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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,	)	
Plaintiff,	)	C.A. No. N20C-09-097 MMJ CCLD
v.	)	
BP AMERICA INC., *et al.*,	)	
Defendants.	)	

PLAINTIFF'S ANSWERING BRIEF IN OPPOSITION TO DEFENDANT AMERICAN PETROLEUM INSTITUTE'S MOTION TO STRIKE AND/OR DISMISS THE COMPLAINT UNDER THE DISTRICT OF COLUMBIA'S ANTI-SLAPP STATUTE

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INTRODUCTION

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

API's Anti-SLAPP Special Motion to Dismiss ("Motion" or "Mot.") fails for two principal reasons. First, Delaware law governs the scope of API's anti-SLAPP protections under Delaware's choice-of-law rules. Delaware clearly has the "most significant relationship" to the parties and the subject matter of this Motion. Both the State and API have extensive contacts with Delaware, all the relevant injuries occurred in Delaware, the parties' relationship is centered in Delaware, and a substantial portion of API'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 API seeks to invoke, and because importing law from the District

of Columbia ("D.C." or "the District") would unnecessarily complicate administration of this action. Delaware's anti-SLAPP law applies, and as API concedes, it does not bar the State's claim. *See* Mot. 2–3.

Second, even if D.C.'s anti-SLAPP law could apply, the State's claim still cannot be dismissed because it is likely to succeed on the merits. The Complaint cites sufficient evidence in support of its allegations for a jury to find API liable for deceptively advertising fossil fuels under the Delaware Consumer Fraud Act ("CFA"). And the First Amendment poses no obstacle to API's liability, because the Constitution does not protect API's false, deceptive, and misleading commercial speech. Nor does the *Noerr-Pennington* doctrine bar the State's claim, since the Complaint challenges API's deceptive commercial conduct, not its petitioning activity.

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

BACKGROUND

A. The State's Allegations

The State alleges that API has played a central role in the fossil fuel industry's decades-long campaigns to deceive consumers and the public about the dangers of fossil fuel use. API 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. The industry's scientific research into greenhouse gas pollution was conducted partly through API, *see id*. ¶¶ 62–72, 80, 87, which created communication hubs like the Climate and Energy Task Force "to monitor and share cutting edge climate research among the oil industry," *id*. ¶ 78. *See id*. ¶¶ 78–80, 92. Defendants took this research 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. As it did with climate research, API played a key role in developing and executing the industry's campaigns to mislead the public about hazards of fossil fuel consumption, on behalf of and/or under the control of its members. *See id*. ¶ 37. API spread knowingly deceptive information about the dangers of fossil fuels, such as a 1996 publication that falsely claimed, "no scientific evidence exists that human activities are significantly affecting sea levels, rainfall, surface temperatures, or the intensity and frequency of storms." *Id*. ¶ 118. To ensure the public internalized this message, API organized a constellation of bogus think

tanks, front groups, and foundations that discredited the science of climate change from putatively independent perches, and it bankrolled fringe scientists whose views contradicted the fossil fuel industry's internal research. *See id*. ¶¶ 121–131, 134–36. It also convened a "Global Climate Science Communications Team" to coordinate the fossil fuel industry's deception efforts, borrowing tactics and personnel from the tobacco industry's earlier campaigns to obscure and deny the health risks of cigarettes. *See id*. ¶ 122.

API memorialized its aims in its "Global Climate Science Communications Action Plan." *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, API and its co-Defendants sought to "influence consumers to continue using . . . fossil fuel products" to "increase sales and protect profits." *Id*. ¶¶ 109, 110. Indeed, API continues its deception today by tout[ing] its members' purported commitments to reducing their carbon footprint while continuing its core mission of promoting its members' extraction, production, and sale of fossil fuels to consumers . . . at unprecedented rates." *Id*. ¶ 199. 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 API's illegal conduct. *See 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 API and its co-Defendants in this Court, asserting a claim against API for violations of the CFA. *See id.* ¶¶ 264–79. The State principally seeks (1) damages for injuries already sustained as a result of Defendants' deception campaigns, and (2) penalties for each instance in which API 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. API concedes that Delaware's anti-SLAPP statute does not apply here. *See* Mot. 2–3.

C. The District of Columbia's Anti-SLAPP Statute

In contrast to Delaware's narrow statute, D.C.'s anti-SLAPP law protects speech "very broadly," *Fells v. Serv. Emps. Int'l Union*, 281 A.3d 572, 580 (D.C. 2022), and "provides substantial advantages to the defendant over and above those usually available in civil litigation," *Competitive Enter. Inst. v. Mann*, 150 A.3d 1213, 1238 (D.C. 2016). *See* D.C. Code. § 16-5502. For claims that fall within its scope, the statute "revers[es]" the ordinary "burdens for dismissal" under Rule 12(b)(6) by "plac[ing] the initial burden on the [plaintiff] to . . . substantiat[e] the merits" of the claim. *Mann*, 150 A.3d. at 1237.

Even where the statute applies, a claim that is "likely to succeed on the merits" cannot be dismissed. D.C. Code § 16-5502(b). Because "the Anti-SLAPP Act shields only those defendants who face unsupported claims that do not meet established legal standards," a claim covered by the statute may proceed where the plaintiff "present[s] evidence that could persuade a jury to find in her favor." *Mann*, 150 A.3d. at 1239. This pleading standard ensures the statute does not become

"a sledgehammer . . . [that] get[s] rid of any claim against a defendant able to make a prima facie case that the claim arises from activity covered by the Act." *Id.*

QUESTIONS INVOLVED

1. Does Delaware or D.C. have the "most significant relationship" to the State's lawsuit?

2. Is the State's claim likely to succeed on the merits?

LEGAL STANDARD

Delaware's choice-of-law analysis proceeds in two stages. "First, 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 guide this determination: "(1) the place where the injury occurred; (2) the place where the conduct causing the injury occurred; (3) the domicile, residence,

[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."

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 "flexible" 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 47, 48 (declining to apply Quebec law where "Quebec, unlike Delaware, generally does not endorse a no-fault system of tort law.").

ARGUMENT

API's Motion fails at each step. Delaware's anti-SLAPP statute governs this Motion because Delaware has the "most significant relationship" to this action and any special speech protections API might invoke. *Bell Helicopter*, 113 A.3d at 1050. Because Delaware's statute concededly does not cover the State's claim, API is entitled to no anti-SLAPP protection. And even if D.C.'s statute applies, the State's claim cannot be dismissed because it is likely to succeed on the merits.

I. Delaware's Anti-SLAPP Statute Governs This Motion

Delaware's anti-SLAPP law governs this Motion under Delaware's choice-of-law rules. There is an "actual conflict" between Delaware and D.C. law because,

as API concedes, Delaware's narrow anti-SLAPP statute does not protect API, while D.C.'s broad statute may cover the State's claim. *Bell Helicopter*, 113 A.3d at 1050. *See* Mot. 2–3. That conflict must be resolved by applying Delaware law because Delaware plainly has the "most significant relationship" to this litigation and to any special speech protections API might invoke within it. *Id*. Each relevant Restatement contact, along with several important policy considerations, favor applying Delaware law to this Motion. Therefore, Delaware's anti-SLAPP statute applies, and API's Motion necessarily fails because Delaware's law does not protect its conduct.

A. Delaware's and D.C.'s Anti-SLAPP Laws Conflict

There is an "actual conflict of law" between Delaware's narrow anti-SLAPP statute and D.C.'s expansive counterpart as applied to this Motion. *Bell Helicopter*, 113 A.3d at 1050. Delaware's statute only protects defendants against claims that target speech about land-use disputes. *See Agar*, 151 A.3d at 474–76; *supra* at 5–6. The State's claim does not arise from a land-use dispute, so Delaware law provides API with no special speech protections here. *See* Mot. 3 ("[I]f Delaware's law were to apply, API would not be able to invoke anti-SLAPP protection"). D.C.'s broad anti-SLAPP statute, by contrast, may cover the State's claim. *See* D.C. Code § 16-5501 (expansively defining scope of anti-SLAPP coverage). Accordingly, the law of the state with the "most significant relationship" to this litigation and API's

Motion applies. *Bell Helicopter*, 113 A.3d at 1050. For the reasons explained below, that state is Delaware.

B. Delaware Has the Most Significant Relationship to This Litigation and This Motion

Delaware law applies because Delaware has the "most significant relationship" to this litigation and any special speech protections API might invoke within it. Each relevant factor weighs in favor of applying Delaware law: both the State and API have extensive contacts with Delaware, all the alleged injuries are located in Delaware, API 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). Delaware's anti-SLAPP law provides no protection here, so API's Motion fails. *See* Mot. 2–3.

A Hawai‘i court ruling on a similar motion has reached the same conclusion. *See generally City & Cnty. of Honolulu v. Sunoco LP*, No. 1CCV-20-0000380, Dkt. 585 (Haw. First Cir. Ct. Aug. 27, 2021) ("*Honolulu*") (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* ¶ A. Specifically, several features of the litigation favored applying Hawai‘i law, including:

- The plaintiff public entities' domicile in Hawai‘i, *id*. ¶ B;
- The plaintiffs' "obviously . . . specific, enduring, and substantial attachments to Hawai‘i," *id*. ¶ C;
- The in-state location of the alleged damages, such as "harm to the shoreline, infrastructure, buildings, and economy of Hawai‘i," *id*. ¶ 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*. ¶ 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*. ¶ 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*. ¶¶ I, A—was outweighed by Hawai‘i's more significant relationship to the lawsuit and to 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. *See Bell Helicopter*, 113 A.3d at 1050. Here, as in *Honolulu*, D.C.'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 to any anti-SLAPP protections that may apply within it.

1. 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 API'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 this claim, Delaware law determines 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.").

API's robust ties to Delaware also favor applying Delaware law. API is registered to do business in Delaware, and has "spent millions of dollars on television, newspaper, radio, and internet advertisements in the Delaware market"

over the past fifteen years. Compl. ¶¶ 37(a), (c). Much of API's advertising in Delaware contained the deceptive statements and material omissions that trigger its liability under the CFA. *See, e.g.*, *id.* ¶ 201 (API disseminated "a series of Facebook advertisements, many of which have reached a substantial number of Delaware consumers, that falsely paint the fossil fuel industry as a leader on climate change action."). Thus, the germane and "substantial business" API has "conduct[ed]" in Delaware favors applying Delaware law to this Motion. *Travelers*, 594 A.2d at 48.

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, e.g.*, *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 D.C. 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.").

Relationship of the Parties. The relationship between the State and API is centered in Delaware. API has directed and continues to direct significant marketing campaigns toward Delaware, spending "millions of dollars on television, newspaper, radio, and internet advertisements in the Delaware market" over the past fifteen years. Compl. ¶ 37(c). The deceptive statements and material omissions communicated to Delawareans through these advertisements are the basis for the State's claim against API. *See id*. ¶ 270–72. This factor, too, favors applying Delaware law to determine the scope of any special speech protections that may apply 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 API's actionable misstatements and omissions, which deceptively induced consumers to continue purchasing fossil fuels, occurred in Delaware. Over the past fifteen years, API has "spent millions of dollars on television, newspaper, radio, and internet advertisements in the Delaware market," many of which contained the misrepresentations and material omissions that form the basis for the State's claim. Compl. ¶ 37(c). *See, e.g.*, *id*. ¶¶ 198–201 (describing API's deceptive statements

directed at Delaware through advertisements during the Super Bowl, on Facebook, and through API's website). This factor supports applying Delaware law here. *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, API insists that "the Complaint necessarily alleges that API broadcast[ed]" its deceptive speech "from D.C." Mot. 5. But the Complaint does not so allege, and, to the contrary, its allegations indicate that much of the deceptive speech for which API is liable may have originated outside of D.C. For example, API staff—along with representatives from Exxon and Chevron—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 this speech "necessarily" emanated from D.C., as opposed to the home states of Exxon or Chevron.

2. 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 (cleaned up). This interest underlies Delaware law's "presum[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 Am. Tire Ops., 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 D.C.'s anti-SLAPP statute here. Applying D.C. law would jettison the "notice pleading" standard 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.* D.C.'s statute, in contrast to Delaware's, follows the California model. *See Am. Stud. Ass'n v. Bronner*, 259 A.3d 728, 741 (D.C. 2021) (California precedent guides D.C. courts' interpretation of D.C.'s "similar" statute);

Mot. 7 n.2 (acknowledging same). Importing D.C.'s "very broad[]" statute, *Fell*, 281 A.3d at 580, would controvert Delaware legislative policy, which excludes the State's claims from anti-SLAPP scrutiny.

D.C.'s Relevant Policies. Applying D.C. law also would frustrate the District's policy goals. D.C.'s anti-SLAPP statute exempts "any claim brought by the District government" from its heightened protections. D.C. Code § 16-5505(a)(2). This exemption reflects D.C. policy against the use of its anti-SLAPP law to obstruct enforcement actions brought by public officials, which is precisely what API attempts to do. If the D.C. Attorney General had brought a claim under D.C. law analogous to the one Delaware asserts here, API could not invoke D.C.'s anti-SLAPP statute. Importing it here therefore controverts D.C. policy.[2] *See Honolulu* (Attach. A) ¶ G.

API's central choice-of-law argument is that D.C. law applies because D.C. "has the strongest interest in having its own anti-SLAPP law apply to (and protect) its own citizen's conduct in D.C." Mot. 5. *See id*. 3–5. But none of the cases it cites

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

are persuasive in guiding the Court's analysis here because they do not conduct the multi-factor analysis required under Delaware law.

Every case API cites comes from the same line of federal district court cases, most of which are located in one Illinois jurisdiction, and all of which contain little or no substantive analysis. In *Chi v. Loyola University Medical Center*, 787 F. Supp. 2d 797, 803 (N.D. Ill. 2011), for example, the court applied Illinois's anti-SLAPP law to claims against Illinois defendants solely based on its conclusory assertion that Illinois "has a strong interest in having its own anti-SLAPP law applied" to "[d]efendants [who] are citizens of Illinois." The court did not weigh Illinois's purported "strong interest" against any other state's contacts or interests in the litigation. And its only citation was to an earlier case in the same district that stated, without any citation or reasoning, that a defendant's home state had the most significant relationship to the defendant's anti-SLAPP protections. *See Global Relief v. N.Y. Times Co.*, 2002 WL 31045394, at *11 (N.D. Ill. Sept. 11, 2002). *Underground Solutions, Inc. v. Palermo*, 41 F. Supp. 3d 720, 726 (N.D. Ill. 2014), too, only cites *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 the conclusory analysis from *Chi*, *Palermo*, and *Global Relief*.

Because these courts only considered one factor—the defendant's domicile—in deciding which state's law to apply, API's 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 applies law of location of injury 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). Even if D.C. has an interest in applying its anti-SLAPP law in Delaware courts, that interest is eclipsed under the Restatement approach by the parties' and the occurrence's extensive ties to Delaware. *See* § I(B)(1), *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 rules. *Cervantes v. Bridgestone/Firestone N., Tire Co.*, 2010 WL 431788, at *4 (Del. Super. Feb. 8, 2010). Applying D.C. law here would make this action unnecessarily complicated to administer. D.C.'s anti-SLAPP statute imposes many 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. And determining whether and when API is entitled to

[3] The statute automatically stays discovery upon filing and authorizes a special motion to quash certain "discovery orders, requests, or subpoenas." *See* D.C. Code § 16-5502(c)(1), 16-5503. These mechanisms do not exist under Delaware's anti-SLAPP law.

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. 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 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) (noting that "uniformity of result would favor the application of Delaware law because of the strong ties to Delaware" of the parties and the occurrence).

II. The State's Claim Is Likely to Succeed on the Merits

Even if D.C.'s anti-SLAPP law applies, API's Motion still fails because the State's claim is "likely to succeed on the merits." D.C. Code § 16-5502(b). The Complaint supplies ample evidence from which a jury could find API liable under

the CFA, and neither the First Amendment nor the *Noerr-Pennington* doctrine bars liability for API's deceptive commercial speech.[4]

A. The State's Allegations State a Claim Under the CFA

The Complaint alleges in detail that API played a central role in organizing and executing the fossil fuel industry's efforts to mislead consumers in Delaware and elsewhere about the dangers of fossil fuels. These allegations— which are based on investigative reporting, industry documents, and Congressional testimony, among other evidence— establish API's liability under the CFA for deceptively advertising fossil fuels.

The CFA 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 statutory language must be "liberally construed" to advance the statute'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. 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 "advertisements," which are defined

[4] API incorporates the arguments made in its individual Motion to Dismiss and the Defendants' Joint Motion to Dismiss. Mot. 8. The State likewise incorporates the arguments made in its Oppositions to those Motions to demonstrate why its claim is likely to succeed on the merits.

to 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 the actions taken by its members to "reduce their carbon footprint, invest in more renewables, or lower their fossil fuel production." Compl. ¶¶ 118, 127, 199, 239; *see also id*. ¶¶ 198–201. API's deceptive advertisements had the purpose and effect of "increase[ing] consumer consumption of oil and gas to [the] financial benefit" of API's members. *Id*. ¶ 37(a). Thus, 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 argues that it cannot be liable under the CFA because it does not sell fossil fuels. Mot. 9–10. But the CFA plainly encompasses deceptive acts or omissions by "*any* person" "in connection with . . . the sale, lease, or advertisement of *any* merchandise." 6 *Del. C.* § 2513(a) (emphasis added). The Legislature knew how to limit liability only to sellers of goods, but instead it expansively drafted the CFA to cover non-merchant advertisers like API. *See, e.g.*,

6 *Del. C.* § 2508 ("No merchant shall sell . . ."); *id*. § 4011 ("A seller shall not state . . . .").

API cannot cite a single 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, 440 (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); *see also Young*, 351 A.2d at 859 (interpretation of the CFA was "consistent" with interpretations of "similar consumer fraud statutes" in other jurisdictions); *Ramson v. Layne*, 668 F. Supp. 1162, 1166–67 (N.D. Ill. 1987) (non-seller endorser of merchandise could be liable under similar Illinois statute that covered "'advertising' as well as 'sale'" of "any property").

None of the cases API cites 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. For the same reason, *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.

Therefore, 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.

B. The State's Claim Does Not Violate the First Amendment

API's deceptive commercial speech enjoys no First Amendment protection.[5] The Complaint alleges that API designed and implemented sophisticated public relations campaigns to mislead consumers about the dangers of fossil fuels, with the goal of increasing sales of fossil fuel products. *See* Compl. ¶ 37. That is commercial speech, which the State plainly may restrict because it is "false, deceptive, [and] misleading." *Zauderer v. Off. of Disciplinary Couns.*, 471 U.S. 626, 638 (1985).

[5] The State's complete refutation of API's First Amendment defense appears in Section II of its Opposition to API's individual Motion to Dismiss, which the State incorporates here.

See, e.g., *United States v. Philip Morris USA Inc*., 566 F.3d 1095, 1143–44 (D.C. Cir. 2009) (tobacco industry engaged in commercial speech when it deceived consumers and the public about the health risks of cigarettes); *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 Prods. Co.*, 227 Cal. Rptr. 3d 499, 535–36 (Cal. 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). *See also* Pl.'s Opp. to API's Mot. to Dismiss, at 8–11.

The First Amendment does not immunize API's conduct simply because API lied about environmental dangers that are grave enough to provoke widespread public concern. To the contrary, 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 v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 67–68

(1983). *See also Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y.*, 447 U.S. 557, 563 n.5 (1980) (declining to extend "full First Amendment protection to all promotional advertising that includes claims relating to . . . questions frequently discussed and debated by our political leaders" because "many, if not most, products may be tied to public concerns with the environment [or] energy"). API's "false, deceptive, [and] misleading" commercial speech receives no First Amendment protection. *Zauderer*, 471 U.S. at 638.

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

The *Noerr-Pennington* doctrine does not bar the State's claim because the Complaint targets API's deceptive commercial conduct, not its petitioning activity.[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). 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).

[6] The State's complete refutation of API's *Noerr-Pennington* defense appears in Section III of its Opposition to API's individual Motion to Dismiss, which the State incorporates here.

That describes the State's lawsuit. API's liability rests on its deceptive marketing of fossil fuels to consumers. *See* Compl. ¶¶ 37(b), (d); § II.A, *supra*. Those activities "are in essence commercial activities," so *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 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).

In any case, further factual development regarding API's motives and strategies is necessary before determining that any—let alone all—of API's conduct was genuine petitioning activity meriting *Noerr-Pennington* immunity. *See Honolulu* (Attach. A) ¶ L; *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, API's Motion should be denied.

Respectfully submitted,

DELAWARE DEPARTMENT OF JUSTICE

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