MAYOR AND CITY COUNCIL OF BALTIMORE Plaintiff, v. BP P.L.C., *et al.* Defendants.	*	IN THE CIRCUIT COURT FOR BALTIMORE CITY Case No. 24-C-18-004219 Specially Assigned to the Hon. Videtta A. Brown

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PLAINTIFF MAYOR AND CITY COUNCIL OF BALTIMORE MEMORANDUM OF LAW IN OPPOSITION TO CHEVRON DEFENDANTS' MOTION TO DISMISS UNDER MARYLAND'S ANTI-SLAPP LAW

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

I. INTRODUCTION

The Mayor and City Council of Baltimore (the "City") sued Chevron Corporation and Chevron U.S.A. Inc. (collectively, "Chevron") in Maryland court for deceiving consumers and the public about their products' damaging effects on the Earth's climate. Faced with internal reports warning that unabated fossil fuel consumption would cause calamitous and irreversible damage, Chevron never issued warnings commensurate with its knowledge, and instead helped wage sophisticated disinformation campaigns to prevent consumers from recognizing or acting on the looming consequences of fossil fuel use. These facts are amply supported by investigative reporting and information in the public record, as documented in the City's Complaint. Chevron's failure to warn and its tortious deception exacerbated the enormously expensive consequences of climate change for Baltimore, which now seeks to have Chevron pay for the costs of its misconduct.

Nevertheless, this Motion seeks dismissal of all claims against Chevron under Maryland's Anti-SLAPP statute, a law designed to head off "litigation launched to deter, punish, or intimidate efforts at critical public comment . . . involving the suit-bringer's interests." *MCB Woodberry Dev., LLC v. Council of Owners of Millrace Condo., Inc.*, 253 Md. App. 279, 287 (2021). *See* Md. Code Ann., Cts. & Jud. Proc. § 5-807. Chevron insists that this lawsuit is not a sincere effort to hold it accountable for misconduct, but rather was brought with an ulterior motive "to harass Chevron for protected and truthful speech." Mot. at 12. Unsurprisingly, Chevron provides no evidence to substantiate this accusation. The City did not intend—nor could it expect—to intimidate Chevron, a wealthy multinational corporation, into changing its speech by filing this lawsuit. Chevron's failure to provide *any* evidence of an improper motive independently warrants denying this Motion. *See* § IV.A.2.a, *infra*.

In any case, the Anti-SLAPP statute does not bar this lawsuit because Chevron cannot satisfy any—let alone all—of the statute's "statutory thresholds." *MCB Woodberry*, 253 Md. App. at 297. To begin with, Chevron cannot show that this lawsuit targets its "protected communications" because the Complaint challenges Chevron's deceptive commercial speech, which receives no protection under the U.S. Constitution or the Maryland Declaration of Rights. *Id.* And because the Complaint does not challenge protected speech, Chevron also cannot prove that this suit is "materially related to the protected communications," nor that it was "intended to inhibit or to have inhibited the making of those protected communications." *Id.* Next, even if Chevron could satisfy those three elements, its Motion still must be denied because this suit is not "brought in bad faith." *Id.* The City's sincere pursuit of its well-pleaded and meritorious claims is worlds apart from the sort of conduct that constitutes bad faith under Maryland law. And Chevron's attempt to inflate its contention that the Complaint fails to state a claim into proof of bad faith is unsupported by any Maryland authority. Finally, even if Chevron could prove all of the above requirements, the Court *still* should deny this Motion because Chevron acted with "constitutional malice" by knowingly concealing and misrepresenting the climate dangers of fossil fuels to consumers and the public. *Id.* This lawsuit is not a SLAPP suit, so the Anti-SLAPP statute does not bar it.

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

For these reasons, the Court should deny this Motion.

II. BACKGROUND

A. Statement of Facts

Chevron has knowingly deceived consumers and the public about the dangers of fossil fuel use for decades. Chevon and its co-Defendants have known for more than sixty years that fossil fuels, when used as intended, create greenhouse gas pollution that warms the oceans and atmosphere, alters climate patterns, increases storm frequency and intensity, and causes sea levels to rise. *See* Compl. ¶¶ 1–6, 103–40. Chevron was well-informed about these dangers through its employees' participation in industry research-sharing enterprises like the American Petroleum Institute's ("API") "Climate and Energy Task Force," *id.* ¶ 115, and was repeatedly warned—by both industry scientists and independent experts—of dire consequences for the planet should fossil fuel use continued unabated, *see id.* ¶¶ 107–108, 111, 116, 120, 126, 129. Defendants—and Chevron in particular—took this information seriously: they began evaluating the impacts of climate change on their fossil fuel infrastructure, investing to protect assets from rising seas and deadlier storms, and patenting technologies that would allow them to profit in a warmer world. *See id.* ¶¶ 171–176.

Despite their knowledge, Chevron and its co-Defendants never issued adequate warnings about these dangers, *see id.* ¶ 142, and instead launched a sophisticated disinformation offensive designed to prevent consumers and the public from recognizing or acting on the looming consequences of fossil fuel use, *see id.* ¶¶ 141–170. By casting doubt on the reality of climate change and the role of fossil fuels in causing it, Chevron and its co Defendants sought to "influence consumers to continue using Defendants' fossil fuel products irrespective of those products' damage to communities and the environment." *Id.* ¶ 147. For example, in 1991 the Information Council for the Environment ("ICE"), formed in part by the Chevron predecessor Pittsburg and Midway Coal Mining company (*see id.* ¶ 31(f)), launched a national climate change science denial

campaign. The campaign, conducted through full-page newspaper ads, radio commercials, and a speaking tour, was intended to "reposition global warming as theory (not fact)." *Id.* ¶ 150. Commercials placed during the campaign told listeners: "Stop panicking! I'm here to tell you that the facts simply don't jibe with the theory that catastrophic global warming is taking place." *Id.* ¶¶ 150–152 & n.171. ICE newspaper advertisements similarly compared global warming to "Chicken Little's hysteria about the sky falling," asserting that "evidence the Earth is warming is weak," and "[p]roof that carbon dioxide has been the primary cause is non-existent." *Id.* ¶ 152 & n.173.

To ensure the public internalized this false message, Defendants flooded the nation with deceptive newspaper ads, radio commercials, and mailers; bankrolled fringe scientists whose views contradicted Defendants' own research; and funded front groups and think tanks that discredited the science of climate change from putatively independent perches. *See id.* ¶¶ 146–170. Chevron representatives served in leadership roles in the industry organizations that conceived and organized these deception campaigns. For instance, its employees served on the "Global Climate Science Team," which was convened by API and sought to sow doubt and confusion about climate change in order to further Fossil Fuel Defendants' business interests. *Id.* ¶ 165. Chevron's representatives on the Team worked alongside "The Advancement of Sound Science Coalition," a "front group created by the tobacco industry . . . to sow uncertainty about the fact that cigarette smoke is carcinogenic," and now repurposed to sow doubt about climate science on behalf of the fossil fuel industry. *Id.*

The industry memorialized the aims of its disinformation offensive in API's "Global Climate Science Communications Plan," which Chevron staff helped write. *Id.* ¶ 158 & n.179. "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.* ¶ 158. To that end, the plan launched a "multi-million-dollar, multi-year" budget that included "public outreach and the dissemination of educational materials to schools." *Id.* To this day, Chevron continues its deception by failing to "[make] reasonable warnings to consumers, the public, and regulators of the dangers known . . . of the unabated consumption of [its] fossil fuel products" and by "tout[ing] 'profitable renewable energy' as part of its business plan for several years" despite "roll[ing] back its renewable and alternative energy projects." *Id.* ¶¶ 142, 184. These 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 to the City. *Id.* ¶ 6.

Baltimore now bears the enormous costs of Chevron's illegal conduct. *See id.* ¶¶ 195–215. The City will need to spend huge amounts of taxpayer money to protect its residents, infrastructure, and natural resources from local harms caused by Defendants' deceptive promotion of fossil fuels. *See id.* ¶¶ 12, 199–201. Accordingly, the City filed this lawsuit "to ensure that the parties who have profited from externalizing the responsibility for . . . [the] consequences of" climate change "bear the costs of those impacts on the City, rather than [the City], local taxpayers, residents, or broader segments of the public." *Id.* ¶ 12.

B. Maryland's Anti-SLAPP Statute

Strategic lawsuits against public participation, or "SLAPP suits," are "'lawsuits brought for the improper purpose of harassing individuals who are exercising their protected right to freedom of speech.'" *MCB Woodberry*, 253 Md. App. at 296 (quoting *Fairfax v. CBS Corp.*, 2 F.4th 286, 296 (4th Cir. 2021)). "SLAPP suits are by definition meritless suits," *id.*, which are "filed not because [the plaintiff] thinks he can win, but to intimidate or punish someone else." Nicole J. Ligon, *Solving SLAPP Slop*, 57 U. Rich. L. Rev. 459, 466 (2023). "This "dishonest

motivation" to coerce defendants into changing their behavior is the essential feature of SLAPP suits, which is why "[t]he quintessential SLAPP is directed at individual citizens of modest means for speaking publicly against development projects." *MCB Woodberry*, 253 Md. App. at 307, 296 (cleaned up).

Indeed, the Fiscal and Policy Note to Senate Bill 464, which established the Anti-SLAPP law, justifies the statute as necessary to protect the comparatively under-resourced targets of SLAPP suits. "Plaintiffs in these lawsuits, who typically have far greater resources than defendants," usually seek "not to win the case, but rather to cause the defendants to devote such significant resources to defending it that they are unable to continue the challenged activities." Dep't Legis. Servs., Fiscal and Policy Note, S.B. 464, Reg. Sess., at 2 (2004) (**Exhibit A**). Accordingly, the General Assembly enacted the Anti-SLAPP statute to "protect individuals and groups, many with few assets, from defending costly legal challenges to their lawful exercise of [] constitutionally protected rights" such as "writing letters to the editor, circulating petitions, organizing and conducting peaceful protests, reporting unlawful activities, speaking at public meetings, and similar actions." *Id.*

III. LEGAL STANDARDS

The Anti-SLAPP statute defines a lawsuit as a SLAPP suit if it meets all four "statutory thresholds." *MCB Woodberry*, 253 Md. App. at 297. The defendant must prove that the lawsuit is "1) brought in bad faith, 2) brought against a party that has made protected communications to a government body or the public on a matter within the authority of government body or on an issue of public concern, 3) materially related to the protected communications, and 4) intended to inhibit or to have inhibited the making of those protected communications." *Id.* (emphasis removed). *See* Md. Code Ann., Cts. & Jud. Proc. § 5-807(b). Even if a lawsuit meets each of these criteria, a

defendant is only immune from civil liability if it "lack[ed] constitutional malice in making the communications at issue." *MCB Woodberry*, 253 Md. App. at 312. *See* Md. Code Ann., Cts. & Jud. Proc. § 5-807(c). In assessing whether the defendant has proven these requirements, the court "must assume the truth of well-pleaded factual allegations made in the complaint and draw all reasonable inferences from those allegations in favor of the plaintiff." *MCB Woodberry*, 253 Md. App. at 296.

Likewise, in reviewing a motion to dismiss for failure to state a claim, the court "must assume the truth of all relevant and material facts that are well pleaded and all inferences which can reasonably be drawn from those pleadings." *Wheeling v. Selene Fin. LP*, 473 Md. 356, 374 (2021) (quotation omitted). The court must view the well-pleaded facts and allegations "in a light most favorable to the non-moving party." *Wireless One, Inc. v. Mayor & City Council of Baltimore*, 465 Md. 588, 604 (2019) (quotation omitted). "Dismissal is proper only if the alleged facts and permissible inferences, so viewed, would, if proven, nonetheless fail to afford relief to the plaintiff." *Ruffin Hotel Corp. of Md. v. Gasper*, 418 Md. 594, 614 (Md. 2011) (cleaned up).

IV. ARGUMENT

The Court should deny this Motion because neither Maryland's Anti-SLAPP statute nor the *Noerr-Pennington* doctrine bars the City's claims against Chevron. Chevron cannot prove *any*—let alone all—of the Anti-SLAPP law's requirements, and *Noerr-Pennington* does not apply because the Complaint targets Chevron's commercial activities, not its petitioning conduct.

A. The Anti-SLAPP Statute Does Not Apply to This Lawsuit.

Maryland's Anti-SLAPP law does not bar the City's claims because Chevron cannot satisfy any of the statute's elements. First, Chevron cannot show that it made "protected communications," as required to satisfy three elements of the statute, because the Complaint

challenges Chevron's deceptive commercial speech, which receives no protection under the First Amendment or Article 40 of the Maryland Declaration of Rights. *MCB Woodberry*, 253 Md. App. at 297. Second, Chevron cannot prove—and has not seriously tried to prove—that this lawsuit is brought in bad faith or with intent to inhibit its rights. Chevron provides *no* evidence of the City's purported improper motive, and the Court cannot find that this lawsuit is a SLAPP suit solely based on Chevron's unsupported accusation. To the contrary, this lawsuit is brought in *good* faith because the City is sincerely pursuing its well-pleaded and meritorious claims, and because none of its conduct remotely resembles bad faith under Maryland law. Third, even if Chevron could satisfy the four threshold elements, the Court still must deny this Motion because Chevron acted with "constitutional malice" by knowingly concealing and misrepresenting the climate dangers of fossil fuels. *Id.*

1. Chevron's Conduct Is Not Protected by the First Amendment.

Chevron cannot satisfy the first three elements of the Anti-SLAPP statute because its deceptive marketing of fossil fuels is not protected by the U.S. Constitution or the Maryland Declaration of Rights.[1] Chevron's conduct—"cast[ing] doubt on the science connecting global climate change to fossil fuel products and greenhouse gas emissions" in order to "influence consumers to continue using [its] fossil fuel products irrespective of those products' damage to communities and the environment," Compl. ¶ 147—constitutes commercial speech under the First Amendment. Commercial speech has long received "less protection" than other forms of expression, meaning "false, deceptive, or misleading" commercial speech like Chevron's plainly may be restricted without offending the Constitution. *Bolger v. Youngs Drug Prods. Corp.*, 463

[1] The Maryland Declaration of Rights confers the same speech rights as the First Amendment. *See Jakanna Woodworks, Inc. v. Montgomery Cnty.*, 344 Md. 584, 595 (1997).

U.S. 60, 64, 69 (1983). *See also Zauderer v. Off. of Disciplinary Couns. of Supreme Ct. of Ohio*, 471 U.S. 626, 638 (1985) (States "are free to prevent the dissemination of commercial speech that is false, deceptive, or misleading."); *Luskin's Inc. v. Consumer Prot. Div.*, 338 Md. 188, 198 (1995) (recognizing the same). Because Chevron's deceptive commercial speech receives no constitutional protection, Chevron cannot establish that it "made protected communications to . . . the public," that the City's claims are "materially related to the protected communications," or that this suit is "intended to inhibit or to have inhibited the making of those protected communications." *MCB Woodberry*, 253 Md. App. at 297 (listing "statutory thresholds" for invoking Anti-SLAPP statute). Accordingly, the Motion fails on those grounds.

Chevron's challenged conduct is unprotected commercial speech. Courts consistently have held that the First Amendment does not protect sophisticated campaigns to mislead consumers about the dangers of a product.[2] 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 knowingly 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 USA Inc.*, 566 F.3d 1095, 1144 (D.C. Cir. 2009) ("*Philip Morris III*"). The same is true of Chevron's climate disinformation campaigns, which deployed the same

[2] *See, e.g., 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); *Kasky v. Nike, Inc.*, 27 Cal. 4th 939, 960 (Cal. 2002) (Nike's allegedly false and misleading statements about labor conditions in its overseas factories were unprotected as deceptive commercial speech); *People v. ConAgra Grocery Prod. Co.*, 227 Cal. Rptr. 3d 499, 536 (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).

marketing tactics—through some of the same individuals and groups—to knowingly mislead consumers about the climate dangers of fossil fuels, including by:

- Presenting settled climate science as "uncertain[]," *compare* Compl. ¶ 165, *with Philip Morris III*, 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. ¶ 191, *with Philip Morris III*, 566 F.3d at 1106 ("denying any adverse health effects of smoking");

- Working with front groups like "The Advancement of Sound Science Coalition"— originally created by the tobacco industry to discredit the scientific link between cigarettes and increased risks of cancer and heart disease—to "manufactur[e] climate change uncertainty," *compare* Compl. ¶ 165, *with Philip Morris III*, 566 F.3d at 1107 (creating "The Council for Tobacco Research" and "The Tobacco Institute" to disseminate "false and misleading press releases and publications"); and

- Funding scientists who published research casting doubt on the link between burning fossil fuels and climate change, *compare* Compl. ¶ 162, *with Philip Morris III*, 566 F.3d at 1107 ("fund[ing] 'special projects' to produce favorable research results").

This "false, deceptive, [and] misleading" commercial conduct is not protected by the First Amendment. *Bolger*, 463 U.S. at 69.

Resisting this conclusion, Chevron insists that its conduct was protected because its speech on "important topics like the threat of climate change and the impacts of Defendants' fossil fuel products" is "of interest to the public at large." Mot. at 11 (cleaned up). But, as the U.S. Supreme Court has explained, statements can "constitute commercial speech notwithstanding the fact that they contain discussions of important public issues." *Bolger* 463 U.S. at 67–68. This bedrock principle of First Amendment law assures the ability to restrict deceptive commercial speech because "many, if not most, products may be tied to public concerns with the environment, energy, economic policy, or individual health and safety." *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y.*, 447 U.S. 557, 563 n.5 (1980) (citation omitted) (declining to extend full First

Amendment protection to all commercial speech "relating to . . . questions frequently discussed and debated by our political leaders"). The Constitution does not protect Chevron's right to knowingly lie about the dangers of fossil fuels any more than it protects other commercial sellers' right to lie about the harmful effects of their products—even if those effects are grave enough to provoke public concern.[3] *See, e.g., United States v. Philip Morris USA Inc.*, 566 F.3d 1095, 1142–45 (D.C. Cir. 2009) ("*Philip Morris III*") (First Amendment did not protect tobacco companies' false and misleading statements "denying the adverse effects of cigarettes and nicotine in relation to health and addiction"); 9 n.2, *supra*. Nor does the Constitution immunize Chevron's refusal to adequately warn about dangers of its products of which it is aware. *See Zauderer*, 471 U.S. at 651 n.14 ("The right of a commercial speaker not to divulge accurate information regarding his services is not . . . a fundamental [First Amendment] right.").

Likewise, Chevron mischaracterizes the Complaint in order to argue that its conduct was protected. *See* Mot. at 4–6, 16–17. But Chevron's liability rests on its deceptive marketing of fossil fuels to consumers, not on political speech or petitioning activity.[4] The Complaint makes clear that Chevron is liable for failing to issue warnings commensurate with its knowledge of the climate risks of fossil fuels, *see, e.g.*, Compl. ¶¶ 237–248, and for engaging in "concerted public relations

[3] Chevron intimates that this lawsuit may "chill[]" its "fully protected expression." *See* Mot. at 3 (quoting *Counterman v. Colorado*, 143 S.Ct. 2106, 2115 (2023). But as *Counterman* itself recognizes, "the [U.S. Supreme] Court has often noted that commercial speech is less vulnerable to chill than most other speech is." 143 S.Ct. at 2116 n.4. "[T]he leeway for untruthful or misleading expression that has been allowed in other contexts 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). Because Chevron has a durable incentive to continue marketing fossil fuels, and because it is able to control the accuracy of its representations about fossil fuels, there is "little worry that regulation to assure truthfulness will discourage [Chevron's] protected speech." *Id.*

[4] The Complaint's limited references to statements that might qualify as political speech do not compel dismissal at the pleading stage. "The First Amendment [] does not prohibit the evidentiary use of speech to . . . prove motive or intent." *Wisconsin v. Mitchell*, 508 U.S. 476, 489 (1993). Even if some of Chevron's statements cannot form the basis for liability—a determination that, in any event, cannot be made without a fully developed factual record, *see* 13–14, *infra*—they nevertheless illustrate Chevron's intent to conceal and misrepresent the climate impacts of fossil fuels to increase its profits.

campaign[s] to cast doubt on the science connecting global climate change to fossil fuel products" in order to "influence consumers to continue using [its] fossil fuel products," *id.* ¶ 147. Chevron's deception campaigns were commercial activities, as they "focused on concealing, discrediting, and/or misrepresenting information that tended to support restricting consumption of (and thereby decreasing demand for) Defendants' fossil fuel products." *Id.* ¶ 146. Chevron employees helped organize and implement these campaigns to misdirect and stile public knowledge of climate in order to "accelerate their business practice of exploiting fossil fuel reserves, and concurrently externalize the social and environmental costs of their fossil fuel products." *Id.*

For example, Chevron employees served on the Global Climate Science Team, an industry creation that sought to "develop[] a strategy to spend millions of dollars manufacturing climate change uncertainty." *Id.* ¶ 165. This Team produced a multi-year, multi-million-dollar plan—co-written by a Chevron representative—to ensure that "'climate change becomes a non-issue'" by making "'average citizens 'understand' (recognize) uncertainties in climate science'" and assuring that "'recognition of uncertainties becomes part of the 'conventional wisdom.'" *Id.* ¶ 158. Another component of these efforts was to fund scientists who published research casting doubt on the link between burning fossil fuels and climate change, which "[c]reat[ed] a false sense of disagreement in the scientific community" and "had an evident impact on public opinion." *Id.* ¶ 163. In short, Chevron's failure to warn and deceptive promotion was "designed to influence consumers to continue using [its] fossil fuel products irrespective of those products' damage to communities and the environment." *Id.* ¶ 147.

Unlike the SLAPP suit in *MCB Woodberry*, therefore, the Complaint does not target "customarily protected First Amendment activities," 253 Md. App. at 310, but rather customarily *unprotected* activities. But even if the Court harbors any doubt that Chevron engaged in

unprotected commercial speech, it should permit the City's claims to proceed to discovery to develop the full factual record needed to decide 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. Liab. 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 Ctr. for Pregnancy Concerns, Inc. v. Mayor & City Council of Baltimore*, 721 F.3d 264, 285 (4th Cir. 2013) (cleaned up). Accordingly, courts 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." *Id.* at 286.

At a minimum, the Complaint advances a plausible case that Chevron is liable for engaging in unprotected commercial speech that injured the City. *See* Compl. ¶¶ 22(g), 146, 147, 158–163. Chevron 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. at 12–14. 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. Factual development is "especially important" here because many of "the relevant facts are exclusively in the control of [Chevron]," including its motives and plans. *Greater Baltimore*, 721 F.3d at 285. Without further factual development, it would be premature to conclude that

Chevron's speech was fully protected, as required to dismiss this lawsuit under the Anti-SLAPP law. Thus, the City's claims cannot be dismissed on Anti-SLAPP grounds at this early stage.

2. This Lawsuit Is Brought in Good Faith, Not to Inhibit Chevron's Rights.

Chevron cannot show—nor has it seriously tried to show—that this lawsuit is "brought in bad faith" or that it is "intended to inhibit" (or has inhibited) the exercise of Chevron's rights. *MCB Woodberry*, 253 Md. App. at 297. Because Chevron fails to carry its burden of proving these "statutory thresholds," its Motion fails on those grounds. *Id.*

a. Chevron Provides No Evidence of the City's Purported Ill Motive or Bad Faith.

From the outset, this Motion should be denied because Chevron provides *no* evidence of the City's alleged improper motive. Courts routinely deny motions to dismiss under Maryland's Anti-SLAPP statute where the defendant supplies no evidence of the plaintiff's purported bad faith or intent to inhibit the defendant's rights. Because granting an Anti-SLAPP motion requires the Court to "rule definitively" that a lawsuit "is a SLAPP suit," "bare allegations" of improper motive cannot justify dismissal at the pleading stage. *Knox v. Mayor & City Council Baltimore City*, 2017 WL 5903709, at *11 (D. Md. Nov. 30, 2017). *See, e.g.*, *id.* (denying Anti-SLAPP motion because "the Court has been provided with no evidence that Lewis's counterclaim is brought in bad faith and is intended to inhibit Knox in the exercise of her right to petition the government or to speak on a matter of public concern"); *Connolly v. Lanham*, 2023 WL 4932870, at *20 (D. Md. Aug. 2, 2023) (similar); *Ugwuonye v. Rotimi*, 2010 WL 3038099, at *4 (D. Md. July 30, 2010) (similar).

Accordingly, Chevron's failure to provide *any* evidence of the City's purported improper motive is fatal to this Motion. Chevron has not seriously tried to substantiate its accusation that this lawsuit is brought in bad faith and intended to inhibit its rights. Chevron's *only* argument hinges on its contention that the Complaint fails to state a claim, which purportedly shows that this lawsuit "is not a serious attempt to hold Chevron liable for actionable misconduct." Mot. at 14;

see id. at 12–16. But even if Chevron's arguments had merit, neither *MCB Woodberry* nor any other Maryland case the City is aware of supports a finding of bad faith (or intent to inhibit rights) solely based on purportedly deficient pleadings.[5]

In any case, Chevron's arguments that the City's case fails to state a claim are wrong. Chevron first argues that the Complaint targets its "constitutionally protected speech opposing government regulation." Mot. at 12. As explained elsewhere, Chevron's liability rests on its deceptive commercial conduct, not on petitioning activity or political speech, so neither the *Noerr-Pennington* doctrine nor the First Amendment's full protections apply. *See* § IV.A.1, *supra*; § IV.B, *infra*. Chevron also attacks the specificity of the Complaint's allegations regarding its conduct. *See* Mot. at 13. But the City amply pleads specific facts alleging Chevron's knowledge about the climate dangers of fossil fuels and its concurrent failure to warn, *see* Compl. ¶¶ 103–140, 237–247, and specific facts regarding Chevron's participation in industry efforts to deceive the public about the same, *see id.* ¶¶ 145–147, 150–152, 158 & n.179, 170. Pivoting to the law, Chevron insists that its freedom of association immunizes deceptive marketing of fossil fuels conducted through front groups. *See* Mot. at 13. This argument fails too because Chevron is not liable merely for associating with those groups, but rather for funding, coordinating, and working with them to sow deception about fossil fuels to protect its profits. *See Holder v. Humanitarian L. Project*, 561 U.S. 1, 39 (2010) (distinguishing "being a member" of a group from "giving material support" to it).

[5] In fact, because "SLAPP suits are by definition meritless suits," *MCB Woodberry*, 253 Md. App. at 296, Maryland courts have denied Anti-SLAPP motions as to *any* claim that "pleads sufficient facts to otherwise survive [a] motion to dismiss," *Connolly*, 2023 WL 4932870, at *20. *See also Knox*, 2017 WL 5903709, at *11 (pleading "a nonfrivolous claim of battery . . . [was] sufficient to warrant denial" of Anti-SLAPP motion).

Beyond these key flaws, Chevron has not even attempted to show that this lawsuit *has* inhibited its rights. That is not surprising, because as a wealthy multinational company, Chevron is highly unlikely to be deterred from speaking its preferred messages by the threat of meritless litigation. The City did not intend to, nor could it expect to, cow Chevron into changing its speech or falling silent by filing this lawsuit. Accordingly, this is not a SLAPP suit, and Chevron's Motion fails.

b. This Lawsuit Is Brought in Good Faith.

Even setting aside Chevron's failure to substantiate its accusations, this lawsuit is brought in good—not bad—faith because the City's claims against Chevron are amply supported in law and fact, and because the City is sincerely pursuing its meritorious claims.[6] The City is not acting with a "dishonest motivation" to pursue frivolous claims "for the purpose of harassment." *MCB Woodberry*, 253 Md. App. at 307. The City did not intend—nor could it expect—to intimidate Chevron into changing its behavior by filing this lawsuit. Rather, the City is litigating in good faith to "ensure that the parties who have profited from externalizing the responsibility for" the consequences of climate change "bear the costs of those impacts on [Baltimore]." Compl. ¶ 12.

"Bad faith" denotes a lawsuit that is pursued "vexatiously, for the purpose of harassment or unreasonable delay, or for other improper reasons." *MCB Woodberry*, 253 Md. App. at 307 (cleaned up). The term "emphasize[s] dishonest motivation," *id.*, which is the defining feature of SLAPP suits because SLAPP suits typically seek "not to win the case, but rather to cause the defendants to devote such significant resources to defending it that they are unable to continue the

[6] The Hawaii Supreme Court's recent decision affirming the denial of motions to dismiss in an analogous lawsuit alleging that fossil fuel companies "misled the public about fossil fuels' dangers and environmental impact" testifies to the merit of the City's lawsuit, and shows that the City similarly is pursuing its claims in good faith. *See City & Cnty. of Honolulu v. Sunoco LP*, 537 P.3d 1173 (2023) ("*Honolulu II*").

challenged activities." Fiscal and Policy Note, S.B. 464, at 2. Caselaw interpreting "bad faith" under Maryland's sanctions statute—which guides Maryland precedent defining the term under the Anti-SLAPP statute, *see MCB Woodberry*, 253 Md. App. at 307—makes clear that "only egregious behavior will support" a finding of bad faith.[7] *Needle v. White, Mindel, Clarke & Hill*, 81 Md. App. 463, 474 (1990). Because finding bad faith "requires clear evidence that the action is entirely without color or taken for other improper purposes," there is no bad faith "where the underlying action presents a colorable claim." *Id.*

The glaring differences between *MCB Woodberry* and this lawsuit illustrate why this lawsuit is not a SLAPP suit. In *MCB Woodberry*, a real estate developer seeking approval of a new construction project sued residents of nearby homes who had opposed the project in front of the planning commission by submitting letters, testifying, and filing a petition for administrative mandamus when the planning commission initially approved the project. 253 Md. App. at 288–95. Four days after the residents' petition was partially granted, the developer filed suit seeking $25 million in punitive damages and a declaratory judgment that would prohibit the residents from challenging the project. *Id.* at 293–94. Ten days later, the developer served discovery requests directing the residents to produce "all electronically stored information on personal and business devices" as well as their "personal banking records" for the past five years. *Id.* at 294.

On this record, the Court of Appeals found that the developer's suit was brought in bad faith, relying on four factors. First, "the timing of [the developer's] complaint, filed four days after a ruling arguably adverse to [the developer] . . . was suggestive of retaliation." *Id.* at 309. Because

[7] For examples of "egregious behavior" sufficient to show bad faith under the Maryland sanctions statute, *see, e.g., Optic Graphics, Inc. v. Agee*, 87 Md. App. 770, 794 (1991) (affirming finding of bad faith where party used forged confidentiality agreement and continued litigating even after it learned the agreement was falsified); *Inlet Assocs. v. Harrison Inn Inlet, Inc.*, 324 Md. 254, 271 (1991) (affirming finding of bad faith where the plaintiffs sued the defendant for abuse of process "not because [they] wished to recover tort damages from him, but to intimidate him into encouraging his clients to dismiss their legal challenges to the Inlet project").

"timing is particularly relevant . . . in the context of an alleged SLAPP suit," the court found that the complaint "was intended expressly to put a stop to [the residents'] actions." *Id.* Second, the developer's "request for $25 million in punitive damages was unsupported by any plausible allegations that the [residents] acted with an evil motive," as required to recover punitive damages under Maryland law. *Id.* (cleaned up). "Given [the developer's] failure to plead adequately punitive damages, the excessiveness of its demand [was] evidence that its true intent was intimidation." *Id.* at 310. Third, the developer's "abusive" discovery requests were "unreasonable and supported an inference of bad faith." *Id.* Fourth, many of the developer's allegations targeted "customarily protected First Amendment activities," while the remainder "were conclusory and devoid of *any* specific facts to support" liability. *Id.* (emphasis added). Taken together, these factors "demonstrated that the lawsuit was pursued vexatiously in retaliation against the [residents] for their public opposition to [the developer's] development efforts and to deter them from continuing those efforts." *Id.* at 312.

On each score, the City's lawsuit is nothing like the developer's suit. First, the timing of the City's lawsuit is not "suggestive of retaliation." *Id.* at 309. Whereas the residents' partially granted petition sparked the developer's lawsuit four days later, Chevron can identify no setback it inflicted to the City's interests that proximately triggered this lawsuit. Indeed, Chevron had been engaged in deceptive marketing of fossil fuels long before the City filed suit, so Chevron cannot argue that this lawsuit was timed to "put a stop to" Chevron's speech. *Id.* This "particularly relevant" factor does not support a finding of bad faith. *Id.*

Second, the City's request for punitive damages, unlike the developer's, is well-supported by allegations that Chevron acted with the requisite ill motive. Maryland law authorizes punitive damages for intentional torts where the defendant acted with "legal malice," meaning "conduct of

an extraordinary nature characterized by a wanton or reckless disregard for the rights of others." *Schaefer v. Miller*, 322 Md. 297, 300 (1991). That is precisely what the City alleges. Chevron's knowing failure to warn and tortious deception was carried out with "wanton or reckless disregard for the rights" of the City and its residents, among others, who foreseeably would be injured by runaway climate change. *Id. See* Compl. ¶ 22(g). The City's well-pleaded request for punitive damages thus shows this lawsuit is brought in good, not bad, faith. *See Garcia v. Foulger Pratt Dev., Inc.*, 155 Md. App. 634, 685 (2003) (no bad faith where punitive damages request was supported by "facts (with inferences therefrom) . . . suggesting an ill-will or improper motive," even though punitive damages ultimately were not awarded).

Third, the City has not served any discovery on Chevron (or any other defendant), let alone an "abusive" or "unreasonable" request that could "support an inference of bad faith." *MCB Woodberry*, 253 Md. App. at 310. Chevron does not, and cannot, argue that the City has engaged in abusive litigation tactics comparable to the developer. That is because the City is pursuing its meritorious claims in good faith, with no ulterior motive to overwhelm Chevron or cow it into silence. This is not a SLAPP suit.

Fourth, the City's claims are well-supported both factually and legally, so this lawsuit cannot be a SLAPP suit "by definition." *Id.* at 296 ("SLAPP suits are by definition meritless suits.") (cleaned up); *see Needle*, 81 Md. App. at 474 (no bad faith "where the underlying action presents a colorable claim"). *See also, e.g.*, *Honolulu II* (affirming denial of motions to dismiss in lawsuit alleging that fossil fuel companies "misled the public about fossil fuels' dangers and environmental impact."). The *MCB Woodberry* court found bad faith in part because most of the complaint's allegations targeted residents' "customarily protected First Amendment activities," while the rest were "devoid of *any* specific facts" to support liability. 253 Md. App. at 310

(emphasis added). But here, the City's claims target Chevron's deceptive commercial speech, which is customarily *unprotected* activity. *See* § IV.A.1, *supra*. And the Complaint is replete with specific facts that allege Chevron's liability for failing to warn about the climate dangers of fossil fuels, and for tortiously concealing and misrepresenting those dangers to consumers and the public. *See* § II.A, *supra*. The City plainly brings this case in good faith.

3. Chevron Acted With Constitutional Malice.

Even if Chevron could satisfy the other elements of the Anti-SLAPP statute, Chevron still cannot show that it "lack[ed] constitutional malice in making the communications at issue" here. *MCB Woodberry*, 253 Md. App. at 312. That defect alone warrants denying this Motion.

Constitutional malice "is established by clear and convincing evidence that a statement was made 'with knowledge that it was false or with reckless disregard of whether it was false or not.'" *Id.* (quoting *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 279–80 (1964)). The Complaint's specific and non-conclusory allegations thoroughly establish that Chevron acted with constitutional malice.

Chevron, through its participation in the fossil fuel industry's research into greenhouse gas pollution, was informed since the 1960s about the climate risks of burning fossil fuels. *See* Compl. ¶¶ 111, 131–133, 137, 139. Its employees participated in research-sharing efforts like the "Climate and Energy Task Force," *id.* ¶ 115, and were warned—by both industry scientists and outside ones—of dire consequences for the planet should fossil fuel use continued unabated, *see id.* ¶¶ 111, 120. But Chevron never issued warnings commensurate with its knowledge, and instead engaged in sophisticated disinformation efforts to prevent consumers and the public from recognizing or acting on these climate risks. *See* Compl. ¶ 165 (Chevron employees served on the "Global Climate Science Team," alongside the key figure from a former tobacco industry front group "whose purpose was to sow uncertainty about the fact that cigarette smoke is carcinogenic"); ¶¶ 158 & n.179 (Chevron representative helped draft a multi-year, multi-million-dollar industry

plan to make "'average citizens 'understand' (recognize) uncertainties in climate science'" and ensure that "'recognition of uncertainties becomes part of the 'conventional wisdom'"). Chevron's knowing lies about the climate dangers of its fossil fuel products are quintessential examples of constitutional malice. The Anti-SLAPP law therefore does not apply to this lawsuit.

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

In the alternative, Chevron contends that the *Noerr-Pennington* doctrine absolutely bars the City's claims because its deception campaigns sometimes reached regulators in addition to consumers and the public. *See* Mot. at 14–18. This argument misstates the law and mischaracterizes the Complaint's allegations.

"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). Contrary to Chevron's suggestion, then, *Noerr-Pennington* does not "characterize (and therefore immunize) every public relations campaign as 'petitioning' of the government." *United States v. Philip Morris USA, Inc.*, 337 F. Supp. 2d 15, 26 (D.D.C. 2004) ("*Philip Morris II*"). 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 City's lawsuit here. As explained above, Chevron's liability rests on its deceptive marketing of fossil fuels to consumers to increase sales of its products, not on petitioning activity. *See* § IV.A.1, *supra*. *See also* Compl. ¶¶ 22(g), 145, 146, 158–163. Because these activities "are in essence commercial activities," *Noerr-Pennington* does not immunize them. *Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U.S. 492, 507 (1988). That is true even if Chevron's deceptive marketing campaigns "ha[d] a political impact," *id.*, and even if the

"subjective intent" of those campaigns was "to seek favorable legislation or to influence governmental action," *Pro. Real Est. Invs., Inc. v. Columbia Pictures Indus., Inc.*, 508 U.S. 49, 59 (1993).

Eastern R. R. Presidents Conf. v. Noerr Motor Freight, Inc. does not compel a contrary conclusion. 365 U.S. 127 (1961). In that case, the railroads' publicity campaign merited immunity because the economic injury it inflicted was merely the "incidental effect" of a "genuine effort to influence legislation and law enforcement practices." *Id.* at 143, 144. But whereas "no one denie[d]" the campaign in *Noerr* was "designed to foster the adoption and retention of laws," *id.* at 144, 129, Chevron's deception was "designed to influence consumers to continue using [its] fossil fuel products irrespective of those products' damage to communities and the environment," Compl. ¶ 147.[8]

Nor does *Noerr-Pennington* require dismissal at the pleading stage simply because a complaint references petitioning activity. "[W]hile a corporation's petitioning of government officials may not itself form the basis of liability, evidence of such petitioning activity may be admissible if otherwise relevant." *Hernandez v. Amcord, Inc.*, 156 Cal. Rptr. 3d 90, 104 (Ct. App. 2013). *See also United Mine Workers of Am. v. Pennington*, 381 U.S. 657, 670 n.3 (1965) (similar); *N. Carolina Elec. Membership Corp. v. Carolina Power & Light Co.*, 666 F.2d 50, 53 (4th Cir. 1981) (recognizing that "the *Pennington* decision allows at least some of that evidence [of

[8] The other cases Chevron cites are distinguishable on similar grounds. In *Manistee Town Ctr. v. City of Glendale*, the court held that the *Noerr-Pennington* doctrine protected the city's "lobbying and public relations efforts" directed at petitioning Maricopa County to decline to lease space in the plaintiff's shopping center. 227 F.3d 1090, 1093 (9th Cir. 2000). And *Boone v. Redev. Agency of City of San Jose* held that *Noerr-Pennington* protected a developer's right to engage in efforts "solely to influence the [San Jose Redevelopment] agency and the [San Jose City] council" to relocate a proposed municipal parking garage. 841 F.2d 886, 895 (9th Cir. 1988). The lobbying efforts at issue in both cases were protected under the Petition Clause because they sought to impel *government*, not private, action. In contrast, Chevron's deceptive marketing was designed to induce *consumers* "to continue using [its] fossil fuel products irrespective of those products' damage to communities and the environment." Compl. ¶ 147.

petitioning activity] to be admitted at trial if accompanied by a proper jury instruction"). To the limited extent the Complaint references Chevron's efforts to stop climate regulation, those references simply illustrate Chevron's intent to conceal and misrepresent the climate impacts of fossil fuels. *See In re Tylenol (Acetaminophen) Mktg., Sales Pracs. & Prods. Liab. Litig.*, 181 F. Supp. 3d 278, 306 (E.D. Pa. 2016) (petitioning activity was admissible to "show [the defendants'] knowledge, state of mind, or intent").

In any event, a motion to dismiss is not the vehicle for drawing lines between Chevron's commercial and petitioning activities. The application of *Noerr-Pennington* "varies with the context and nature of the activity." *Allied Tube*, 486 U.S. at 499. Accordingly, "determin[ing] whether the challenged predicate acts are acts of petitioning is a fact-intensive inquiry" best left for trial. *United States v. Philip Morris Inc.*, 304 F. Supp. 2d 60, 73 (D.D.C. 2004) ("*Philip Morris I*"). Notably, a Hawaii court has rejected Chevron's motion to dismiss an analogous climate deception lawsuit on *Noerr-Pennington* grounds, holding that it was premature to determine whether "all or most of the alleged tortious conduct is actually 'petitioning'" before the factual record was fully developed. *See City & Cnty. of Honolulu v. Sunoco LP*, No. 1CCV-20-0000380 (Haw. First Cir. Ct. Aug. 27, 2021), Dkt. 585 ("*Honolulu I*") **(Exhibit B)** ¶ L. This Court should do the same. *See In re Warfarin Sodium Antitrust Litig.*, 1998 WL 883469, at *9–10 (D. Del. Dec. 7, 1998), *rev'd in part on other grounds*, 214 F.3d 395 (3d Cir. 2000) (court could not "infer at this stage of the proceedings that the totality of defendant's public statements were 'part and parcel' of its efforts to secure more stringent [regulatory] standards").

V. CONCLUSION

For these reasons, Chevron's Motion should be denied in its entirety.

Dated: December 12, 2023

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 12th day of December, 2023, a copy of the *Mayor and City Council of Baltimore's Memorandum of Law in Opposition to Chevron Defendants' Motion to Dismiss Under Maryland's Anti-SLAPP Law* was served upon all counsel of record via email (by agreement of the parties).

/s/ Matthew K. Edling
Matthew K. Edling

EXHIBIT A

Department of Legislative Services
Maryland General Assembly
2004 Session

FISCAL AND POLICY NOTE

Senate Bill 464 (Senator Green)
Judicial Proceedings Judiciary

Qualified Immunity from Civil Liability – SLAPP Suits

This bill establishes that a lawsuit is a "strategic lawsuit against public participation" (SLAPP) suit if it is: (1) brought in bad faith against a party who has exercised specified federal or State constitutional rights of free speech in communicating with a government body or the public at large; (2) materially related to the defendant's communication; and (3) intended to inhibit the exercise of free speech rights. The bill provides immunity from civil liability to a defendant in a SLAPP suit who acts without constitutional malice in exercising rights protected by the first amendment of the U.S. Constitution, and Articles 10, 13, and 40 of the Maryland Declaration of Rights. A defendant in an alleged SLAPP suit may move to dismiss the suit, or move to stay all court proceedings until the matter about which the defendant communicated to the government body or the public at large is resolved.

The bill applies only to cases filed on or after the October 1, 2004 effective date.

Fiscal Summary

State Effect: None. Any effect on the Judiciary's caseload is expected to be negligible.

Local Effect: None.

Small Business Effect: None.

Analysis

Current Law: There are no statutory provisions specifically relating to SLAPP suits. The first amendment to the U.S. Constitution guarantees the rights of free speech and free press, the right to peaceably assemble, and the right to petition the government for a redress of grievances. Article 10 of the Maryland Declaration of Rights, which protects the right of legislators to free speech and debate in the legislature, is the State counterpart of Article I, section 6, clause 1 of the U.S. Constitution. Article 13 of the Maryland Declaration of Rights guarantees citizens the right to petition the legislature for redress of grievances, and Article 40 guarantees the rights of free speech and free press.

Maryland Rule 1-341 provides that if a court finds that the conduct of any party in maintaining or defending any proceeding was in bad faith or without substantial justification, the court may require the offending party and/or the party's attorney to pay to the adverse party the costs of the proceeding and the reasonable expenses, including reasonable attorney's fees, incurred by the adverse party in opposing it.

"Constitutional malice," also known as "actual malice," is the standard established by the Supreme Court in the seminal defamation case of *New York Times v. Sullivan*, 376 U.S. 254 (1964). A person acts with constitutional malice if the person makes a statement that the person knows is false, or acts with reckless disregard as to whether the statement is false or not.

Background: SLAPP suit laws protect individuals and groups, many with few assets, from defending costly legal challenges to their lawful exercise of such constitutionally protected rights as free speech, assembly, and the right to petition the government. Covered activities may include writing letters to the editor, circulating petitions, organizing and conducting peaceful protests, reporting unlawful activities, speaking at public meetings, and similar actions.

Plaintiffs in these lawsuits, who typically have far greater resources than defendants, may allege a number of legal wrongs. The more common causes of action include defamation, invasion of privacy, intentional infliction of emotional distress, interference with contract or economic advantage, and abuse of process. Their goal is often not to win the case, but rather to cause the defendants to devote such significant resources to defending it that they are unable to continue the challenged activities.

Approximately 20 states have enacted SLAPP suit laws. There are judicial precedents in other states that accomplish this same result.

Additional Information

Prior Introductions: HB 113 of 2003, HB 481 of 1999, HB 12 of 1998, HB 134 of 1997, HB 532 of 1996, and HB 142 of 1995 all passed the House. HB 113 received an unfavorable report from the Senate Judicial Proceedings Committee. HB 481, HB 134, and HB 532 received hearings before the Senate Judicial Proceedings Committee. Otherwise, no further action was taken on any of these bills.

Cross File: HB 930 (Delegate Rosenberg, *et al.*) – Judiciary.

Information Source(s): Judiciary (Administrative Office of the Courts), Office of the Attorney General, Department of Legislative Services

Fiscal Note History: First Reader - February 25, 2004
n/jr

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EXHIBIT B

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Attorneys for Plaintiffs CITY AND COUNTY OF HONOLULU and HONOLULU BOARD OF WATER SUPPLY

IN THE CIRCUIT COURT OF THE FIRST CIRCUIT
STATE OF HAWAI'I

CITY AND COUNTY OF HONOLULU and HONOLULU BOARD OF WATER SUPPLY, Plaintiffs, vs. SUNOCO LP; ALOHA PETROLEUM, LTD.; ALOHA PETROLEUM LLC; EXXON MOBIL CORP.; EXXONMOBIL OIL CORPORATION; ROYAL DUTCH SHELL PLC; SHELL OIL COMPANY; SHELL OIL PRODUCTS COMPANY LLC; CHEVRON CORP; CHEVRON USA INC.; BHP GROUP LIMITED; BHP GROUP PLC; BHP HAWAII INC.; BP PLC; BP AMERICA INC.; MARATHON PETROLEUM CORP.; CONOCOPHILLIPS; CONOCOPHILLIPS COMPANY; PHILLIPS 66; PHILLIPS 66 COMPANY; AND DOES 1 through 100, inclusive, Defendants.	CIVIL NO. 1CCV-20-0000380 (JPC) (Other Non-Vehicle Tort) **ORDER DENYING CHEVRON DEFENDANTS' SPECIAL MOTION TO STRIKE AND/OR DISMISS THE COMPLAINT PURSUANT TO CALIFORNIA'S ANTI-SLAPP LAW** Hearing: Date: August 27, 2021 Time: 8:30 a.m. Judge: The Honorable Jeffrey P. Crabtree Trial Date: None.

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ORDER DENYING CHEVRON DEFENDANTS' SPECIAL MOTION TO STRIKE AND/OR DISMISS THE COMPLAINT PURSUANT TO CALIFORNIA'S ANTI-SLAPP LAW

Chevron Defendants' Special Motion to Strike and/or Dismiss the Complaint pursuant to California's Anti-SLAPP Law ("Anti-SLAPP Motion"), filed on June 2, 2021 (Dkt. 349), came for video hearing on August 27, 2021, at 8:30 a.m. before the Honorable Jeffrey P. Crabtree. All parties appeared through counsel. Theodore J. Boutrous argued for Defendant Chevron, and Matthew K. Edling argued for Plaintiffs.

After considering the written submissions and the arguments of counsel, the files herein, and other good cause appearing therefore, Chevron Defendants' Anti-SLAPP Motion is DENIED for reasons, set forth as follows:

A. For this choice of law issue, the court primarily applies *Mikelson v. USAA*, 107 Haw 192 (2005), and *Lewis v. Lewis*, 69 Haw. 497 (1988). *Mikelson* adopted a flexible balancing approach, with no one factor being dispositive. The court is to assess the factors, interests, and

policy factors involved. The goal is to determine which state has the most significant relationship to the parties and subject matter. *Mikelson* at 198.

B. The Plaintiffs (City & County of Honolulu and the Board of Water Supply) are in Hawai'i. This weighs in favor of applying Hawai'i law.

C. Plaintiffs obviously have specific, enduring, and substantial attachments to Hawai'i, as opposed to if they were individuals who moved to Hawai'i six months before suit was filed. This further weighs in favor of applying Hawai'i law.

D. There are some Hawai'i Defendants. This weighs in favor of applying Hawai'i law.

E. The alleged damages include harm to the shoreline, infrastructure, buildings, and economy of Hawai'i. This weighs in favor of applying Hawai'i law.

F. Hawai'i has its own anti-SLAPP law, HRS Chapter 634F, which is more limited than California's version. Hawai'i's statute protects testimony to a governmental body during a government proceeding. The court concludes as a matter of law that the Hawai'i statute provides no relief to movant. In other words, Hawai'i's legislative policy does not favor the protection sought by this motion. This weighs against applying California's anti-SLAPP law in Hawai'i.

G. California's anti-SLAPP law may not protect Chevron if a similar suit were brought in California by a California municipality. Cal. Civ. Proc. Code § 425.16(d) and § 731 indicate that city public nuisance actions are not protected by the anti-SLAPP law. The court understands this language can be parsed and distinguished (e.g., must the action be brought "in the name of the people?"). Nevertheless, it generally indicates a public policy in California that public enforcement actions should not be overly constrained by the anti-SLAPP provisions. This weighs against applying California's anti-SLAPP law in Hawai'i.

H. There are non-California Defendants. This weighs against applying California's anti-SLAPP law.

I. Chevron is domiciled in California. This clearly weighs in favor of applying California's anti-SLAPP law but is not dispositive.

J. Chevron argues that the allegedly tortious conduct would all originate in its California headquarters. As far as the court is aware, this is not alleged in Plaintiffs' operative pleading and is disputed. More importantly, even if this is correct, the location where alleged tortious conduct originates is not dispositive. It is a factor to consider, along with where the alleged harm occurred, where the alleged victims reside, etc. On balance, the court concludes this factor weighs in favor of applying California's anti-SLAPP law, but not substantially.

K. California's anti-SLAPP law has a "commercial speech" exception. The parties raise several complex arguments on whether or not that exception would apply to the conduct alleged here. The court is not clearly convinced one way or the other on this limited record, and concludes it is a gray area under the circumstances and the current record of this case. On balance, the court concludes that if this factor weighs at all, it weighs slightly in favor of applying California's anti-SLAPP law.

L. Chevron argues the *Noerr-Pennington* doctrine immunizes it. The court concludes it is premature to apply the doctrine at this early stage. For example, the court cannot conclude based on the current record that all or most of the alleged tortious conduct is actually "petitioning." That is a complex and fact-based exercise which the court declines to resolve at this time based on the limited record.

M. On the issue of dépeçage, the court concludes it simply provides that different states' laws can apply to different issues in the same case. It does not dictate any particular choice of law result. It does not supplant *Mikelson*'s emphasis on a flexible approach that weighs and balances multiple factors.

For the reasons stated above, and Court's February 3, 2022 Order (Dkt. 579), Chevron Defendants' Motion is DENIED.

IT IS SO ORDERED.

Dated:
Honolulu, Hawai'i

/s/ Jeffrey P. Crabtree

HONORABLE JEFFREY T. CRABTREE
JUDGE OF THE ABOVE-ENTITLED COURT

APPROVED AS TO FORM:

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