol (Acetaminophen) Mktg., Sales Pracs. & Prod. Liab. Litig.,
181 F. Supp. 3d 278 (E.D. Pa. 2016) 18

In re Warfarin Sodium Antitrust Litig.,
1998 WL 883469 (D. Del. Dec. 7, 1998) 19

Jordan v. Jewel Food Stores, Inc.,
743 F.3d 509 (7th Cir. 2014) 11

Nat'l Comm'n on Egg Nutrition v. FTC,
570 F.2d 157 (7th Cir. 1977) 10

Nat'l Servs. Grp., Inc. v. Painting & Decorating Contractors of Am., Inc.,
2006 WL 2035465 (C.D. Cal. July 18, 2006) 14

Neurotron, Inc. v. Am. Ass'n of Electrodiagnostic Med.,
189 F. Supp. 2d 271 (D. Md. 2001) 13

Norman Gershman's Things to Wear, Inc. v. Mercedes-Benz of N. Am., Inc.,
558 A.2d 1066 (Del. Super. 1989) 7

Pack & Process, Inc. v. Celotex Corp.,
503 A.2d 646 (Del. Super. 1985) 5

Pennsylvania Employee Benefit Trust Fund v. Zeneca, Inc.,
2005 WL 2993937 (D. Del. Nov. 8, 2005) 6

People v. ConAgra Grocery Prod. Co.,
227 Cal. Rptr. 3d 499 (Ct. App. 2017) 10

Pro. Real Est. Invs., Inc. v. Columbia Pictures Indus., Inc.,
508 U.S. 49 (1993) 17

Q-Tone Broad. Co. v. MusicRadio of Md. Inc.,
1995 WL 875438 (Del. Super. Dec. 22, 1995) 9

Ramson v. Layne,
668 F. Supp. 1162 (N.D. Ill. 1987)...6

S&R Assocs., L.P. v. Shell Oil Co.,
725 A.2d 431 (Del. Super. 1998) 5

Sorrell v. IMS Health Inc.,
564 U.S. 552 (2011) 14

Thomas v. Harford Mut. Ins.,
2003 WL 21742143 (Del. Super. July 25, 2003) 6

Ticor Title Ins. Co. v. FTC,
998 F.2d 1129 (3d Cir. 1993) 16

Tuttle v. Lorillard Tobacco Co.,
2001 WL 821831 (D. Minn. July 5, 2001)..6

United Mine Workers of Am. v. Pennington,
381 U.S. 657 (1965) 18

United States v. Philip Morris Inc.,
304 F. Supp. 2d 60 (D.D.C. 2004) 2, 19

United States v. Philip Morris USA Inc.,
566 F.3d 1095 (D.C. Cir. 2009) 10, 11

United States v. Philip Morris USA, Inc.,
337 F. Supp. 2d 15 (D.D.C. 2004) 16

W. Sugar Co-op. v. Archer-Daniels-Midland Co.,
2011 WL 11741501 (C.D. Cal. Oct. 21, 2011) 10

Young v. Joyce,
351 A.2d 857 (Del. 1975)..3, 6

Zauderer v. Off. of Disciplinary Couns. of Supreme Ct. of Ohio,
471 U.S. 626 (1985) 14

Statutes

6 *Del. C.* § 2508(a) 5

6 *Del. C.* § 2511(1) 4

6 *Del. C.* § 2511(7) 3, 5

6 *Del. C.* § 2513(a) 2, 3, 5

Minn. Stat. § 214.078 6

Minn. Stat. § 325F.69 6

Other Authorities

2 Smolla & Nimmer on Freedom of Speech § 20:10 (2023) 15

INTRODUCTION

The State of Delaware seeks to hold the American Petroleum Institute ("API") liable under the Delaware Consumer Fraud Act ("CFA") for deceptively advertising fossil fuel products to consumers in Delaware. API, the fossil fuel industry's largest trade association, was created to advance the business interests of its members. Compl. ¶ 37(a). It has long "acted as a marketing arm" for the industry, "spend[ing] millions of dollars on television, newspaper, radio, and internet advertisements in the Delaware market" alone. *Id.* ¶ 37(c). And for more than six decades, API has known that fossil fuel consumption causes dangerous climate change. *Id.* ¶¶ 62–70. But rather than disclosing those dangers, API and other Defendants waged sophisticated public relations campaigns to prevent consumers from recognizing or acting on fossil fuels' latent hazards. *Id.* ¶¶ 104–41, 198–201. That deceptive conduct had the purpose and effect of misleading Delaware consumers about the risks of fossil fuels, and it therefore violates the CFA.

Although this CFA claim is highly fact-intensive, API moves to dismiss it at the pleading stage based on three misguided defenses.[1] *First*, API insists that the CFA only applies to sellers of merchandise. But the statute expressly reaches "*any* person" who acts deceptively "in connection with the . . . advertisement of *any*

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[1] The State incorporates by reference all arguments in its Answering Brief in Opposition to Defendants' Joint Motion to Dismiss for Failure to State a Claim ("Joint Opposition").

merchandise." 6 *Del. C.* § 2513(a) (emphases added). That expansive language clearly encompasses non-sellers like API.

Second, API urges dismissal based on the First Amendment. But the Constitution does not protect API's deceptive commercial speech, even though its climate disinformation campaigns reference "important public issues." *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 68 (1983). The State plausibly alleges that API engaged in unprotected commercial speech, and in arguing otherwise, API simply raises "fact-driven" questions that cannot be adjudicated without discovery. *See Ariix, LLC v. NutriSearch Corp.*, 985 F.3d 1107, 1115 (9th Cir. 2021).

Third, API invokes the *Noerr-Pennington* doctrine based on a distorted reading of the Complaint. That doctrine only applies when a defendant petitions the government for redress. It does not protect API's deceptive marketing to consumers. Like API's First Amendment defense, moreover, this petitioning defense is premature, requiring "a fact-intensive inquiry" that is not appropriate for resolution on the pleadings. *United States v. Philip Morris Inc.*, 304 F. Supp. 2d 60, 73 (D.D.C. 2004) ("*Philip Morris I*").

The Court therefore should deny API's Motion to Dismiss and allow this case to proceed to discovery.

QUESTIONS INVOLVED

1. Does the Complaint state a claim under the CFA?

2. Does the Complaint allege that API engaged in deceptive commercial speech, which is not protected by the First Amendment?
3. Does the Complaint allege that API engaged in deceptive commercial activity, which is not immunized by the *Noerr-Pennington* doctrine?

ARGUMENT

I. The Complaint States a Claim Under the CFA

The CFA plainly encompasses API's deceptive marketing of fossil fuels to Delaware consumers. The statute broadly prohibits "any person" from performing deceptive acts or omissions "in connection with the . . . advertisement of any merchandise." 6 *Del. C.* § 2513(a). That sweeping language must be "liberally construed" to advance the CFA's "primary purpose" of "protect[ing] the consumer." *Young v. Joyce*, 351 A.2d 857, 859 (Del. 1975).

Here, API clearly qualifies as a "person" within the meaning of the statute. *See* 6 *Del. C.* § 2511(7). Fossil fuels unquestionably constitute "merchandise." *Id.* § 2511(6). And the Complaint amply alleges that API made false and misleading statements and omissions about fossil fuels in "advertisement[s]," which include any "publication" that "attempt[s] . . . to induce, directly or indirectly, any person" to purchase "any merchandise." *Id.* § 2511(1). In "widely disseminated marketing materials," API knowingly advanced debunked "pseudo-scientific theories" of global warming, cast doubt on the causal link between fossil fuels and global

warming, funded front groups that "minimized fossil fuels' role in climate change," and exaggerated its members' efforts to "reduce their carbon footprint, invest in more renewables, or lower their fossil fuel production." *Id.* ¶¶ 118, 127, 199, 239, 266, 270. To take a few illustrative examples:

- In a 1996 publication designed to ensure that API's "members could continue to produce and sell fossil fuels in massive quantities," API falsely declared that "no . . . scientific evidence exists that human activities are significantly affecting sea levels, rainfall, surface temperatures, or the intensity and frequency of storms.'" *Id.* ¶ 152(g), (k).

- During the 2017 Super Bowl, API ran advertisements that misleadingly touted the environmental benefits of oil and gas as "cleaner" while failing to disclose that those same fossil fuels are primary drivers of global warming. *See id.* ¶ 198.

- In a 2020 advertising campaign, API misleadingly portrayed the fossil fuel industry as "tackl[ing] climate change," "reduc[ing] CO_2 emissions," and "helping cars emit less CO_2," while concealing that the industry had minimally invested in clean energy and planned to increase fossil fuel production. *See id.* ¶ 201.

API's deceptive advertisements had the purpose and effect of "increasing consumer consumption of oil and gas to the [] financial benefit" of API's members. *Id.* ¶ 37(a). Crediting those allegations (as this Court must), API has violated the CFA by making deceptive statements and omissions "in connection with" publications that "attempt . . . to induce, directly or indirectly," the consumption of fossil fuels. 6 *Del. C.* §§ 2511(1), 2513(a).

Resisting that conclusion, API contends that "[t]he CFA applies only to sellers of goods or merchandise." Mot. 3. But that interpretation ignores the unambiguous statutory text, which this Court cannot do. *See Arnold v. State*, 49 A.3d 1180, 1183–84 (Del. 2012). The General Assembly stated that "*any* person" may violate the CFA, and it broadly defined "person" to include "*any* . . . legal or commercial entity." 6 *Del. C.* §§ 2511(7), 2513(a) (emphases added). The statute does not require the defendant to have produced, owned, or sold the particular merchandise at issue. It only demands a "connection" between the defendant's deceptive conduct and "the sale, lease, receipt, or advertisement of *any* merchandise." *Id.* § 2513(a) (emphasis added); *see also Pack & Process, Inc. v. Celotex Corp.*, 503 A.2d 646, 658 (Del. Super. 1985) ("'In connection with' is a phrase suggesting a broad interpretation . . . ."). The Legislature knew how to limit liability to sellers only, but instead it expansively drafted the CFA to cover non-merchant advertisers like API. *See, e.g.*, 6 *Del. C.* § 2508(a) ("No merchant shall sell . . . ."); *id.* § 2509(a) ("No manufacturer may sell . . . ."); *id.* § 4011(a) ("A seller shall not state . . . .").

API cites no case holding that non-sellers are categorically exempt from CFA liability. None exists. Instead, Delaware courts have applied the CFA to defendants who "actively participate[] in the promotion of" merchandise but do not themselves sell that merchandise. *S&R Assocs., L.P. v. Shell Oil Co.*, 725 A.2d 431, 434 (Del. Super. 1998). Interpreting similarly worded statutes, courts in other states also have

held that trade associations and other non-sellers may be liable for making deceptive "promotional statements" that are "designed to increase public use of [a product]." *Tuttle v. Lorillard Tobacco Co.*, 2001 WL 821831 at *7 (D. Minn. July 5, 2001) (consumer fraud claim against the tobacco industry's trade association) (interpreting Minn. Stat. § 325F.69, *amended by* Minn. Stat. § 214.078 (2023)). *See also Ramson v. Layne*, 668 F. Supp. 1162, 1166–67 (N.D. Ill. 1987) (non-seller endorser of merchandise could be liable under Illinois statute covering "'advertising' as well as 'sale'" of "any property"); *Young*, 351 A.2d at 859 (interpretation of the CFA was "consistent" with interpretations of "similar consumer fraud statutes" in other jurisdictions).

None of the cases cited by API disturb this commonsense interpretation. In *Thomas v. Harford Mutual Insurance*, the court granted summary judgment because the defendant never advertised anything to the injured consumer. *See* 2003 WL 21742143, at *1 (Del. Super. July 25, 2003). Here, by contrast, API directly advertised fossil fuels to consumers in Delaware, including through Super Bowl and Facebook advertisements. *See, e.g.*, Compl. ¶¶ 198–201. Similarly, *Pennsylvania Employee Benefit Trust Fund v. Zeneca, Inc.* (a vacated decision) is inapposite because the court there found that the plaintiff did not allege that the purportedly deceptive statements were used in sales or advertisements to consumers. 2005 WL 2993937, at *2 n.3 (D. Del. Nov. 8, 2005). Here, the Complaint alleges that API's

deceptive statements were transmitted to consumers in publications aimed at directly or indirectly inducing consumers to buy more fossil fuels. *See, e.g.*, Compl. ¶¶ 198–201.

Norman Gershman's Things to Wear, Inc. v. Mercedes-Benz of North America, Inc., is even farther afield. 558 A.2d 1066 (Del. Super. 1989). There, the court simply held, under the version of the CFA then in effect, that "post-sale representations" do not violate the CFA. *Id.* at 1074. But here, the State clearly alleges that API's pre-sale representations caused consumers to increase their purchases of fossil fuels. *See, e.g.*, Compl. ¶ 273. As for *Grand Ventures, Inc. v. Whaley*, that decision did not even involve a CFA claim. 632 A.2d 63 (Del. 1993). Instead, it addressed whether consumers could sue under the Uniform Deceptive Trade Practices Act ("UDTPA"), *id.* at 66, observing in *dicta* that the CFA covered "vertical relationships" with consumers while the UDTPA covered "horizontal relationships" between businesses. *Id.* at 70.

In any event, API *does* have a vertical relationship with consumers because its "purpose" is to "increas[e] consumer consumption of oil and gas." Compl. ¶ 37(a); *id.* ¶ 37(d). That relationship is not "peripheral" or "attenuated." Mot. 4–5. Instead, "API acts and has acted as a marketing arm for its member companies," spending "millions of dollars on television, newspaper, radio, and internet advertisements in the Delaware market." Compl. ¶ 37(c). API's conduct in carrying

out its industry's campaigns to mislead consumers about the dangers of fossil fuels sits at the core of the CFA.

II. The First Amendment Does Not Bar the State's Claim

API's First Amendment defense fails, and to the extent it raises factual questions, it is premature.[2]

A. The First Amendment Does Not Protect API's Deceptive Commercial Speech

API's deceptive commercial speech enjoys no First Amendment protection. Commercial speech has long received "less protection" than other forms of expression, and thus may be restricted if "false, deceptive, or misleading." *Bolger*, 463 U.S. at 64, 69. (citation omitted). As the U.S. Supreme Court has explained, "the leeway for untruthful or misleading expression . . . has little force in the commercial arena" because "the advertiser knows his product and has a commercial interest in its dissemination." *Bates v. State Bar of Ariz.*, 433 U.S. 350, 383 (1977). It is well-settled that statements can "constitute commercial speech notwithstanding the fact that they contain discussions of important public issues," and that "advertising which links a product to a current public debate is not thereby entitled to the constitutional protection afforded noncommercial speech." *Bolger*, 463 U.S. at 67–68 (cleaned up). This bedrock principle of First Amendment law safeguards

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[2] Because the U.S. and Delaware Constitutions confer the same speech rights, *see* Mot. 5, the State's arguments apply equally to API's state constitutional defense.

the commercial speech doctrine because "many, if not most, products may be tied to public concerns with the environment [or] energy." *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y.*, 447 U.S. 557, 563 n.5 (1980) (citation omitted).

The *Bolger* test determines whether speech is commercial. *See, e.g.*, *Q-Tone Broad. Co. v. MusicRadio of Md. Inc.*, 1995 WL 875438, at *9 (Del. Super. Dec. 22, 1995) (applying *Bolger*); *Greater Baltimore Ctr. for Pregnancy Concerns, Inc. v. Mayor & City Council of Baltimore*, 721 F.3d 264, 285 (4th Cir. 2013) (collecting cases). Under that test, courts analyze three characteristics of the challenged speech: (1) its "advertising" format; (2) its "reference[s] to a specific product"; and (3) the speaker's "economic motivation." *Bolger*, 463 U.S. at 66—67 . The presence of these indicia "provides strong support" for classifying speech as commercial, although all three need not "be present for speech to be commercial." *Id.* at 67, 68 n.14.

Here, all three *Bolger* factors favor classifying API's deceptive statements about fossil fuels as commercial speech. First, API made those statements in advertising directed at consumers. *See, e.g.*, Compl. ¶ 198 (Super Bowl commercials); *id.* ¶ 200 (deceptive "television, radio, and internet advertisements"); *id.* ¶ 201 (Facebook advertisements). Second, API's advertisements were replete with references to the fossil fuel industry and specific fossil fuel products. *See, e.g.*, *id.* ¶ 198 ("Power Past Impossible" ads stating that "gas comes cleaner" and "oil

runs cleaner"); *id.* ¶ 200 (API website entitled "America's Natural Gas and Oil: Energy for Progress"); *id.* ¶ 201 (Facebook ads touting "engine oils that improve fuel efficiency"). Third, API's motive for running these advertisements was plainly economic—to "advance [its] core mission of growing its member companies' oil and natural gas businesses." *Id.* ¶ 200. API's speech therefore is commercial even though it "contain[s] discussions" of climate change. *Bolger*, 463 U.S. at 68.

Indeed, courts consistently have held that the First Amendment does not protect sophisticated public relations efforts designed to mislead consumers about the dangers of a product.[3] In litigation against the tobacco industry, for example, the D.C. Circuit rightly concluded that the defendants had engaged in unprotected commercial speech when they misrepresented "the safety of their products . . . in attempts to persuade the public to purchase cigarettes"—even though some of their public statements "discuss[ed] cigarettes generically without specific brand names" and "link[ed] cigarettes to an issue of public debate." *United States v. Philip Morris*

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[3] *See Nat'l Comm'n on Egg Nutrition v. FTC*, 570 F.2d 157, 159–63 (7th Cir. 1977) (egg industry trade group engaged in commercial speech when it denied scientific evidence that egg consumption increases the risk of heart disease); *People v. ConAgra Grocery Prod. Co.*, 227 Cal. Rptr. 3d 499, 535–36 (Ct. App. 2017) ("Defendants' lead paint promotional advertising and participation in trade-association-sponsored lead paint promotional advertising were not entitled to any First Amendment protections."); *W. Sugar Co-op. v. Archer-Daniels-Midland Co.*, 2011 WL 11741501, at *4–5 (C.D. Cal. Oct. 21, 2011) (sugar trade association engaged in commercial speech when it made allegedly deceptive statements about the health effects of high-fructose corn syrup).

USA Inc., 566 F.3d 1095, 1144 (D.C. Cir. 2009) ("*Philip Morris II*"). The same is true of API's climate disinformation campaigns, which used the same marketing tactics to mislead consumers about the climate impacts of fossil fuels, including:

- Presenting settled climate science as "uncertain[]," *compare* Compl. ¶ 123 *with Philip Morris II*, 566 F.3d at 1106 (pursuing an "'open question' position of sowing doubt");

- Denying the causal link between fossil fuels and climate change, *compare* Compl. ¶ 39, *with Philip Morris II*, 566 F.3d at 1106 ("denying any adverse health effects of smoking");

- Deploying front groups like "The Advancement of Sound Science Coalition" to "spread doubt about climate science," *compare* Compl. ¶ 122, *with Philip Morris II*, 566 F.3d at 1107 (creating "The Council for Tobacco Research" and "The Tobacco Institute" to disseminate "false and misleading press releases and publications");

- Funding "think tanks and advocacy groups that minimized fossil fuels' role in climate change," *compare* Compl. ¶ 127 *with Philip Morris II*, 566 F.3d at 1107 ("fund[ing] 'special projects' to produce favorable research results"); and

- Marketing fossil fuels as "safe," "clean," "emissions-reducing," and "impliedly beneficial to the climate," *compare* Compl. ¶ 207 *with Philip Morris II*, 566 F.3d at 1107 ("promot[ing] their low tar brands . . . as less harmful than full flavor cigarettes").

This "false, deceptive, [and] misleading" commercial conduct is not protected by the First Amendment. *Bates*, 433 U.S. at 383.

In claiming otherwise, API mistakenly asserts that commercial speech consists only of "speech that proposes a commercial transaction." Mot. 8, 9. But that "definition is just a starting point" for the commercial-speech analysis. *Jordan*

v. Jewel Food Stores, Inc., 743 F.3d 509, 516 (7th Cir. 2014) (collecting cases). Commercial speech plainly may encompass statements that "cannot be characterized merely as proposals to engage in commercial transactions." *Bolger*, 463 U.S. at 66–67.

Next, API tries to evade liability because "[its] speech is intertwined with noncommercial speech advocating a policy position." Mot. 9. Mere entwinement is not enough, however. Mixed commercial and noncommercial speech only receives full protection where the commercial elements are "inextricably intertwined" with the noncommercial elements. *Bd. of Trustees of State Univ. of N.Y. v. Fox*, 492 U.S. 469, 474 (1989). API cannot make that showing here because "[n]o law of man or nature makes it impossible" for API to opine on energy policies without lying about the effects of consuming fossil fuels. *Id.* To the contrary, API could have discussed those policies without including false and misleading statements about the climate impacts of fossil fuels or the clean energy expenditures of its member companies. *See Ass'n of Nat'l Advertisers, Inc. v. Lungren*, 44 F.3d 726, 730 (9th Cir. 1994) ("[A] firm can editorialize about the environment, lambast the statute or laud recycling without advertising or otherwise making commercial representations about one of its products.").

Pivoting again, API insists that the First Amendment fully protects all promotional speech that cites scientific research. *See* Mot. 10–12. That is wrong.

A commercial entity can be liable for using scientific research to deceptively promote its products, for example by not providing the "necessary context" or failing to disclose "potential conflicts of interest." *Eastman Chem. Co. v. Plastipure, Inc.*, 775 F.3d 230, 236 (5th Cir. 2014). That is precisely what API did here. *See* Compl. ¶¶ 104–41.

Nor do any of API's citations help it. In *Neurotron, Inc. v. American Ass'n of Electrodiagnostic Medicine*, the court held that a medical professional association's review of a medical device was noncommercial speech because the association did not engage in "activities [that] are commercial in nature," and the review was published "for the edification of the association's members." 189 F. Supp. 2d 271, 276–77 (D. Md. 2001). In contrast, API serves as "a marketing arm" for the fossil fuel industry, and its deceptive conduct targeted consumers with the goal of increasing fossil fuel consumption. *See* Compl. ¶¶ 37(c), 110, 272. In *Gordon & Breach Science Publishers S.A. v. Am. Inst. of Physics*, the court found that a survey of scientific journals was noncommercial because of the First Amendment's "special concern" with "academic freedom" and because academic journals themselves are "constitutionally protected" products. 859 F. Supp. 1521, 1540–43 (S.D.N.Y. 1994). But fossil fuels are not constitutionally protected products, and no "special" First Amendment concern transforms API's deceptive marketing into noncommercial speech. *See id*. Finally, in *National Services Group, Inc. v. Painting & Decorating*

Contractors of America, Inc., the court concluded that a trade association article was noncommercial because it criticized non-member companies' business models "[r]ather than promot[ed] [association] members' services to consumers." 2006 WL 2035465, at *6 (C.D. Cal. July 18, 2006). Here, API deceptively promoted its members' fossil fuels to consumers in Delaware and elsewhere. Compl. ¶¶ 37, 104–41, 198–201.

As a fallback position, API also contends that its speech is fully protected even if it is commercial because the State's lawsuit is a content-based restriction. *See* Mot. 14–15. But states plainly "are free to prevent the dissemination of commercial speech that is false, deceptive, or misleading." *Zauderer v. Off. of Disciplinary Couns. of Supreme Ct. of Ohio*, 471 U.S. 626, 638 (1985); *see also Bolger*, 463 U.S. at 68–69; *Bates*, 433 U.S. at 83. And contrary to API's suggestion, *Sorrell v. IMS Health Inc.* did not silently overturn that longstanding tenet of First Amendment law—nor could it, as *Sorrell* involved restrictions on *truthful* commercial information. 564 U.S. 552, 577–78 (2011).

B. API's First Amendment Defense Involves Questions of Fact That Cannot Be Resolved at the Pleading Stage

If the Court harbors any doubt that API engaged in deceptive commercial speech, it should deny API's Motion to Dismiss and wait until it has a complete factual record before deciding the question.

The commercial speech inquiry "will often be deeply fact-intensive and fact-driven, with results turning on the nature of the record developed." 2 Smolla & Nimmer on Freedom of Speech § 20:10 (2023). That is because speech typically "consists of complex mixtures of commercial and noncommercial elements," *In re Orthopedic Bone Screw Prods. Liability Litig.*, 193 F.3d 781, 793 (3d Cir. 1999) (cleaned up), and because disentangling those elements routinely "involves complex factual questions about intent and motive," *Greater Baltimore*, 721 F.3d at 286. Accordingly, courts should refrain from prematurely adjudicating a question of commercial speech "in the absence of a fully developed record" and "[w]ithout all the pertinent evidence—including evidence concerning the [defendant's] economic motivation (or lack thereof) and the scope and content of its advertisements." *Greater Baltimore*, 721 F.3d at 286.

Here, the State alleges that API concealed and misrepresented the climate impacts of fossil fuels in advertisements that were widely disseminated in Delaware, all to persuade consumers to buy more fossil fuels. *See* Compl. ¶¶ 37, 104–41, 198–201. Taking those allegations as true, a factfinder easily could classify API's conduct as deceptive commercial speech. API may argue that its motivations were political, not economic; that its statements were truthful, not deceptive; or that its public communications were policy statements, not commercial advertisements. *See* Mot. 9–10. But those arguments simply raise contested issues of fact that cannot

be resolved until "the factual record is more fully developed." *Orthopedic Bone*, 193 F.3d at 794. Indeed, factual development is "especially important" to API's defense because many of "the relevant facts are exclusively in the control of [API]," including its motives and plans. *Greater Baltimore*, 721 F.3d at 285.

III. *Noerr-Pennington* Does Not Bar the State's Claim

Finally, API invokes the *Noerr-Pennington* doctrine, arguing that the State impermissibly targets its petitioning activities. But that defense misstates the law and mischaracterizes the Complaint.

"Because the *Noerr-Pennington* doctrine grows out of the Petition Clause," it applies "only to what may fairly be described as *petitions*." *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 API'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' 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. As alleged in the Complaint, API primarily "promoted disinformation about fossil fuel products *to consumers*," not regulators or policymakers. Compl. ¶ 37(b) (emphasis added). The goal of those advertising efforts was to "influenc[e] consumer demand for their fossil fuel products." *Id.* ¶ 37(d). API badly misreads the Complaint when it asserts that "the sole basis for the State's CFA claim" is "API's alleged attempts to influence local, state, and federal policy." Mot. 18. Instead, liability rests on API's deceptive marketing of fossil fuels to consumers. Because those activities "are in essence commercial activities," *Noerr-Pennington* does not immunize them. *Allied Tube & Conduit Corp., v. Indian Head Inc*. 486 U.S. 492 at 507 (1988). That is true even if API'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, API's deception targeted consumers to persuade them to "continue purchasing and using . . . fossil fuel products without altering their behavior," Compl. ¶ 272.

Nor should the Court credit API's conclusory assertion that its "promotional activities are part and parcel with [its] legislative and public policy activities." Mot. 17. As the Complaint makes clear, API's liability arises out of its deceptive marketing of fossil fuels to consumers, not any regulatory or lobbying activity. *See, e.g.*, Compl. ¶¶ 198–201. And *Noerr-Pennington* does not require dismissal 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 API's efforts to stop climate regulation, those references simply illustrate API'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 Rule 12(b)(6) motion is not the vehicle for "draw[ing]" lines between API's commercial and petitioning activities. Mot. 17. 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. *Philip Morris I*, 304 F. Supp. 2d at 73. Indeed, a Hawaiʻi court rejected a motion to dismiss a similar climate deception case for that reason, holding that it was premature to determine whether "all or most of the alleged tortious conduct is actually 'petitioning.'" *See City & Cnty. of Honolulu v. Sunoco LP*, No. 1CCV-20-0000380 (Haw. First Cir. Ct. Aug. 27, 2021) Dkt. 585 at ¶ L (Attach. A). 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 the foregoing reasons, and for the reasons in the Joint Opposition, API's Motion to Dismiss should be denied.

Respectfully submitted,

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