IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

STATE OF DELAWARE, *ex rel.* KATHLEEN JENNINGS, Attorney General of the State of Delaware,

Plaintiff,

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,

C.A. No. N20C-09-097-MMJ CCLD

INC., and AMERICAN PETROLEUM INSTITUTE,

Defendants.

APACHE CORPORATION'S SUPPLEMENTAL BRIEF IN SUPPORT OF MOTION TO DISMISS PLAINTIFF'S COMPLAINT FOR FAILURE TO STATE A CLAIM

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Defendant Apache Corporation ("Apache") incorporates by reference the arguments set forth in Defendants' Joint Opening Brief in Support of Motion to Dismiss Plaintiff's Complaint for Failure to State a Claim (the "Joint Brief") and submits this supplemental brief in support of its motion to dismiss for failure to state a claim.

I.
PRELIMINARY STATEMENT

Plaintiff should not be allowed to pursue claims to recover from Defendants for the effects of global climate change, a phenomenon that Plaintiff admits has been exacerbated through fossil fuel use around the world by society-at-large and has been well understood for decades. But in any case, Plaintiff certainly should not be allowed to pursue these claims against Apache because the Complaint lacks allegations that Apache actually participated in the complained-of conduct.

In an effort to avoid federal jurisdiction and preemption, Plaintiff framed its case as one about alleged misrepresentations and concealments of the effects of fossil fuels on global climate change. 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 under Plaintiff's flawed misrepresentation theory, Plaintiff's claims against Apache must still be dismissed. Plaintiff filed a two-hundred-and-eighteen page Complaint alleging that certain

Defendants, with knowledge of the climate-related effects of fossil fuels, participated in a disinformation campaign designed to conceal those effects from consumers, but Plaintiff did not include a single allegation that Apache participated in the complained-of conduct. Specifically, Plaintiff does not allege that Apache had special knowledge of the dangers of climate change, ever took any action to conceal climate change, made any misrepresentations with respect to climate change, or even marketed any of its products to consumers. Indeed, the Complaint contains no substantive, non-conclusory allegations specifically about Apache other than that it is an exploration and production company.

Allowing Plaintiff to pursue its claims against Apache, without any specific allegations about Apache's role in the alleged disinformation campaign, by lumping it with a group of "Fossil Fuel Defendants" and vaguely pointing to Apache's membership in the American Petroleum Institute ("API") at some unspecified time, would violate Delaware's pleading standards and public policy. For the reasons stated in the Joint Brief, Plaintiff's claims fail as to all Defendants regardless of the group pleading defect. However, Plaintiff's claim especially fail as to Apache because the Complaint does not contain any specific allegations about Apache. As such, this Court should dismiss the claims against Apache.

II.
BACKGROUND

Plaintiff sued Apache along with thirty other "fossil fuel" Defendants for global climate change. Each of Plaintiff's claims is based on allegations that Defendants have known about the relationship between fossil fuels and climate change for decades, but "engaged in a coordinated, multi-front effort to conceal and deny" knowledge of climate change, "to discredit the growing body of available scientific evidence, and to persistently create doubt . . . about the reality and consequences of the impacts" of fossil fuel products. Compl. ¶1. Based on this alleged conduct, Plaintiff brings novel claims for failure to warn, trespass, and nuisance. Plaintiff also brings a Delaware Consumer Fraud Act claim against eighteen Defendants, but not Apache.

Although each of Plaintiff's novel claims is premised on an alleged knowledge of the effects of fossil fuels on climate change and alleged actions taken to conceal the allegedly known dangers, the Complaint lacks any allegations that support any inference that Apache knew of the dangers or took actions to conceal that knowledge. Throughout the Complaint, there are only two specific allegations about Apache. The first is that Apache "is an oil and gas exploration and production company, with crude oil and natural gas exploration and extraction operations," and

the second is that Apache is or was, at some unidentified time relevant to the Complaint, one of "more than 600 members" of API. Compl. ¶¶33(a), 37.[1]

Plaintiff then conclusorily asserts, using the same boilerplate language applied to other Fossil Fuel Defendants, that "Apache's statements in and outside of Delaware made in furtherance of its campaign of deception and denial, and its chronic failure to warn consumers of global warming-related hazards when it marketed, advertised, and sold its products, were intended to conceal and mislead consumers and the public about the serious adverse consequences from continued use of Apache's products." Compl. ¶33(e). As explained below, this blanket assertion, which fails to identify any particular statement or activities, does not satisfy Delaware's pleading standards. And, this is especially true where Apache is not even alleged to have marketed, advertised, or sold its products to consumers. Plaintiff's decision to omit Apache from the Delaware Consumer Fraud Act claim is telling and points to a pleading defect for each of Plaintiff's claims: the Complaint does not allege that Apache misrepresented or concealed facts about climate change from consumers.

[1] Subparts (b) and (c) of Paragraph 33 assert the same boilerplate and generalized allegations against Apache as are made against other Defendants regarding control of "companywide decisions" about fossil fuel production and sales.

A. The Complaint is Devoid of Any Facts Regarding Apache's Knowledge of Danger.

Plaintiff alleges that "Fossil Fuel Defendants," as a group, knew about "the potential warming effects of greenhouse gas emissions since as early as the 1950s." Compl. ¶62. Plaintiff pleads allegations based on research sent to, discussed by, or created by certain Defendants and API. *See id.* ¶¶62-103. But, there is not a single reference to Apache in Plaintiff's allegations regarding what certain Defendants were allegedly aware of and/or researching in the 1950s, 60s, and 70s. *See id.*

While Plaintiff seeks to lump Defendants together through their membership in API with a conclusory assertion that certain Defendants, including Apache, were among "more than 600 members" of that organization, the Complaint does not allege when Apache was a member of API or that it received any information from API or took any action as a result thereof. Instead, each time the Complaint specifies a connection between API and a "Fossil Fuel Defendant," Apache is conspicuously omitted. For example, Apache is not among the twenty-four enumerated "API members" alleged to have received a report in 1972 that discussed the impact of fossil fuel products on the environment. *See id.* ¶72. Similarly, Apache is not among the nine companies alleged to have been members of a 1979 API "Task Force" convened "to monitor and share cutting edge climate research among the oil industry," *see id.* ¶78, or the "Global Climate Science Communications Team"

allegedly convened by API in 1998 to "sow doubt and confusion about climate change." *Id.* ¶¶122-23.

Beyond the allegations about certain non-Apache Defendants and API, the remaining allegations in the Complaint refer to "Fossil Fuel Defendants" generally, and fail to make allegations regarding what Apache allegedly knew or when. There are no allegations that Apache was researching the effects of fossil fuel consumption or that *Apache* was participating in any discussions regarding the same. Simply put, the Complaint fails to allege any facts to support an allegation that Apache had the unique, non-public knowledge of the effects of fossil fuel consumption necessary to support imposing a duty on Apache to disclose such information to the public.

B. The Complaint Is Devoid of Any Facts Suggesting that Apache Concealed or Misrepresented Climate Change.

Plaintiff likewise fails to plead any facts alleging that Apache concealed or misrepresented any information regarding climate change. Plaintiff alleges that Defendants, generally, "funded, conceived, planned, and carried out a sustained and widespread campaign of denial and disinformation about the existence of climate change and their products' contribution to it." Compl. ¶110. Plaintiff then discusses actions and statements by certain non-Apache Defendants and organizations that allegedly affected that scheme. *See* Compl. ¶¶110-38. Plaintiff does not allege any actions or statements by Apache. *See id.*

Although Plaintiff refers to certain organizations other than API (addressed elsewhere herein) that were allegedly also coordinating alleged disinformation campaigns, Plaintiff acknowledges that Apache was not a member of those organizations. *See* Compl. ¶¶41-42, 114-16, 129-30 (alleging that the Information Council for the Environment ("ICE") and the Global Climate Coalition ("GCC") contributed to disinformation campaigns but excluding Apache from the list of members for those organizations).

Plaintiff's Complaint also references alleged "greenwashing" statements about investments "in lower carbon technologies and renewable energy sources." Compl. ¶161; *see also id.* ¶¶162-210. It is not clear how these claims are relevant to Plaintiff's claims—which are based on allegedly concealing the effects and dangers of burning fossil fuels—however, Plaintiff does not allege that Apache made any "greenwashing" statements. *See* Compl. ¶¶161-210.

In sum, the Complaint lacks any allegation that Apache made any misrepresentations about climate change or otherwise participated in any of the alleged disinformation campaigns.

III.
LEGAL STANDARD

Dismissal under Superior Court Rule of Civil Procedure Rule 12(b)(6) is appropriate where an allegation does not "put[] the opposing party on notice of the claim being brought against it." *Oliver v. Galerman*, 2022 WL 287907, at *2 (Del.

Super. Ct. Jan. 31, 2022); *see also Griffin Corp. Servs., LLC v. Jacobs*, 2005 WL 2000775, *3, *6 (Del. Ch. Aug. 11, 2005). Further, "[t]he Court need not accept conclusory allegations of fact or law." *Goldstein v. BGC Holdings, L.P.*, 2022 WL 7327372, at *2 (Del. Super. Ct. Oct. 12, 2022). "The Court should grant dismissal if 'under no reasonable interpretation of the facts alleged could the complaint state a claim for which relief might be granted.'" *Id.* (citation omitted).

Delaware Superior Court Civil Rule 8(a) requires a complaint to "contain a short and plain statement of the claim that gives a defendant fair notice of what the claim is and the facts upon which it rests." *Alston v. Admin. Off. of the Courts*, 2018 WL 1080606, at *1 (Del. Feb. 23, 2018). Delaware Superior Court Civil Rule 9(b) requires that "the circumstances constituting fraud, negligence or mistake shall be stated with particularity." Del. Super. Ct. Civ. R. 9(b); *see also Rinaldi v. Iomega Corp.*, 1999 WL 1442014, at *8-9 (Del. Super. Ct. Sept. 3, 1999) (holding that negligent failure to warn claim is governed by Rule 9(b)).

IV.
ARGUMENT

A. Plaintiff's Group Pleading Does Not Satisfy Delaware Law.

Plaintiff's claims are each premised on "Fossil Fuel Defendants" allegedly concealing and misrepresenting the dangers of fossil fuels. Compl. ¶¶1, 4-5. However, as discussed above, the Complaint does not state that *Apache* concealed any known information or breached any duty. All of Plaintiff's allegations that could

conceivably relate to Apache are non-specific and directed in a generalized fashion towards all Defendants.

This sort of group pleading—*i.e.*, pleading allegations against a group of defendants—does not satisfy Delaware's pleading standards under Rule 8(a), let alone Rule 9(b). "[D]efendants are entitled at the pleading stage to isolate the wrong they are alleged to have committed, and to distinguish their behavior, if appropriate in the facts, from the behavior of the other defendants[.]" *In re Benzene Litig.*, 2007 WL 625054, at *7, n.77 (Del. Super. Ct. Feb. 26, 2007) (noting that Rule 8 and Rule 9 require plaintiffs to identify the conduct of each defendant in multi-party litigation); *see also Hupan v. All. One Int'l, Inc.*, 2015 WL 7776659, at *12 (Del. Super. Ct. Nov. 30, 2015) (finding that a plaintiff "cannot satisfy Rules 8 or 9(b) by engaging in [] group pleading"), *aff'd sub nom. Aranda v. Philip Morris USA Inc.*, 183 A.3d 1245 (Del. 2018).

Hupan is instructive. There, the court dismissed claims relating to herbicides and pesticides against multiple defendants where the pleading did not distinguish between defendants. *Id.* at *12. In their complaint, plaintiffs grouped several entities, including Monsanto Company and Monsanto Argentina, S.A.I.C., and referred to them collectively as "Monsanto Defendants." *Id.* The court noted that this grouping left the individual Monsanto entities "to guess whether the alleged tortious act refers to them. As a result, it is impossible for Monsanto to evaluate

which allegations are actually directed at them." *Id.* The court concluded that this lack of specificity, together with the complaint's vagueness as to the timing of allegedly tortious marketing practices and as to how the injuries occurred, was insufficient to provide defendants "notice as to what they allegedly did wrong." *Id.* The court noted that, "[i]n the context of [toxic] tort claims, [p]laintiffs must plead with specificity which defendant caused the alleged harm, what products caused the harm, how the harm occurred, and when that harm occurred." *Id.* Consequently, the court dismissed the complaint.

Other Delaware cases have applied this reasoning to dismiss claims based on alleged misrepresentations leveled against defendants collectively. *See Genworth Fin., Inc. Consl. Deriv. Litig.*, 2021 WL 4452338, at *22 (Del. Ch. Sept. 29, 2021) (dismissing claims premised on misstatements where specific officers were not alleged to have made misstatements, because "[a] plaintiff must adequately plead a breach of fiduciary duty claim 'against each individual director or officer; so called 'group pleading' will not suffice'"); *In re Pattern Energy Grp. Inc. Stockholder Litig.*, 2021 WL 1812674, at *70 (Del. Ch. May 6, 2021) (dismissing fiduciary duty claims based on alleged disclosure violations where "the [c]omplaint contain[ed] no specific allegations that [defendants] were involved" in making the disclosure); *Steinman v. Levine*, 2002 WL 31761252, at *15 (Del. Ch. Nov. 27, 2002) (dismissing negligent misrepresentation claim where the complaint did not identify which

misrepresentations were made by which particular individuals, and instead "simply lump[ed] all of the Director Defendants together").

Here, Plaintiff relies exclusively on impermissible group pleading for its claims against Apache. Repeatedly in the Complaint, Plaintiff refers to alleged conduct of individual Defendants (but not Apache) and then purportedly includes the rest in a group collectively named "Fossil Fuel Defendants." The inclusion of Apache in the "Fossil Fuel Defendants" group fails to put Apache on notice of the claims against it. *See Alston*, 181 A.3d 614, at *1. Plaintiff's allegations in this case span over seventy years. Without specifying which conduct or statements of Apache's during that era (more than two generations) give rise to its claims, the Complaint does not give Apache notice of the claims against it and does not allow Apache to defend itself against those claims. *See Hupan*, 2015 WL 7776659, at *12. Further, the bare allegations Plaintiff does put forth against Apache are so conclusory that there is "no reasonable interpretation of the facts alleged" that raises a claim against Apache. *See Goldstein*, 2022 WL 7327372 at *2. Apache is "entitled at the pleading stage to isolate the wrong [it is] alleged to have committed, and to distinguish [its] behavior, if appropriate in the facts, from the behavior of the other defendants." *See In re Benzene Litig.*, 2007 WL 625054, at *7. The Complaint does not meet Delaware's pleading standards and must be dismissed. *See Hupan*, 2015 WL 7776659, at *12.

The Complaint's allegations against Apache are especially inadequate because Plaintiff's claims, each of which are based on alleged knowing misrepresentations, are subject to the heightened pleading requirements of Rule 9(b). *See* Joint Brief § V. Plaintiff's failure to even mention a specific act or misstatement by Apache plainly does not allege with particularity "the time, place, and contents of the false representations" as required by Rule 9(b). *Browne v. Robb*, 583 A.2d 949, 955 (Del. 1990); *see also Sparton Corp. v. O'Neil*, 2017 WL 3421076, at *8-9 (Del. Ch. Aug. 9, 2017) (dismissing fraud claims where complaint failed to "identify specific acts of individual defendants").

B. The Allegations Against API Cannot Be Imputed to Apache.

Plaintiff's allegations regarding API do not cure its absence of allegations against Apache. While Plaintiff makes allegations regarding conduct by API throughout the Complaint and pleads that Apache was a member of API, those allegations are insufficient to impute API's alleged conduct to Apache. As discussed above, Plaintiff simply pleads that Apache was a member of API "at times relevant to this litigation." Compl. ¶37(e). "Times relevant to this litigation" potentially span over 70 years, as the Complaint begins its factual recitation in the early 1950s. Compl. ¶62. The Complaint, however, does not specify any dates of Apache's alleged membership. And, by failing to ever specifically identify Apache as participating in the complained-of conduct, Plaintiff implicitly concedes that Apache

was not a member of API during the times most relevant to the litigation. For instance, in one allegation regarding a research report received by API members in 1972, the Complaint lists the Defendants who received the report and that list does not include Apache. Compl. ¶72. Likewise, Plaintiff alleges that API contributed to a plan to oppose treaties restricting greenhouse gas emissions, but does not include Apache in the specified Defendants associated with that plan. Compl. ¶124. Without any allegations that Apache was an API member when API allegedly engaged in actionable conduct, the general allegation of membership "at times relevant to the litigation" is insufficient to give Apache notice of the claims against it. *See Hupan*, 2015 WL 7776659, at *12.

Further, even if Plaintiff did sufficiently plead that Apache was a member of API at the necessary times (which it does not and cannot do), API's alleged conduct cannot be imputed to Apache. The Restatement (Second) of Torts, which Delaware courts follow, limits the circumstances in which a defendant can be held liable for "harm resulting to a third person from the tortious conduct of another" to those where 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, *cited with approval in, e.g., Kuczynski v. McLaughlin*, 835 A.2d 150, 156 n.26 (Del. Super. Ct. 2003). Plaintiff has not pleaded facts to support any of these theories.

As to Restatement Section 876(a), the Complaint does not plead any allegations that Apache conspired or acted "in concert with" API. Instead, the Complaint merely asserts that Apache was a member of API at unspecified "times relevant to this litigation." Compl. ¶37(e). 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. Nocolet, 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) ("[w]e do not conceive that 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.").

There can likewise be no liability under Restatement Section 876(b) because Plaintiff does not allege that Apache "kn[ew] that [API's] conduct constitute[d] a breach of duty [or gave] substantial assistance or encouragement to the other so to conduct [it]self." *See Anderson v. Airco, Inc.*, 2004 WL 2827887, at *4 (Del. Super. Ct. Nov. 30, 2004); Restatement (Second) of Torts § 876(b).

Restatement Section 876(c) assigns liability where a defendant's own tortious conduct, along with that of another whom he assisted, breached a duty to a third party. Again, Plaintiff does not allege that Apache assisted with any tortious conduct. Moreover, the Complaint does not allege any facts supporting an inference of tortious conduct by Apache. The only allegation against Apache in connection with API is the claim of membership, which in and of itself is not tortious conduct. Plaintiff has thus failed to raise allegations that are sufficient to impute liability to Apache for the alleged conduct of API.

Because Plaintiff has failed to plead when Apache was a member of API, let alone any facts that would support an inference that Apache acted in concert with API with respect to the complained-of conduct, the allegations against API cannot be imputed to Apache.[2]

[2] Apache incorporates by reference the arguments set forth in API's Memorandum in Support of Motion to Dismiss for Failure to State a Claim explaining that API's alleged conduct is inactionable because it is protected under the First Amendment.

C. Plaintiff Does Not Sufficiently Plead a Nuisance Claim Against Apache.

As explained in the Joint Brief, Plaintiff's nuisance claim fails as to all Defendants because Plaintiff cannot state a cognizable claim for nuisance based on *products* under Delaware law and Plaintiff has not pleaded that any Defendant controlled the instrumentality of the nuisance. *See* Joint Brief § IV.A. Even setting that fatal flaw aside, such claim should be dismissed specifically as to Apache, because there is no connection between *Apache* and the instrumentality.

Under Delaware law, "a defendant is not liable for public nuisance unless it exercises control over the instrumentality that caused the nuisance at the time of the nuisance." *State ex rel. Jennings v. Purdue Pharma L.P.*, 2019 WL 446382, at *13 (Del. Super. Ct. Feb. 4, 2019). As stated in the Joint Brief, no Defendant controlled the instrumentality, *i.e.*, greenhouse gas emissions. However, even if the Court credits Plaintiff's allegations that the instrumentality somehow included "flooding the marketplace with disinformation concerning their products, and by controlling every step of the fossil fuel product supply chain from extraction, to marketing, to consumer sales[,]" (Compl. ¶ 261) Plaintiff's claim against Apache still fails.

As detailed above, Plaintiff does not plead that Apache participated in any disinformation or that Apache—which is an exploration and production company—marketed or sold any fossil fuel products to consumers. Thus, even under Plaintiff's flawed theory of controlling the instrumentality, Apache is still too far removed to

be deemed to have control over consumers' emissions. The nuisance claim against Apache should, therefore, be dismissed. *See Purdue*, 2019 WL 446382, at *13 (dismissing nuisance claim where defendants lacked "control over the instrumentality that caused the nuisance at the time of the nuisance"); *see also McQuail v. Shell Oil Co.*, 183 A.2d 581, 583, 585 (Del. Ch. 1962) (dismissing nuisance claims because allegations were conclusory).

D. Plaintiff Does Not Plead Facts to Support a Failure to Warn Claim Against Apache.

Plaintiff's failure to warn claim fails against all Defendants because Plaintiff failed to allege that Defendants owe the State of Delaware a duty to warn and there is no duty to warn of an open and obvious danger. *See* Joint Brief § IV.C.

Further, Plaintiff's claim is based on an allegation that Defendants failed to adequately warn "consumers . . . of the climate effects that inevitably flow from the intended or foreseeable use of their fossil fuel products." Compl. ¶236. But Plaintiff does not plead that Apache marketed or sold any products to consumers. Instead, and as a tacit acknowledgement of this fact, Plaintiff pleads that Apache is an exploration and production company and excluded Apache from the Delaware Consumer Fraud Act Claim. Apache cannot be liable for failing to warn consumers when it did not market or sell any products to consumers. *See In re Asbestos Litig*, 2007 WL 4571196, at *12 (Del. Super. Ct. Dec. 21, 2007) (rejecting failure to warn claim where court could not "discern a relationship between the plaintiff and the

defendant that would support a legal duty"); *Money v. Manville Corp. Asbestos Disease Comp. Tr. Fund*, 596 A.2d 1372, 1377 (Del. 1991) (rejecting failure to warn claim where plaintiff failed to establish a "causal nexus" between the defendant's product and its injuries).

Setting aside those fatal flaws, Plaintiff's claim against Apache fails for the independent reason that Plaintiff does not plead that Apache had knowledge of the alleged dangers (*supra* § II.A), which is a prerequisite to having a duty to warn. A manufacturer'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) ("[T]here is no duty to warn or protect from an open and obvious danger."); *accord* Restatement (Second) of Torts § 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"). Where the manufacturer lacks "actual or constructive knowledge of the hazards associated" with its product, the manufacturer does not have a duty to warn. *In re Asbestos Litig.*, 799 A.2d at 1152.

Again, while the Complaint contains numerous allegations about what some Defendants were allegedly researching or knew, the Complaint does not contain any allegations specific to Apache. There are no allegations that Apache was researching

climate change, that Apache was a member of API when API was allegedly disseminating reports regarding the dangers of climate change, or that Apache otherwise received the information. Asserting that Apache had knowledge without any factual allegations to support the assertion is conclusory and does not sufficiently plead a failure to warn cause of action. *See Pope v. AstraZeneca AB*, 2021 WL 1263044, at *3 (Del. Super. Ct. Apr. 5, 2021) (dismissing failure to warn claim because of "conclusory allegations unsupported by specific facts").

E. Plaintiff Does Not Plead Facts Establishing a Trespass Claim Against Apache.

Plaintiff has not pleaded any element of trespass against any Defendant and Plaintiff's trespass claim should be dismissed. *See* Joint Brief § IV.B. Plaintiff pleads that the "Fossil Fuel Defendants … caused flood waters, extreme precipitation, and other materials to enter the State's real property." Compl. ¶249. While this allegation is deficient for the reasons set out in the Joint Brief, it also fails to put Apache on notice of the claims against it. *See Hupan*, 2015 WL 7776659, at *12. Plaintiff does not plead which of Apache's products were alleged to have caused these events or when or where such products were combusted. As such, this Court should dismiss the trespass claim against Apache. *See Sussex Cnty. Env't Concerns Ass'n, Inc. v. Rehoboth Mall Ltd. P'ship*, 1985 WL 165734, at *6 (Del. Ch. Mar. 20, 1985) (dismissing trespass claim due to conclusory allegations).

V.
CONCLUSION

For the foregoing reasons, Apache respectfully requests that the Court dismiss Plaintiff's Complaint with prejudice.

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