IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

STATE OF DELAWARE, Plaintiffs, v. BP AMERICA INC., BP P.L.C., CHEVRON CORPORATION, CHEVRON U.S.A. INC., CONOCOPHILLIPS, CONOCOPHILLIPS COMPANY, PHILLIPS 66, PHILLIPS 66 COMPANY, EXXON MOBIL CORPORATION, EXXONMOBIL OIL CORPORATION, XTO ENERGY INC., HESS CORPORATION, MARATHON OIL CORPORATION, MARATHON OIL COMPANY, MARATHON PETROLEUM CORPORATION, MARATHON PETROLEUM COMPANY LP, SPEEDWAY LLC, MURPHY OIL CORPORATION, MURPHY USA INC., ROYAL DUTCH SHELL PLC, SHELL OIL COMPANY, CITGO PETROLEUM CORPORATION, TOTAL S.A., TOTAL SPECIALTIES USA INC., OCCIDENTAL PETROLEUM CORPORATION, DEVON ENERGY CORPORATION, APACHE CORPORATION, CNX RESOURCES CORPORATION, CONSOL ENERGY INC., OVINTIV, INC., and AMERICAN PETROLEUM INSTITUTE, Defendants.	C.A. No. N20C-09-097-MMJ CCLD

CITGO PETROLEUM CORPORATION'S AND MURPHY USA INC.'S OPENING BRIEF IN SUPPORT OF THEIR MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM

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Defendants CITGO Petroleum Corporation ("CITGO") and Murphy USA Inc. ("MUSA") submit this brief in support of their motion to dismiss and incorporate by reference the statement of the case, statement of issues, and arguments set forth in Defendants' Joint Memorandum in Support of Motion to Dismiss for Failure to State a Claim (the "Joint Brief").

INTRODUCTION

Plaintiff's alleged injuries are the result of worldwide greenhouse-gas emissions by billions of individuals, companies, and governmental entities over the past century. But Plaintiff's complaint does not target greenhouse-gas emitters. Instead, it seeks to hold a small handful of companies in the fossil-fuel chain of production liable for the impacts of global climate change. As the Joint Brief explains, Plaintiff's tort claims are hopelessly flawed because federal law categorically prohibits state law from regulating out-of-state emissions, the claims present non-justiciable political questions, and Plaintiff has failed to allege the essential elements of its claims under state law. Indeed, it would be both hypocritical and unjust to hold oil & gas companies responsible for alleged downstream environmental impacts caused by the cumulative, worldwide use of lawful products that power the necessities and conveniences of modern life.

Plaintiff's theory as to why state tort law should apply and why *these Defendants* should be held singularly responsible for the consequences of global

climate change is that Defendants engaged in an alleged "campaign" to mislead the public about the dangers of climate change. Compl. ¶1. For more than two years, Plaintiff has argued at every level of the federal courts that it does *not* seek to hold Defendants liable for their production and sale of fossil-fuel products or the emissions resulting from their use, but rather seeks to hold Defendants liable for their alleged *misrepresentations* about climate change and for *concealing* the risks of fossil-fuel use. In other words, Plaintiff contends that this case is fundamentally about what Defendants said and/or did not say.

As the Joint Brief explains, Plaintiff's focus on Defendants' speech cannot save its claims because Plaintiff's alleged injuries are necessarily tied to nationwide and worldwide greenhouse-gas emissions, and claims based on such emissions are barred by federal law. But even if Plaintiff's misrepresentation theory of liability somehow enabled it to escape preemption (which it does not), its embrace of that theory dooms its claims as to CITGO and MUSA because the Complaint does not allege that either Defendant said *anything* about their products' connection to global climate change, much less that they made any *misrepresentations* that misled consumers. Nor has Plaintiff adequately alleged that CITGO or MUSA can be held responsible for any alleged misstatement made by any other Defendant, including the American Petroleum Institute (API), a trade association CITGO and MUSA

allegedly belonged to for some unspecified period(s).[1] The Complaint thus not only fails to satisfy Rule 9(b)'s particularity requirement, which applies to all claims sounding in fraud, but fails even to satisfy Rule 8(a)'s requirement to put CITGO or MUSA on notice as to their allegedly wrongful conduct.

The Complaint also falls well short of stating a claim against CITGO or MUSA for failing to warn consumers about the alleged dangers of global climate change that could result from the use of their products. The Joint Brief argues that Plaintiff's "failure to warn" theory is untenable because the risks of global climate change have been widely known and publicized for many decades. But even if that were not so, the Complaint does not allege that CITGO or MUSA ever studied climate change, obtained special information about the risks of climate change, or concealed any information about climate change from their customers. In the absence of special knowledge, CITGO and MUSA had no duty to warn about the potential environmental damage that allegedly results from the use of their products.

Thus, even under Plaintiff's flawed speech-based theory of liability, the Complaint utterly fails to state a claim against CITGO or MUSA.

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[1] The complaint alleges that "Murphy"—defined to include both MUSA and separate Co-Defendant Murphy Oil Corporation—is a member of API. *See* Compl. at ¶¶27(e), 37(e). This group pleading is inappropriate, and MUSA notes that API's website does not list it as a member. *See* API Membership List, available at: https://www.api.org/membership/members#M (Last Accessed: 5/17/23).

BACKGROUND

A. The Complaint

Plaintiff's Complaint alleges that CITGO, MUSA, and 28 other Defendants have caused climate-change-related harms in the state. The asserted theory of Plaintiff's case is that:

> Defendants have known for decades that climate change impacts could be catastrophic, and that only a narrow window existed to take action before the consequences would be irreversible. They have nevertheless engaged in a coordinated, multi-front effort to conceal and deny their own knowledge of those threats, to discredit the growing body of publicly available scientific evidence and persistently create doubt in the minds of consumers, regulators, the media, journalists, teachers, and the public about the reality and consequences of the impacts of their fossil fuel products. This campaign was intended to, and did, target and influence the public and consumers, including in Delaware.

Compl. ¶1. The Complaint alleges that various Defendants studied the dangers associated with fossil-fuel products, *id.* ¶¶62–103, and supposedly engaged in public campaigns to "deceive" the public about the dangers of these products, *id.* ¶¶104–41. Plaintiff alleges that Defendants have also continued to mislead the public about the impact of their products on climate change through "greenwashing" campaigns. *Id.* ¶¶161–210. Each of Plaintiff's four causes of action likewise accuses Defendants of misleading the public and concealing information about the risks of climate change. *See id.* ¶¶236, 239, 241, 249, 257, 258, 261, 265, 266–79.

Yet while the Complaint includes nearly 200 pages of factual allegations, CITGO is individually mentioned in only *four* paragraphs, *see* Compl. ¶¶29, 36, 37,

265, and MUSA is individually mentioned in only *three* paragraphs, *see id.* ¶¶27, 36, 37. The bulk of the allegations involving CITGO appear in paragraph 29, which identifies CITGO as an energy company incorporated in Delaware and headquartered in Houston. *Id*. ¶29(a). Subparts (b) and (c) allege that CITGO "controlled companywide decisions" both "about the quantity and extent of fossil fuel production and sales" and "related to … climate change and greenhouse gas emissions from its fossil fuel products." *Id.* ¶29(b)–(c). The Complaint is silent, however, about any decisions CITGO supposedly made related to those topics. Subpart (d) is definitional, and subpart (e) alleges that CITGO made "statements in and outside of Delaware" in "furtherance of its campaign of deception and denial," even though no such statements are identified in the complaint. *Id.* ¶29(d)–(e). Finally, subpart (f) alleges that a "significant amount" of CITGO's fossil fuel products is "transported, traded, distributed, promoted, marketed, manufactured, sold, and/or consumed in Delaware." *Id.* ¶29(f).

The bulk of the allegations involving MUSA appear in paragraph 27, which identifies MUSA as incorporated in Delaware in 2013 and headquartered in El Dorado, Arkansas. *Id.* ¶27(d). Subpart (d) further explains that MUSA holds, through subsidiaries, the "retail" business of its former parent Murphy Oil Corporation. *Id.* Although it identifies MUSA as a fuel retailer, the complaint does not allege that MUSA ever sold fuel or engaged in any other relevant activities in

Delaware. Nor does the complaint reflect that MUSA engaged in any particular advertising or promotion of its fuel products, whether in or outside of Delaware. Subpart (f) provides only vague, boilerplate allegations that "Murphy"—defined as both MUSA and Murphy Oil Corporation—made some undefined "statements" at unspecified times to unidentified individuals. *Id.* ¶27(f).

Paragraph 36 is definitional, including CITGO and "Murphy" as among the Defendants referred to as "Fossil Fuel Defendants." *Id.* ¶36.

Paragraph 37 alleges that CITGO, "Murphy," and/or their predecessors-in-interest were, at some unspecified time, members of API, and that at least one CITGO executive served as a member of API's Board of Directors. *Id*. ¶37(e).

Finally, paragraph 265, which addresses Plaintiff's claim under the Delaware Consumer Fraud Act ("DCFA"), generically alleges that the Defendants sued in that count—which include CITGO but not MUSA—"persistently misrepresented material facts, or suppressed, concealed, or omitted material facts, with the intent that consumers will rely thereon." *Id.* ¶265.

B. Removal Proceedings

Defendants removed this case to federal court on the ground that Plaintiff's claims arise under federal law because the Complaint alleges that Plaintiff's alleged injuries resulted from global climate change, which is allegedly caused by worldwide greenhouse-gas emissions. *See Delaware v. BP America Inc., et al.*, No.

1:20-cv-04129-UNA, ECF No. 1. Notwithstanding these allegations—and many more that discuss the role of interstate emissions in causing Plaintiff's alleged injuries, *see, e.g.*, Compl. ¶¶47–61, 141, 148–50, 226–33—Plaintiff repeatedly argued in the federal courts that its claims are *not* based on Defendants' contribution to interstate emissions but rather are based on Defendants' alleged *misrepresentations* and *concealment*. For example, Plaintiff's remand motion argued that "the wrongful conduct that lies at the heart of this lawsuit [is] unlawfully concealing and misrepresenting the known dangers of fossil fuels, while simultaneously promoting their unrestrained use, sale, and production." *Delaware*, ECF No. 89 at 33.

In the Third Circuit, Plaintiff insisted that the complaint seeks to redress harms allegedly caused by Defendants' "decades-long *campaign of deception* regarding their fossil fuel products' relationship to climate change." Appellees' Ans. Br. at 1, *Delaware v. BP America Inc.*, No. 22-1096 (3d Cir. Apr. 14, 2022) (emphasis added). Although the Third Circuit rejected that characterization of the claims, *City of Hoboken v. Chevron Corp.*, 45 F.4th 699, 712 (3d Cir. 2022), Plaintiff repeated its theory in its opposition to Defendants' petition for a writ of certiorari. Resp. Opp. to Pet. at 1, *BP America Inc., v. State of Delaware*, No. 22-821 (S. Ct. 2023) (arguing that Defendants "*misled consumers and the public* about their products within and outside Delaware, and that *those misrepresentations* will have severe consequences

to the State and its citizens") (emphasis added).

ARGUMENT

As the Third Circuit recognized, the allegations in Plaintiff's Complaint "belie[] th[e] suggestion" that Plaintiff's claims are based solely on misrepresentations. *City of Hoboken*, 45 F.4th at 712. At bottom, this case is about Defendants' contribution to worldwide greenhouse-gas emissions. *See* Joint Br. at 19–22. But even if this Court were to credit Plaintiff's flawed misrepresentation theory, its claims would have to be dismissed as to CITGO and MUSA because the Complaint does not allege (i) that CITGO or MUSA is responsible for *any* misrepresentations about the connection between oil & gas products and global climate change, or (ii) that CITGO or MUSA had special knowledge that use of their products would likely contribute to climate change.[2]

I. The Complaint Does Not Allege Any Actionable Misrepresentations About Climate Change Made by, or Attributable to, CITGO or MUSA

Claims predicated on misstatements—*i.e.,* fraud—must be asserted with particularity under Rule 9(b) of the Superior Court Civil Rules whether pleaded

[2] To be clear, CITGO and MUSA agree with the arguments in the Joint Brief showing that Plaintiff has failed to allege facts establishing the requisite elements of its claims as to all Defendants. But to the extent Plaintiff contends that the tortious conduct underlying its claims involves Defendants' speech (or failure to speak), the Court must dismiss Plaintiff's claims *as to CITGO and MUSA* for the independent reason that the Complaint fails to allege that they engaged in the allegedly tortious conduct.

under the DCFA or any other theory. *See Rinaldi v. Iomega Corp.*, 1999 WL 1442014, at *7–9 (Del. Super. Ct. Sept. 3, 1999) (holding that claims under the Delaware Consumer Fraud Act and for negligent failure to warn are governed by Rule 9(b)); *York Linings v. Roach*, 1999 WL 608850, at *2 (Del. Ch. July 28, 1999) (applying heightened pleading requirement to claim for breach of fiduciary duty premised on allegations of fraud).

Rule 9(b) requires that "the circumstances constituting fraud, negligence or mistake shall be stated with particularity." Del. Sup. Ct. Civ. R. 9(b); *see also Browne v. Robb*, 583 A.2d 949, 955 (Del. 1990) (a complaint based on fraud must plead the "contents of the false representations" with particularity). The purpose of the particularity requirement is to "enable an opponent to be informed of charges so as to be able to prepare a defense to them," *KnighTek, LLC v. Jive Commc'ns, Inc.*, 225 A.3d 343, 351 (Del. 2020) (internal quotation marks omitted), and to "discourage the initiation of suits brought solely for their nuisance value, and safeguard[] potential defendants from frivolous accusations of moral turpitude," *Hauspie v. Stonington Partners, Inc.*, 945 A.2d 584, 587 (Del. 2008) (internal quotation marks omitted).

A. CITGO and MUSA are not alleged to have said *anything* about their products' alleged connection to global climate change.

Most of the allegations about MUSA and CITGO are found in Paragraphs 27 and 29 of the Complaint, but the only allegations in those paragraphs that even touch

on representations are (1) that CITGO and MUSA "wrongfully distribute[d], market[ed], advertise[d], and promote[d]" their products; and (2) that MUSA and CITGO each made unspecified statements "in furtherance of [their] campaign of deception and denial." Compl. ¶¶ 27(f), 29(e), 29(f). But Rule 9(b) does not permit a plaintiff to state a misrepresentation claim by simply slapping the adverb "wrongfully" in front of a list of lawful business activities. And the allegations in Paragraphs 27 and 29 plainly fail to specify "the time, place, and contents" of any statements made in furtherance of the alleged campaign. *Browne*, 583 A.2d at 955 (internal quotation marks omitted).

Paragraph 37(e)—which alleges that CITGO and "Murphy" were, at unspecified times, members of API—does not allege that CITGO or MUSA made any misrepresentations.[3]

And although Paragraph 265 vaguely asserts that, in "marketing and selling fossil fuel products," CITGO and other Defendants "persistently misrepresented material facts, or suppressed, concealed, or omitted material facts, with the intent that consumers will rely thereon," "group pleading will not suffice" to state a claim. *In re Swervepay Acquisition, LLC*, 2022 WL 3701723, at *9 (Del. Ch. Aug. 26, 2022) (cleaned up); *accord Bank of Am., N.A. v. Knight*, 725 F.3d 815, 818 (7th Cir. 2013) (because "[e]ach defendant is entitled to know what he or she did that is

[3] *See infra* n.1.

asserted to be wrongful," a "complaint based on a theory of collective responsibility must be dismissed"). And in all events, that vague allegation fails to specify what facts CITGO supposedly misrepresented, when it did so, or where, as required by Rule 9(b).

Given the dearth of allegations that CITGO or MUSA made *any* statements about their products' connection to global climate change—much less any *misrepresentations* that could have deceived consumers—the Complaint falls well short of Rule 9(b)'s requirement to specify the "time, place, and contents" of the alleged misrepresentations. *Browne*, 583 A.2d at 955. Indeed, the Complaint fails even to satisfy Rule 8(a)'s basic requirement to put CITGO and MUSA on "notice of what they allegedly did wrong." *See Hupan v. Alliance One Int'l, Inc.*, 2015 WL 7776659, at *12 (Del. Super. Ct. Nov. 30, 2015), *aff'd sub nom. Aranda v. Philip Morris USA Inc.*, 183 A.3d 1245 (Del. 2018). Accordingly, the Complaint does not state a cognizable claim against CITGO or MUSA under Plaintiff's misrepresentation theory.

B. The complaint does not allege any basis for attributing any statements made by other Defendants to CITGO or MUSA.

The Complaint purports to allege misrepresentations about climate change by other Defendants, but those statements are not actionable—*see* API Memorandum in Support of Mot. to Dismiss ("API Br.")—and even if they were, Plaintiff does not allege any basis for attributing them to CITGO or MUSA. It is well established that

"oblique references to false statements allegedly made by each defendant will not serve to attribute misrepresentations to all defendants in an action." *Hupan*, 2015 WL 7776659, at *12 n.70 (cleaned up). This is because the "first element" of a fraud claim is that the defendant made "a false statement," and "only the speaker who makes a false representation is, of course, accountable for it." *Swervepay*, 2022 WL 3701723, at *9 (cleaned up).

Furthermore, although the Complaint alleges that CITGO and "Murphy" were members of API at unspecified times, Compl. ¶37(e), any attempt to hold CITGO or MUSA liable for API's speech or that of its members fails for two reasons. First, the Complaint does not allege any actionable misrepresentations by API, much less with particularity, in Delaware or elsewhere. *See generally* API Br.

Second, the Complaint does not allege any facts suggesting a basis for holding CITGO or MUSA liable for the protected statements made by API or its members. Delaware courts have followed the Restatement (Second) of Torts, which describes three circumstances in which a defendant can be held liable for "harm resulting to a third person from the tortious conduct of another": the defendant (a) "does a tortious action in concert with the other or pursuant to a common design with him, or (b) knows that the other's conduct constitutes a breach of duty and gives substantial assistance or encouragement to the other so to conduct himself, or (c) gives substantial assistance to the other in accomplishing a tortious result and his own

conduct, separately considered, constitutes a breach of duty to the third person." Restatement (Second) of Torts §876 (1979) (hereinafter, "Restatement"), *cited with approval in, e.g.*, *Kuczynski v. McLaughlin*, 835 A.2d 150, 156 n.26 (Del. Super. Ct. 2003). None of these circumstances exists here.

The first category is akin to civil conspiracy, but Plaintiff has not alleged facts showing that CITGO or MUSA "conspired" with API or any other Defendant. Compl. ¶46(b). The factual allegations, accepted as true, establish at most that CITGO and "Murphy" were *members* of API for some unspecified period. But "mere membership in a trade association, including attendance at meetings, is not sufficient to give rise to an inference of conspiracy, absent proof of 'knowing participation' in the wrongful conduct." *In re Asbestos Litig.*, 509 A.2d 1116, 1120 (Del Super. Ct. 1986), *aff'd sub nom. Nicolet, Inc. v. Nutt*, 525 A.2d 146 (Del. 1987); *see also Maple Flooring Mfrs. Ass'n v. United States*, 268 U.S. 563, 584 (1925) ("We do not conceive the members of trade associations become conspirators merely because they gather and disseminate information"); *In re Ins. Brokerage Antitrust Litig.*, 618 F.3d 300, 349 (3d Cir. 2010) ("But neither defendants' membership in the [trade association], nor their common adoption of the trade group's suggestions, plausibly suggest conspiracy.").

Here, there are no allegations that CITGO or MUSA knowingly participated in any alleged misconduct. And "pertinent legal authority is clear that participation

in a trade group association and/or attending trade group meetings, even those meetings where key facets of the conspiracy allegedly were adopted or advanced, are not enough on their own to give rise to the inference of agreement to the conspiracy." *In re Processed Egg Prod. Antitrust Litig*., 821 F. Supp. 2d 709, 722 (E.D. Pa. 2011) (citing cases); *see also Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 567 n.12 (2007). Indeed, the First Amendment protects CITGO's and MUSA's right to join a trade association, and "requiring [them] to stand trial for civil conspiracy and concert of action predicated solely on [their] exercise of [those] First Amendment freedoms could generally chill the exercise of the freedom of association by those who wish to contribute to, attend the meetings of, and otherwise associate with trade groups and other organizations that engage in public advocacy and debate." *In re Asbestos Sch. Litigation*, 46 F.3d 1284, 1296 (3d Cir. 1994) (Alito, J.).

The second category enumerated in the Restatement describes aiding-and-abetting liability. *See Anderson v. Airco, Inc.*, 2004 WL 2827887, at *4 (Del. Super. Ct. Nov. 30, 2004) ("civil liability for aiding and abetting tortious conduct stems from the provisions of Restatement Section 876(b)."); *Int'l Constr. Prods. LLC v. Caterpillar Inc.*, 2020 WL 4584354, at *7 (D. Del. Aug. 10, 2020) ("In general, the elements of 'aiding and abetting' are drawn from the Restatement (Second) of Torts §876(b)."). But even if Plaintiff had alleged that API or one of its members made

an actionable misrepresentation (which it has not), CITGO and MUSA could not be held liable for aiding and abetting that wrongdoing unless they *knew* "that the [association's] conduct constitute[d] a breach of duty" and nevertheless gave "substantial assistance or encouragement to [the association]." Restatement §876(b). There are no such allegations here. CITGO and MUSA are not alleged even to have been aware of—let alone encouraged—any advocacy messaging that API or any other Defendant communicated. The Complaint likewise fails to allege that CITGO or MUSA supported or knew about any of the so-called "greenwashing" statements, or that they were even members of API when those statements were made. *See id.* ¶¶198–201. They thus cannot be held liable for aiding and abetting API's or other members' alleged wrongdoing. *See In re Hydroxycut Mktg. & Sales Practices Litig.*, 299 F.R.D. 648, 657 (S.D. Cal. 2014) (liability under Section 876(b) "normally requires that the individual have *actual knowledge* of the specific primary wrong that he is substantially assisting"); *Riverside Fund V, L.P. v. Shyamsundar*, 2015 WL 5004924, at *5 (Del. Super. Ct. Aug. 17, 2015) ("A plaintiff alleging an aiding and abetting fraud claim must allege the existence of the underlying fraud, actual knowledge, and substantial assistance"—"[m]ere awareness is not sufficient to rise to the level of substantial assistance").

The third category is a hybrid of the first two but requires that the defendant's own conduct breached a duty to a third party. Here, the Complaint does not allege

that CITGO or MUSA made any misrepresentation that could be considered a breach of duty. *See supra* I.A. Nor does it allege that CITGO or MUSA provided any assistance to API or any other Defendant in accomplishing a tortious result. The only alleged connections between them and API is membership and CITGO's representation on API's Board of Directors "at various times." Compl. ¶37(e). But as previously noted, "the mere fact of membership in an association is not of itself a sufficient basis for the tort liability of individual members for the wrongful acts or omissions of an association," 62 A.L.R. 3d 1165 §4; *see also Asbestos Sch. Litig*., 46 F.3d at 1290 (holding that Pfizer could not be held "civilly liable for any wrongful conduct committed by SBA or its members," notwithstanding Pfizer's membership and financial contributions to the trade association, "unless it c[ould] be shown that Pfizer's actions taken in relation to the SBA were specifically intended to further such wrongful conduct"); *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 920 (1982) ("For liability to be imposed by reason of association alone, it is necessary to establish that the group itself possessed unlawful goals and that the individual held a specific intent to further those illegal aims.").

II. The Complaint Does Not Allege that CITGO or MUSA Had Any Special Knowledge about Climate Change That Could Give Rise to a Duty to Warn.

Plaintiff also purports to base its claims—including its trespass and nuisance claims—on the theory that Defendants had superior knowledge about the risks of

climate change but willfully concealed this information from the public. As the Joint Brief explains, this theory of liability fails because information about the risks of climate change has been publicly available for nearly half a century. But Plaintiff's failure-to-warn theory is doubly deficient as to CITGO and MUSA because the Complaint does not allege that they had *any* knowledge about the potential dangers of climate change during the relevant time.

A supplier's duty to warn hinges "on whether it had knowledge of the hazards associated with its product" at a time when those hazards were not widely known. *In re Asbestos Litig.*, 799 A.2d 1151, 1152 (Del. 2002) (per curiam); *Jones v. Clyde Spinelli, LLC*, 2016 WL 3752409, at *3 (Del. Super. Ct. July 8, 2016) ("there is no duty to warn or protect from an open and obvious danger."); *accord* Restatement § 388(a) (liability attaches only when the supplier "knows or has reason to know that the chattel is or is likely to be dangerous for the use for which it is supplied."); *Ramsey v. Ga. S. Univ. Adv. Dev. Ctr.*, 189 A.3d 1255, 1261 (Del. 2018) (Section 388 of the Restatement applies to negligent failure-to-warn claims). Where the supplier lacks "actual or constructive knowledge of the hazards associated" with its product, the supplier does not have a duty to warn. *Asbestos*, 799 A.2d at 1152; *Ramsey*, 189 A.3d at 1273–74.

Here, the Complaint alleges no facts suggesting *that CITGO or MUSA* had actual or constructive knowledge about the dangers of climate change or the role

their products played in contributing to climate change before such knowledge became readily available to the public. CITGO and MUSA are not alleged to have conducted any research into climate change. *See, e.g.*, Compl. ¶¶66–103. And the blanket allegation that "Defendants knew or should have known" that fossil-fuel products cause climate change "based on information passed to them from their internal research divisions and affiliates and/or from the international scientific community," *id.* ¶¶46, 268–69, is plainly insufficient: the Complaint does not allege that CITGO, MUSA or any of their affiliates even had a "research division." Nor does it allege that CITGO or MUSA received non-public information from the "international scientific community." To the extent CITGO and MUSA learned about the risks of climate change from publicly available reports, they had access to no more information than Plaintiff about the possible consequences of fossil-fuel usage.

The Complaint alleges that API received reports and speeches discussing potential environmental impacts attributable to fossil fuel products. Compl. ¶¶62, 63–64, 67, 69–72, 87, 118, 124–25. But there are no allegations that API passed those reports to CITGO or MUSA, or that anyone from CITGO or MUSA attended any of the relevant speeches. Similarly, the Complaint alleges that API convened a Task Force to "monitor and share cutting edge climate research among the oil industry," but it does not allege that CITGO or MUSA were involved in those efforts

or received any such reports or research. *Id.* ¶¶79–80, 92, 122.

In short, the Complaint does not allege that CITGO or MUSA had actual or constructive knowledge about the alleged connection between their products and climate change before such information was widely available. Accordingly, Plaintiff has not adequately alleged that CITGO or MUSA had a duty to warn about the alleged risks of global climate change resulting from the use of their products. Because they did not have a duty to warn, Plaintiff's claims must be dismissed as to CITGO and MUSA to the extent that they are based on alleged concealment. *See Pedicone v. Thompson/Ctr. Arms Co.*, LLC, 2022 WL 521378, at *3 (Del. Super. Ct. Feb. 21, 2022); *Boros v. Pfizer*, Inc., 2019 WL 1558576, at *2 (Del. Super. Ct. Mar. 25, 2019).

CONCLUSION

For the foregoing reasons, Plaintiff's claims against CITGO and MUSA should be dismissed with prejudice.

DATED: May 18, 2023

Respectfully submitted,

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