IN THE SUPERIOR COURT FOR THE STATE OF DELAWARE

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

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

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Introduction

The State is suing API for its public statements not carrying the State's approved messaging on global climate change, one of the most important issues of our time. The State seeks to punish API for speech it wants to silence, and not surprisingly, its lawsuit runs square into the First Amendment. Many jurisdictions, including the District of Columbia (home to API), have adopted anti-SLAPP statutes that prohibit lawsuits like this that attack free speech. Delaware, however, has a narrow anti-SLAPP statute that does not apply to the State's claim.

So this Motion requires a choice-of-law analysis under the Restatement (Second) of Conflicts. The State seeks to avoid D.C. law by focusing on a host of factors that would be relevant to deciding which consumer fraud act applies to the underlying claims—a question on which there is no dispute. The real question is which state's anti-SLAPP law applies. Under the Restatement, the dispositive factors are the domicile of the speaker and the location of the speech. Because API is domiciled in D.C. and there are no allegations that API's speech emanated from anywhere else, the D.C. anti-SLAPP statute applies. And because the State has failed to show a likelihood of success on the merits of its DCFA claim against API, the Court should grant the Motion and award API its costs.

Argument

I. The District of Columbia Has The Most Significant Relationship To This Motion.

The State's choice of law analysis errs on two critical concepts: (1) Delaware courts apply the principle of depecage to questions regarding choice-of-law-issues—i.e., Delaware courts will apply different states' laws to different aspects of the case, and (2) the choice-of-law analysis for anti-SLAPP focuses on the speaker's domicile and the location of the speech.

A. Delaware Courts Apply the "Depecage" Doctrine That Requires Application of D.C.'s anti-SLAPP Statute to this Motion.

"Delaware courts recognize, under the concept of depecage, that a court need not use a single jurisdiction's law to adjudicate all issues in a case." *Certain Underwriters at Lloyd's v. Nat'l Installment Ins. Servs., Inc.*, 2007 WL 4554453, at *15 (Del. Ch. Dec. 21, 2007). "Depecage is the process of deciding choice of law on an issue by issue basis, with the result that the law of one state may be determined to apply to one issue and the law of a different state to another issue in the same case." *Pittman v. Maldania, Inc.*, 2001 WL 1221704, at *3 (Del. Super. Ct. July 31, 2001).

Under depecage, the choice-of-law test for a defendant's anti-SLAPP immunity differs from the choice-of-law inquiry for the plaintiff's cause of action. *See, e.g.*, *Intercon Sols. v. Basel Action Network*, 969 F. Supp. 2d 1026, 1035 (N.D.

Ill. 2013), *aff'd*, 791 F.3d 729 (7th Cir. 2015) ("[P]laintiff's defamation claims and defendant's anti-SLAPP defenses need not be governed by the same state's laws."). And while the choice-of-law analysis for the underlying cause of action might focus on a host of other factors, the primary—and most important—consideration in the anti-SLAPP context is the defendant's domicile and location of the speech. "In determining which law to apply to defenses raised pursuant to anti-SLAPP statutes, courts have found the place where the allegedly *tortious speech took place* and *the domicile of the speaker* central to the choice-of-law analysis." *Id.* at 1035 (emphases added).

The Second Restatement supports this line of cases, explaining that "the local law of the state where the *parties are domiciled*, rather than the local law of the state of conduct and injury, may be applied to determine *whether one party is immune* from tort liability to the other." Restatement (Second) of Conflict of Laws § 145 cmt. D (1971) (emphases added). This rule reflects "a recognition that the purpose of an anti-SLAPP law is to encourage the exercise of free speech and that states have a strong interest in having their own anti-SLAPP law applied to the speech of their own citizens, at least when that speech is initiated within the state's borders." *Intercon Sols.*, 969 F. Supp. 2d at 1035. While the place of the alleged injury may be significant in determining which state's underlying tort law applies, "in the anti-SLAPP context this factor is less important." *Chi v. Loyola Univ. Med. Ctr.*, 787 F.

Supp. 2d 797, 803 (N.D. Ill. 2011); *see also Diamond Ranch Academy, Inc. v. Filer*, 117 F. Supp. 3d 1313, 1322 (D. Utah 2015) ("To apply the [choice-of-law] test to the [underlying tort] claims would disregard the immediate controversy before the court, that is, whether [the defendant] is entitled to the protection of an anti-SLAPP statute.").

Because Delaware courts follow depecage, the State errs in mucking through each factor relevant to the choice of law for the underlying claims. *Certain Underwriters at Lloyd's*, 2007 WL 4554453, at *15. The proper analysis focuses on the factors for anti-SLAPP choice of law. As the next section shows, that analysis hinges on the defendant's domicile and the forum where the speech originated—*not* the full gamut of Section 145 and Section 6 factors.

B. D.C.'s anti-SLAPP Law Applies to this Motion, Because API Is Domiciled in D.C. and Its Speech Emanated from D.C.

The parties agree that Delaware uses the Restatement (Second) of Conflicts to analyze choice of law issues. The Restatement provides four factors to consider in conducting a choice-of-law analysis in tort cases: "(1) 'where the injury occurred,' (2) 'where the conduct causing the injury occurred,' (3) the parties' 'domicil[e], residence, nationality, place of incorporation and place of business,' and (4) where the parties' relationship is centered." *Tumlinson v. Advanced Micro Devices, Inc.*, 106 A.3d 983, 987 (Del. 2013) (quoting Restatement (Second) of Conflict of Laws § 145(2)) (the "Section 145 factors"). The Restatement further provides that

"issue[s] in tort are determined by the local law of the state which, *with respect to that issue*, has the most significant relationship to the occurrence and the parties under the principles stated in § 6." Restatement (Second) of Conflict of Laws § 145(1) (emphasis added). The Section 6 factors include "(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." *Id.* § 6(2).

The Delaware Supreme Court has cautioned, however, that "the Restatement test does not authorize a court to simply add up the interests on both sides of the equation and automatically apply the law of the jurisdiction meeting the highest number of contacts listed in Sections 145 and 6." *Travelers Indem. Co. v. Lake*, 594 A.2d 38, 48 n.6 (Del. 1991). Rather, "[s]ection 145 has a qualitative aspect. It clearly states that the 'contacts are to be evaluated according to their relative importance *with respect to the particular issue*.'" *Id.* (quoting Restatement (Second) of Conflict of Laws § 145 (emphasis added)).

For this Motion, that particular issue is which anti-SLAPP statute should apply. And the key factors to decide this issue are the domicile of the speaker and

the location of the speech, both of which overwhelmingly favor the application of the D.C. anti-SLAPP statute to this Motion.

1. In the anti-SLAPP context, the Restatement Section 145 factors focus on the domicile of the defendant and location of the speech.

As explained above, the determinative Restatement factors for an anti-SLAPP choice of law analysis are the domicile of the speaker and the location of the speech. Here, the Complaint alleges that API "is a nonprofit corporation based in the District of Columbia[.]" Compl. ¶ 37(a). A defendant's home state has the strongest interest in ensuring that its anti-SLAPP protections are available to citizens, whenever—and wherever—they might be sued for speech-related conduct. *See Diamond Ranch*, 117 F. Supp. 3d at 1323; *Intercon Sols.*, 969 F. Supp. 2d at 1035.

The State seeks to discredit the leading authority supporting this view, insinuating that only a handful of Illinois federal courts have grappled with the issue. Opp. 18. Not so. Many other courts—applying choice-of-law principles from other states that also follow the Restatement factors—have reached the same conclusion in the anti-SLAPP context. Those courts thus apply the anti-SLAPP statute of the speaker's domicile to a lawsuit in a different forum. *See, e.g.*, *Diamond Ranch*, 117 F. Supp. 3d at 1322-23 (explaining that Utah law governed the underlying tort cause of action against California-based defendant but that the defendant's California "place of residence" controlled choice of law analysis for anti-SLAPP issue and that

the "the place where the injury occurred" had "little, if any, relevance."); *see also, e.g.*, *Sarver v. Chartier*, 813 F.3d 891, 898 (9th Cir. 2016) (applying New Jersey choice-of-law principles and determining that California anti-SLAPP law was available to defendants because "all of the corporate defendants other than Playboy Enterprises are incorporated and alleged to be conducting business in California"); *O'Gara v. Binkley*, 384 F. Supp. 3d 674, 681–82 (N.D. Tex. 2019) (applying Texas choice-of-law principles to determine that Texas anti-SLAPP statute was available to defendant, even though parties agreed that California law applied to underlying cause of action); *Woods Servs., Inc. v. Disability Advocs., Inc.*, 342 F. Supp. 3d 592, 608 (E.D. Pa. 2018) (Pennsylvania federal court applying Pennsylvania's choice-of-law principles to determinate that "New York ha[d] the stronger interest in applying its Anti-SLAPP law" in case involving New York-based defendant). So there is ample authority for giving the speaker's domicile primary weight.

The other principal factor—the place where the alleged conduct occurred—also supports applying the D.C. anti-SLAPP statute. The State's claim against API arises from API's alleged publication of certain statements on television, radio, print, and on the Internet. Compl. ¶¶ 198-201. The Opposition asserts that this speech "occurred in Delaware[,]" Opp. 14, but the Complaint offers no facts to support that assertion, nor does it state where API made the speech. In an anti-SLAPP choice-of-law analysis, courts presume that the speech at issue originated from the

defendant's home state, unless specified otherwise. *See, e.g.*, *Diamond Ranch*, 117 F. Supp. 3d at 1323 (applying California anti-SLAPP statute to defamation lawsuit in Utah "because [the defendant] is a resident of California, [and] it is logical to conclude that the website [with the statements at issue] was created in California and that at least a portion of the statements on the website were posted in California"); *Underground Sols., Inc. v. Palermo*, 41 F. Supp. 3d 720, 724 (N.D. Ill. 2014) (applying Tennessee anti-SLAPP statute to tort action in Illinois, where the plaintiff's "complaint and brief in response to [the defendant's] motion do not provide specifics about [the defendant's] web posting locations or servers. But [the plaintiff's] complaint is fairly construed to allege that at least some of [the defendant's] alleged defamatory activities occurred in Tennessee."). Here, without allegations to the contrary, the Court should likewise presume that the alleged speech originated in D.C., API's home state.

The State tries to avoid this presumption by suggesting that API's alleged speech is a product of its conversations "with representatives from Exxon and Chevron" and that, therefore, "[t]here is no reason to assume this speech 'necessarily' emanated from D.C., as opposed to the home states of Exxon or Chevron." Opp. 15 (citing Compl. ¶ 123). But this is a red herring. The allegation in Paragraph 123 of the Complaint has nothing to do with the State's "greenwashing"

DCFA claim, the only claim alleged against API.[1] Moreover, even if this allegation was somehow relevant, it would further support API's argument that its speech *did not originate in Delaware*.[2]

The remaining Section 145 factors have minimal importance to the choice of law analysis with respect to which state's anti-SLAPP statute should apply. *See, e.g.*, *Diamond Ranch*, 117 F. Supp. 3d at 1323 (noting that "the place where the injury occurred, and the relationship of the parties[] ha[s] little, if any, relevance" in the anti-SLAPP context).

2. The Section 6 Restatement factors also require application of D.C. law to this Motion.

The policy considerations embodied in Section 6 also support the conclusion that D.C.—as the central locus for API's alleged speech—indisputably "has a strong interest in having its own anti-SLAPP legislation applied to speech originating within its borders and made by its citizens." *Intercon Sols.*, 969 F. Supp. 2d at 1035. The Second Restatement "cautions courts not to ignore competing laws of sister states when deciding which state has the most significant relationship to a case." *KT4 Partners LLC v. Palantir Techs. Inc.*, 2021 WL 2823567, at *19 & n.246 (Del.

[1] *See* Joint Mot. to Dismiss at 58-59 (explaining the State's two distinct DCFA claims: (1) alleged deception with respect to harms of fossil fuels, and (2) the supposed "greenwashing" disinformation campaign).

[2] The State alleges both Chevron entities are domiciled in California and both Exxon entities are domiciled in Texas. *See* Compl. ¶¶ 22(a), 22(e), 24(a), 24(b).

Super. Ct. June 24, 2021). Thus, even though the Delaware Legislature has chosen to provide only narrow anti-SLAPP protections to speakers domiciled in Delaware, the State must still afford respect to other jurisdictions' interests in protecting speakers domiciled within *their borders*. While Delaware might have an interest in limiting the scope of its own anti-SLAPP statute to speakers domiciled in Delaware, Opp. 15, it has no interest in depriving D.C. speakers of their D.C. anti-SLAPP protections.

The State argues that application of the D.C. anti-SLAPP statute "would jettison the notice pleading standard Delaware law applies to claims like the State's." Opp. 16 (internal quotations and citations omitted). But even under Delaware's liberal pleading standards, the State fails to state a claim against API (*see infra* 12-15), and the application of D.C.'s anti-SLAPP law to this Motion would not change that.

This same rationale also refutes the State's suggestion that application of the D.C. anti-SLAPP statute "would frustrate the District's policy goals" because, as the State contends, "D.C.'s anti-SLAPP statute exempts 'any claim brought by the District government' from its heightened protections." Opp. 17 & n.2 (quoting D.C. Code § 16-5505(a)(2)). But in carving out this exemption, the D.C. City Council made a policy decision regarding *its own government's* ability to bring certain lawsuits implicating speech. The exemption for the D.C. government makes sense

because it has a natural incentive not to unduly burden the rights of its own citizens, whereas other governments do not. And there is nothing in the text of the statute suggesting that other sovereigns can stand in the shoes of the D.C. government and claim the same exemption.

The State next suggests that the "uniformity of result" factor weighs against the application of D.C. law to this Motion because applying each Defendant's home anti-SLAPP law would lead to a "quagmire" and potentially inconsistent outcomes. Opp. 20. But the State is the master of its own case, and API should not have to waive the protections of its home anti-SLAPP statute simply because the State *chose* to add multiple defendants from other states with different anti-SLAPP laws. Furthermore, only two Defendants filed anti-SLAPP motions, and the anti-SLAPP issues in each of these motions overlaps significantly. There should not be a quagmire of different results.

The "ease of determination" factor favors neither the Delaware statute nor the D.C. statute, as the Court's analysis is the same under both. The State contends, however, that this Court's application of the D.C. anti-SLAPP statute would require the Court to "depart from the procedural rules that govern all other motions to dismiss before the Court." Opp. 19. Not so. The Court does not have to look beyond the four corners of the Complaint in order to dismiss it, which is the same standard for dismissal under both Delaware and D.C. law. Again, for purposes of both

motions, API accepts *as true* all of the State's allegations, and contends that, as a matter of law, the State fails to state a claim and therefore as a matter of law is not "likely to succeed on the merits."

And ultimately, because nothing in the case ties this suit to Delaware other than the fact that the State chose to sue API in its home court, "the protection of justified expectations" of District of Columbia speakers, and the interest in ensuring that their speech is protected with "certainty [and] predictability" point to application of D.C. anti-SLAPP to this Motion rather than the anti-SLAPP law of the state where the State simply decided to bring suit. Restatement (Second) of Conflict of Laws §§ 6(2)(d) and (f).

Based on those factors, Delaware's choice-of-law principles dictate that this Court should apply the D.C. anti-SLAPP statute with regard to the State's claim against API.

II. The D.C. anti-SLAPP Statute Requires Dismissal of the State's DCFA Claim Against API Because the Claim Arises From "An Act in Furtherance of the Right of Advocacy on Issues of Public Interest," and the State Is Not "Likely to Succeed on the Merits."

Under the D.C. anti-SLAPP statute, the speech targeted by the State is an "act in furtherance of the right of advocacy" because it "communicat[es] views to members of the public in connection with an issue of public interest," relating to their "environmental," "economic," or "community well-being." D.C. Code § 16-5501. Once API makes a *prima facie* showing that the claim at issue arises from an

act in furtherance of the right of advocacy on issues of public interest, then a motion to dismiss must be granted unless "the [State] demonstrates that the claim is likely to succeed on the merits, in which case the motion shall be denied."[3] D.C. Code § 16-5502(b); *see Competitive Enter. Inst. v. Mann*, 150 A.3d 1213, 1227 (D.C. 2016) ("Once th[e] prima facie showing is made, the burden shifts to the nonmoving party, usually the plaintiff, who must 'demonstrate that the claim is likely to succeed on the merits.'") (quoting D.C. Code § 16-5502(b) (footnote omitted)).

The State does not contest that API has satisfied its initial burden; indeed, absent from the State's Opposition is any discussion at all regarding the first step of the anti-SLAPP analysis. Instead, the State argues that it can avoid dismissal under the D.C. anti-SLAPP statute because it has sufficiently alleged a claim against API under the DCFA. *See* Opp. 20-21. But as the API and Joint Motions lay out in great detail, the State lacks a viable DCFA claim against API. As explained in Defendants' Joint Motion briefing:

- The State's claim is preempted by federal law because state law cannot constitutionally apply to an interstate dispute concerning global climate change. *See* Defs. Joint Mot. Dismiss at 12-31; Defs. Joint Reply at 16-21.

- The State's claim also fails because it raises nonjusticiable political questions. *See* Defs. Joint Mot. Dismiss at 31-39; Defs. Joint Reply at 22-25.

[3] For purposes of this Motion, API does not address the sufficiency of the State's evidence to show a likelihood of success on the merits. Rather, dismissal is required because the State's claim fails as a matter of law even assuming the truth of the allegations.

- The State's claim fails because it is untimely. *See* Defs. Joint Mot. Dismiss at 58-64; Defs. Joint Reply at 39-41.

- The State fails to allege with particularity that any Defendants made deceptive statements. *See* Defs. Joint Mot. Dismiss at 64-67; Defs. Joint Reply at 42-45.

And API's Motion to Dismiss briefing explains:

- The State's application of the DCFA to API fails as a matter of pleading because it only covers alleged misrepresentations made "*in connection with* the sale, lease, receipt, or advertisement of any merchandise[,]" and API does not sell goods. 6 Del. C. § 2513 (emphasis added). *See* API's Mot. to Dismiss at 3-5; API's Reply at 2-5.

- Even if the DCFA covered API's alleged conduct, the doctrine of constitutional avoidance requires that the Court construe the DCFA narrowly so as not to impose a chilling effect on policy-based speech. *See* API's Reply at 5; *see also Cheng v. Neumann*, 2022 WL 326785, at *2 (D. Me. Feb. 3, 2022) (explaining that anti-SLAPP laws provide "enhanced protection [in the] form of a motion to dismiss in which the record and the party's respective burdens are augmented to allow the court to determine, *at the inception of the litigation*, whether a given tort claim is designed to chill the defendant's exercise of free speech rights.") (emphasis added), *aff'd*, 51 F.4th 438 (1st Cir. 2022).

- The State's application of the DCFA to API's alleged policy-based publicity campaigns violates the First Amendment, because that speech does not propose a commercial transaction nor does it reference specific products, rendering the alleged speech at issue fully protected. *See* API's Mot. to Dismiss at 8-11; API's Reply at 6-9.

- The State's use of the DCFA to enforce a content-based restriction on API's speech also violates the First Amendment, because the State is attempting to regulate alleged speech that has a tenuous relationship to the State's assumed interest in preventing consumer deception, and the State does not tailor its claim to specific products that were deceptively marketed. *See* API's Mot. to Dismiss at 12-14; API's Reply at 9-11.

- Even if API's speech is otherwise unprotected, *Noerr-Pennington* would still protect API's alleged speech because it is effectively the same as API's core petitioning activities. *See* API's Mot. to Dismiss at 16-18; API's Reply at 13.

For these reasons, the State's claim against API fails as a matter of law, and the Complaint must be dismissed with prejudice under both Delaware Superior Court Rule 12(b)(6) and the D.C. anti-SLAPP statute. *See* D.C. Code § 16-5502(b). And because the State's speech-based claim against API fails as a matter of law, API should receive attorney's fees given the costly and time-consuming effort API has incurred in preparing both this Motion and its Motion to Dismiss, along with the reply briefs in support thereof. *See* D.C. Code § 16-5504(a) (explaining that the "court may award a moving party who prevails, in whole or in part, on a motion brought under § 16-5502 or § 16-5503 the costs of litigation, including reasonable attorney fees").

Conclusion

For these reasons, and those stated in API's Merits Motion to Dismiss and Reply brief, the Court should grant API's Motion to Strike And/Or Dismiss the Complaint Under the District of Columbia's Anti-SLAPP Statute, and award API the attorney's fees incurred in defending against this litigation.

Dated: August 17, 2023

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Kevin J. Mangan, here by certify that on this 17th day of August, 2023, I caused a true and correct copy of **DEFENDANT AMERICAN PETROLEUM INSTITUTE'S REPLY IN SUPPORT OF ITS MOTION TO STRIKE AND/OR DISMISS THE COMPLAINT UNDER THE DISTRICT OF COLUMBIA'S ANTI-SLAPP STATUTE** to be served upon the following counsel of record via File & Serve*Xpress*:

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