IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

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

THE STATE OF DELAWARE'S APPLICATION FOR CERTIFICATION OF INTERLOCUTORY APPEAL

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INTRODUCTION

The State of Delaware respectfully requests certification of an interlocutory appeal from the Court's January 9, 2024, Opinion and Order (Dkt. No. 370) ("Order"), which dismisses or significantly narrows all of the State's claims at the pleading stage.

This lawsuit seeks to hold major fossil fuel companies and their top trade association ("Defendants") liable for deceiving consumers and the public about the climate change impacts of fossil fuels. For more than half a century, Defendants have known that the ordinary and intended use of fossil fuels creates greenhouse gas pollution that alters the climate. Yet rather than warning about their products' dangers, Defendants waged a widespread, decades-long disinformation campaign to conceal and misrepresent the science, causes, and effects of global warming—a campaign that continues to this day. Defendants' failure to warn and deceptive promotion delayed the transition to a lower-carbon economy and inflated fossil fuel consumption and emissions in Delaware and elsewhere, which—in turn—exacerbated global warming, sea level rise, extreme weather events, and other climate change impacts that are wreaking havoc on Delaware's public safety, health, infrastructure, and environment. To help protect the State and its citizens from these unprecedented harms, and to recover the costs of adapting to and mitigating them, the State brought this action under Delaware law, alleging nuisance, trespass, failure

to warn, and violations of the Delaware Consumer Fraud Act ("DCFA"). Those harms, suffered by the State and Delawareans, compound with each passing year—Delaware is one of the lowest-lying states in the union, and is especially vulnerable to sea level rise and other climate change impacts such as flooding, saltwater intrusion, erosion, tidal wetland losses, and beach loss. Many of those impacts, such as the permanent inundation of State land from sea level rise, are irreversible or will become exponentially more expensive to address over time.

The Order, however, significantly curtails the lawsuit's scope of recovery by granting in part and denying in part Defendants' joint and individual motions to dismiss the State's Complaint for failure to state a claim, lack of personal jurisdiction, insufficient service of process, and based on two out-of-state anti-SLAPP statutes. In doing so, this Court decided at least five issues that warrant interlocutory review ("Issues"):

1. Whether the federal Clean Air Act ("CAA") preempts the State's claims insofar as they seek relief for harms involving out-of-state emissions;

2. Whether *State ex rel. Jennings v. Monsanto Co.*, 299 A.3d 372 (Del. 2023), limits the State's public nuisance claim to harms to State-owned lands;

3. Whether the statute of limitations bars the State's claims for violations of the DCFA;

4. Whether Superior Court Civil Rule 9(b) requires dismissal of all claims alleging misrepresentations by Defendants; and

5. Whether the claims against TotalEnergies SE should be dismissed for insufficient service of process.

Because these Issues all concern the merits of the State's case, they qualify as "substantial issue[s] of material importance" that warrant interlocutory review pursuant to Supreme Court Rule 42. *See* Supr. Ct. R. 42(b)(i).

In addition, interlocutory review is supported by several of the factors "the trial court should consider" in "deciding whether to certify an interlocutory appeal." *See* Supr. Ct. R. 42(b)(iii). *First*, the Order resolves several important questions of first impression. Most notably, this is the first time that any Delaware court has addressed the preemptive scope of the CAA. And in ruling that the CAA preempted the State's claims insofar as they involved out-of-state emissions, the Order squarely conflicts with the Supreme Court of Hawai'i's recent decision in *City & Cnty. of Honolulu v. Sunoco LP*, which held that "the CAA does not preempt" materially indistinguishable claims for climate deception. 153 Haw. 326, 355 (2023).

Second, the Order conflicts with Delaware case law when it holds that the State failed to satisfy Superior Court Civil Rule 9(b)'s particularity requirement as to "[a]ll claims "alleging misrepresentations," including its DCFA claim. Order at 49. That holding cannot be reconciled with decisions of the Court of Chancery, which hold that the materially identical Court of Chancery Rule 9(b) does not apply to DCFA claims brought by the State. *See, e.g.*, *State v. Publishers Clearing House*, 787 A.2d 111, 114–18 (Del. Ch. 2001).

Finally, interlocutory review will serve "considerations of justice" and advance judicial economy. *See* Supr. Ct. R. 42(b)(iii)(H). Because the Order dismisses or greatly curtails all the State's claims at the early pleading stage, it will fundamentally shape and constrain discovery, motions practice, expert work, and trial. And if the Supreme Court ultimately reverses the Order after final judgment, the parties and this Court will need to re-do all those stages of litigation. As a result, a "potential[ly] enormous waste of money, time, and resources" could be avoided through an interlocutory appeal, as the trial court in *Honolulu* observed when certifying the defendants' application for interlocutory review in that case. *See* Declaration of Christian Douglas Wright, Ex. 1, Order Granting Defendants' Motion for Leave to File an Interlocutory Appeal, *City & Cnty. of Honolulu v. Sunoco LP*, No. 1CCV-20-380, Dkt. No. 688 (Haw. Cir. Ct. June 3, 2022). The Court should therefore materially advance the case by certifying these important, threshold Issues for interlocutory review.

BACKGROUND

This lawsuit seeks to hold Defendants liable for concealing, misrepresenting, and failing to warn about the climate change impacts of fossil fuel products. As detailed in the Complaint, that tortious marketing activity increased fossil fuel consumption and greenhouse gas emissions in Delaware and elsewhere, thereby accelerating global warming and exacerbating sea level rise, storm surges, heat

waves, and other climate-related impacts in Delaware. *See, e.g.*, Compl. ¶¶ 7–12. The State seeks relief based on state-law claims for nuisance, trespass, failure to warn, and violations of the DCFA.

Defendants moved to dismiss the Complaint under Superior Court Civil Rules 12(b)(2), 12(b)(5), and 12(b)(6), and under two out-of-state anti-SLAPP statutes (California and the District of Columbia). In the Order, this Court granted in part each of the motions to dismiss for failure to state a claim and granted Defendant TotalEnergies SE's individual motion to dismiss, holding in relevant part that:

1. The CAA preempted "claims in this case seeking damages for injuries resulting from out-of-state or global greenhouse emissions and interstate pollution." Order at 65.

2. Under the Supreme Court's decision in *Monsanto*, "the State has stated a general claim for environmental-based public nuisance and trespass for land the State owns directly, but not for land the State holds in public trust." *Id.* at 66.

3. "All claims alleging misrepresentations . . . must be dismissed, with leave to amend with particularity, pursuant to Rule 9(b)." *Id*.

4. The State's "DCFA claims are barred by the five-year statute of limitations." *Id.*

5. "TotalEnergies must be dismissed for failure to be served with process." *Id.* at 67.

The Court denied, however, Defendants' anti-SLAPP motions, declining to resolve their choice-of-law arguments "at this time based on a limited record." *Id.* And it rejected Defendants' remaining bases for dismissal, holding that the State had stated

cognizable claims for nuisance, trespass, and failure to warn, *id.* at 66; the Complaint is "sufficient to demonstrate specific personal jurisdiction," *id.* at 67; and Defendants' First Amendment defenses are too "fact-intensive" to be resolved at the pleading stage, *id.* at 67.

On January 17, 2024, Defendants CNX Resources Corp., CITGO Petroleum Corp., Murphy USA, Inc., CONSOL Energy Inc., and Apache Corp. moved for reargument under Superior Court Rule Civil 59(e), urging the Court to dismiss the State's failure to warn claims against those defendants.[1] The Supreme Court has held that "[a] timely motion for reargument tolls the period for filing an appeal," including interlocutory appeals under Supreme Court Rule 42. *Stepak v. Tracinda Corp.*, 567 A.2d 424, 1989 WL 149552, at *1 (Del. 1989). There does not appear to be clear authority, however, addressing whether a party's motion for reargument tolls the deadlines for appeal as to non-movants like the State here, and the motions for reargument do not address any of the Issues the State seeks to certify for interlocutory review. Therefore, out of an abundance of caution and to protect its appellate rights, the State files this application for certification of an interlocutory

[1] *See* CNX Res. Corp., CITGO Petrol. Corp., and Murphy USA, Inc.'s Mot. for Reargument (Jan. 17, 2024); Apache Corp.'s Mot. for Clarification and/or Limited Reconsideration (Jan. 17, 2024); CONSOL Energy Inc.'s Joinder in Motion for Reargument (Jan. 17, 2024).

appeal in accordance with the procedures set out in Supreme Court Rule 42(c).[2]

LEGAL STANDARD

Delaware Supreme Court Rule 42 governs the certification of interlocutory appeals. *See Kennedy v. Encompass Indem. Co.*, 2012 WL 6042637, at *1 (Del. Super. Oct. 31, 2012). To warrant interlocutory review, the interlocutory order must "decide[] a substantial issue of material importance that merits appellate review before final judgment." Supr. Ct. R. 42(b)(i). If it does, the Court should then consider whether the order satisfies "one or more of the eight . . . factors" enumerated in Rule 42(b)(iii)(A)–(H). *Solera Holdings, Inc. v. XL Specialty Ins. Co.*, 2019 WL 4733431, at *3 (Del. Super. Sept. 26, 2019). Interlocutory review may be appropriate even if only a subset of those factors favors certification. *See Chemtura Corp. v. Certain Underwriters at Lloyd's*, 2016 WL 3960282, at *3 (Del. Super. July 20, 2016) (certifying an interlocutory appeal even though five of the factors did not favor certification); *Al Jazeera Am., LLC v. AT & T Servs., Inc.*, 2013 WL 5738034, at *2 (Del. Ch. Oct. 23, 2013) (certifying an interlocutory appeal even though only one factor favored certification). Finally, the Court should consider whether an interlocutory appeal would promote efficiency and advance "interests of justice." Supr. Ct. R. 42(b)(iii).

[2] The State reserves the right to seek interlocutory review of any order resolving those motions.

ARGUMENT

The Court should certify the Order for interlocutory review. Doing so will "save substantial time and expense" by resolving "important threshold question[s]" of law that will significantly affect and shape all subsequent phases of the litigation. *See Rhone-Poulenc Basic Chems. Co. v. Am. Motorists Ins. Co.*, 616 A.2d 1192, 1193 n.1 (Del. 1992).

I. The Order Decides a Substantial Issue of Material Importance

The Order satisfies the threshold requirement for certification, because it resolves "a substantial issue of material importance that merits appellate review before a final judgment." Supr. Ct. R. 42(b)(i). That requirement "is met when an interlocutory order decides a main question of law which relates to the merits of the case, and not to collateral matters." *Lawson v. State Dep't of Transp.*, 2014 WL 3530835, at *1 (Del. Super. July 14, 2014) (quotation omitted).

Here, the Order impacts every claim against every Defendant. First and foremost, it significantly limits the State's recoverable injuries under all of its tort claims. As noted above, the State's theory of liability is that Defendants' failure to warn and deceptive promotion have contributed to dire climate impacts in Delaware by increasing and prolonging greenhouse gas emissions both inside and out of the State. *See, e.g.*, Order at 14. The Court ruled, however, that each of the State's claims is preempted by the CAA to the extent it "seek[s] damages for injuries

resulting from out-of-state or global greenhouse emissions and interstate pollution," and that the State may only recover for "alleged claims and damages resulting from air pollution originating from sources in Delaware." *Id.* at 29, 33.

The Order also significantly narrows the scope of the State's public nuisance claim. Relying on the Supreme Court's recent decision in *Monsanto*, the Order holds: "At this stage in the proceedings, the State has stated a general claim for environmental-based public nuisance and trespass for land the State owns directly, but not for land the State holds in public trust." Order at 66.[3] As a result, damages for harms to public-trust lands—and other interferences with important common and public rights—are no longer recoverable under the State's public nuisance claim.

In addition to substantially narrowing all the State's tort claims, the Order dismisses the State's DCFA claim in its entirety, *id.* at 51–54, 66; dismisses Defendant TotalEnergies SE from the case, *id.* at 63–65, 67, 68; and effectively strikes all allegations of misrepresentation from the Complaint, *id.* at 49, 66. Far from resolving only "second-order litigation issues like discovery disputes," the Order thus squarely addresses "the merits of the case." *Stewart v. Wilmington Tr. SP Servs., Inc.*, 2015 WL 1898002, at *3 (Del. Ch. Apr. 27, 2015).

[3] *See also* Order at 66 (noting that possibility "damages caused by air pollution limited to State-owned property may be difficult to isolate and measure . . . should not be a reason to grant dismissal of nuisance and trespass claims at this time").

II. Rule 42(b)'s Factors Favor Interlocutory Review

Interlocutory review is also supported by three of the factors the Court should consider under Rule 42(b)(iii). Counsel for the State has determined in good faith that this application meets these criteria.

A. The Order Involves Important Questions of First Impression

The Order "resolved for the first time in this State" several important questions of law. Supr. Ct. R. 42(b)(iii)(A).

First, the Order is the first time any Delaware court has examined the preemptive scope of the federal Clean Air Act, or considered whether the statute preempts state-law tort claims like the State's, arising from alleged deceptive promotion of fossil fuel products. As noted above, however, while Defendants' motions to dismiss were pending, the Supreme Court of Hawai'i held that the CAA does not preempt state-law nuisance, trespass, and failure to warn claims. *See Honolulu*, 153 Haw. 326.[4] That ruling, on interlocutory appeal from orders denying motions to dismiss, is the first state-court appellate decision to consider the issue and the first appellate decision to address the question in a case where liability rests on fossil fuel companies' climate-related failure to warn and campaign of deception. The Hawai'i court held, contrary to the Court's decision here, that "*where* the

[4] The State provided the *Honolulu* decision to the Court as supplemental authority in opposition to Defendants' motions to dismiss shortly after it was issued. *See* Plaintiff's Notice of Supplemental Authority (Nov. 9, 2023).

emissions originate is irrelevant because emissions are at most a link in the causal chain connecting Plaintiffs' alleged injuries and Defendants' unrelated liability-incurring behavior," namely: their alleged pattern of misrepresentations and deception. *Id.* at 360. The Court's decision on this issue will heavily shape the course of discovery, case management, and the State's proof and recovery here, and it has important potential implications more broadly as to the availability of Delaware common-law causes of action in the face of asserted federal preemption by the CAA. It is therefore critical and appropriate for the Delaware Supreme Court to settle the question.

Second, the Order is the first time any Delaware court has applied Superior Court Civil Rule 9(b) to claims for nuisance, trespass, or failure to warn. As noted below, moreover, trial courts of this State that have analyzed similar questions with respect to Court of Chancery Rule 9(b) have reached conclusions in conflict with this Court's decision.

Third, the Order is the first time any Delaware court has applied *Monsanto* to a public nuisance claim. The Supreme Court held there that a manufacturer of a dangerous product could be "held liable when it substantially contributed to a public nuisance by misleading the public and selling a product it knew would eventually cause a safety hazard and end up contaminating the environment for generations when used by industry and consumers." *Monsanto*, 299 A.3d at 383. This Court is

the first to read *Monsanto* as limiting the State's remedies for an "environmental-based public nuisance" to "land the State owns directly," Order at 66, even though the Supreme Court's ruling in *Monsanto* did not impose such a limitation.

Fourth, Delaware case law has not addressed whether a trial court can, as the Court did here, dismiss a defendant for failure of service without determining whether there was "good cause" for that failure, as required by Superior Court Rule 4(j). Superior Court Rule 4(j) provides:

> *If* a service of the summons and complaint is not made upon a defendant within 120 days after the filing of the complaint *and the party on whose behalf such service was required cannot show good cause why such service was not made within that period*, the action shall be dismissed as to that defendant without prejudice…" (emphasis added).

The Order, however, engages in no analysis as to whether or not good cause existed and thus is inconsistent with Rule 4(j). Order at 64–65.

Each of these questions of first impression weighs strongly in favor of interlocutory review.

B. The Order Conflicts with Decisions Rendered by Other Trial Courts in This State

The Order also conflicts with decisions of other Delaware trial courts as to at least one question of law. *See* Supr. Ct. R. 42(b)(iii)(B). The Court determined that "[a]ll claims alleging misrepresentations, including 'greenwashing', must be dismissed, with leave to amend with particularity, pursuant to Rule 9(b)." Order at 49. That ruling encompasses the State's DCFA claim, which rests in part on

"greenwashing" by Defendants that occurred within the DCFA's statute of limitations. *See, e.g.*, *id.* at 40–41, 45, 47–48, 49.

In applying Superior Court Civil Rule 9(b) to the State's DCFA claim, the Order comes into conflict with the Court of Chancery's decision in *Publishers Clearing House*. The court there "conclude[d] that Court of Chancery Rule 9(b) is inapplicable to actions brought by the Attorney General under the CFA," 787 A.2d at 119, and that "claims by the State under the CFA . . . are not subject to Rule 9(b)'s requirements of particularity," *id.* at 112. Superior Court Civil Rule 9(b) is materially identical to Court of Chancery Rule 9(b), in that both require "circumstances constituting fraud" to be "stated with particularity." *Compare* Super. Ct. Civ. R. 9(b) *with* Ct. Ch. R. 9(b). The Order therefore conflicts with *Publishers Clearing House* on a question of law that is highly significant to the State's ability to enforce the DCFA in this case and others.

C. Interlocutory Review of the Order Serves Considerations of Justice

Considerations of justice also support certification. An interlocutory appeal will not prejudice Defendants, who may well seek certification themselves. But it will eliminate a substantial risk of prejudice to the State. Without immediate review, the State will need to expend significant public resources prosecuting a case that will not afford the State complete relief for the harms caused by Defendants' tortious activity. And if the Supreme Court ultimately reverses the Order on appeal from a

final judgment, the parties will need to conduct significant additional discovery and potentially a new trial, creating substantial burden and delay for both the State and Defendants. *See also infra* Part III.

The public interest also counsels in favor of an interlocutory appeal. This case is exceptionally important, as it seeks remedies that are urgently needed to protect Delawareans' public health, welfare, infrastructure, and environment from ongoing climate-change impacts caused by Defendants' past, current, and ongoing tortious conduct. With each passing year, moreover, those hazards and harms only grow more dangerous and more costly to mitigate, abate, or remediate, making the efficient resolution of this lawsuit an imperative for the State. Given the case's high stakes and statewide implications, the Court should certify interlocutory appeal to enable the Supreme Court to clarify the scope of remedies available for the unprecedented harm to the State that has already occurred, and will continue to occur in ever-increasing severity, as a result of Defendants' conduct. The harm facing the State and its citizens includes harms (for example, the permanent inundation of State land from sea level rise) that will compound over time and either cannot be reversed or will become exponentially more expensive to address with each passing year. The public interest strongly favors resolution of these issues through interlocutory appeal, rather than after trial—and potentially after additional discovery and a new trial, if such appeal is successful.

III. Interlocutory Review Advances Judicial Economy

Finally, an interlocutory appeal would result in "the most efficient and just schedule to resolve the case." Supr. Ct. R. 42(b)(iii). Because the Order dismisses or greatly curtails all the State's claims, it "will significantly affect the subsequent phases of litigation, the scope of discovery, [and] the length and complexity of a potential trial." *HLTH Corp. v. Axis Reinsurance Co.*, 2009 WL 3326625, at *1 (Del. Super. Sept. 30, 2009). The trial court in *Honolulu* granted the defendants' motion for leave to file an interlocutory appeal from its orders denying motions to dismiss, finding in part that the case was "unprecedented," that "[t]he complexity, scope, time, and cost of discovery and motion practice, let alone trial, will be enormous," and that a "potential[ly] enormous waste of money, time, and resources would largely be avoided" if the orders were reversed. *See* Wright Decl. Ex. 1.

The Order's CAA preemption ruling, which precludes tort liability insofar as it involves out-of-state emissions, fundamentally constrains the State's theory and proof of its case. Whereas the State originally set out to prove that Defendants' failure to warn and deceptive marketing injured the State by increasing emissions in Delaware *and elsewhere*, it must now prevail on a far narrower path to liability, causation, and damages, namely: that Defendants' tortious conduct caused in-state climate impacts by increasing *exclusively in-state emissions*. The Order potentially drastically limits the State's ultimate damages claim, and may also constrain fact

discovery, expert work, pretrial motions practice, and trial presentation to focus on the causes and effects of in-state emissions. All those phases of litigation would need to be redone if the Delaware Supreme Court reverses the Order's preemption finding after final judgment. For instance, the State would need to re-depose fact witnesses and propound new written discovery about Defendants' out-of-state marketing activities. Its experts would need to evaluate the impacts of Defendants' out-of-state deception campaigns as they caused injury in Delaware. And if judgment follows trial, a new jury would need to be empaneled to hear the State's original theory of liability based on an expanded evidentiary record.

Interlocutory review now—while this case is still in the early stages of litigation—reduces the risk that the parties and this Court spend years adjudicating claims that would surely need to be relitigated after a successful appeal of the Order by the State. That risk is substantial and not speculative, especially because the Order's preemption finding directly conflicts with the Hawai‘i Supreme Court's decision in *Honolulu*, 153 Haw. at 355, a case on all fours with this one. That court squarely held that "the CAA d[id] not preempt Plaintiffs' claims" because the statute "does not occupy the entire field of emissions regulation" and "[t]here [was] no 'actual conflict' between Plaintiffs' state tort law claims and the CAA's overriding federal purpose or objective." *Id.* at 334–35.

Nor are there any undue costs associated with interlocutory review of the Order. Appellate review will not "cause unnecessary delay." *Rhone-Poulenc Basic Chems. Co.*, 616 A.2d at 1193 n.1 (identifying unnecessary delay as the main concern with interlocutory appeals). Rather, it will "materially advance the litigation" by resolving pure questions of law that will shape and guide the case. *Telcom-SNI Invs., L.L.C. v. Sorrento Networks, Inc.*, 2001 WL 1269320, at *2 (Del. Ch. Oct. 9, 2001). Moreover, Defendants will not be disadvantaged by any delay involved with interlocutory review. Instead, the burdens of any such delay will fall entirely on the State and its people, who must shoulder the costs of Defendants' deceptive conduct as they wait for the relief sought by this lawsuit. Accordingly, "the likely benefits of interlocutory review outweigh the probable costs." Supr. Ct. R. 42(b)(iii).

CONCLUSION

For the above reasons, the State respectfully requests that this Court grant certification of an interlocutory appeal of the Order to the Delaware Supreme Court.

Respectfully submitted,

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