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.	)	C.A. No. N20C-09-097 MMJ CCLD
BP AMERICA INC., *et al.*,	)	
Defendants.	)	

DEFENDANT MARATHON OIL CORPORATION'S
OPENING BRIEF IN SUPPORT OF ITS MOTION TO DISMISS

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Defendant Marathon Oil Corporation (hereinafter "MRO," after its New York Stock Exchange ticker symbol) respectfully submits this Opening Brief in Support of its Motion to Dismiss the Complaint for Failure to State a Claim.

MRO joins the Joint Opening Brief In Support of Motions to Dismiss Plaintiff's Complaint for Failure to State a Claim (the "Joint Opening Brief") filed this day, herein incorporates those arguments by reference, and believes the Complaint should be dismissed as to all Defendants. MRO separately files this Opening Brief to address grounds for dismissal with prejudice that are specific to Plaintiff's minimal and legally inadequate allegations made against MRO.

INTRODUCTION

Plaintiff's 218-page Complaint in this massive action is devoid of well-pleaded allegations that state a claim against MRO. Only four paragraphs of the Complaint mention MRO specifically. Two paragraphs identify it as a defendant in the case generally and as a defendant in Plaintiff's Delaware Consumer Fraud Act ("DCFA") claim. The third alleges MRO's membership in a trade association during an unspecified period, and the last alleges that, solely as a consequence of this membership, MRO received a "status report" that summarized a four-year old survey of published research. Every other allegation against MRO arises through the Company having been sued, and therefore named a "Defendant."

Plaintiff's allegations establish no violation of law, particularly under the heightened pleading standard applicable to Plaintiff's claims. Nor does the Complaint allege either conduct by MRO or circumstances from which an allegation of conspiracy may reasonably be inferred making MRO responsible for conduct alleged against others throughout the Complaint.

For the reasons set forth in the Joint Opening Brief and herein, the Complaint should be dismissed as to MRO with prejudice.

STATEMENT OF FACTS

The Court is respectfully referred to the Statement of the Case as set forth in the Joint Opening Brief for a discussion of the extensive prior proceedings in this case.

MRO is a Delaware corporation headquartered in Houston, Texas, that "is engaged in the exploration and production of crude oil, natural gas, and oil sands." Complaint ("Compl.") ¶ 26(a). It is one of thirty-one Defendants.

The Complaint purports to plead four "Causes of Action." Negligent Failure to Warn, Trespass, Nuisance, and a violation of the DCFA. All four claims purportedly arise from an alleged "campaign of deception":

> Instead, [of providing "warnings about their products' known dangers"'], Defendants embarked on a decades-long campaign of deception (1) to conceal their own knowledge about those dangers; (2) discredit the scientific consensus about the causes and impacts of climate change; and (3) sow doubt in the minds of consumers and the public about the consequences of using their products; all while (4)

> promoting increased use of those products through false and misleading advertising, including sophisticated "greenwashing" campaigns.

Plaintiff's Answering Brief In Opposition To Defendants' Motion To Stay (December 21, 2022) at 2. *Accord* Compl. ¶ 1 (accusing Defendants of engaging in "a coordinated, multi-front effort to conceal and deny their own knowledge of [climate change] threats, to discredit the growing body of publicly available scientific evidence and persistently create doubt in the minds of customers, consumers, regulators, the media, journalists, teachers, and the public about the reality and consequences of the impacts of their fossil fuel products").

STATEMENT OF QUESTIONS INVOLVED

1. Whether the four paragraphs of the Complaint mentioning MRO or "Marathon" make well-pleaded allegations of fact against MRO.
2. Whether allegations against undifferentiated groups of defendants should be imputed to MRO given the applicable heightened pleading standard and distinguishable allegations against MRO.
3. Whether MRO should be held responsible for the actions of other defendants based on an alleged conspiracy absent allegations of any involvement by MRO in the alleged "campaign of deception." Whether the Complaint should be dismissed with prejudice against MRO because Plaintiff, having had the time and resources to investigate the facts, failed to allege any unlawful conduct against the company.

ARGUMENT

I. THE COMPLAINT MAKES NO WELL-PLEADED ALLEGATIONS OF WRONGFUL CONDUCT AGAINST MRO

We address in turn each of the four paragraphs of the Complaint in which MRO or "Marathon" is named specifically and explain why none states or supports a claim against the Company.

Superior Court Civil Rule 9(b) requires "the circumstances constituting fraud, negligence or mistake be stated with particularity." Because "[t]he entire purpose of Rule 9(b) is to put the defendant on notice so that he can adequately prepare a defense," a plaintiff's complaint must allege the "factual bases to support a claim of fraud," including "the time, place and contents of the false representations." *Browne v. Robb*, 583 A.2d 949, 955 (Del. 1990). As further explained in the Joint Opening Brief, the heightened pleading standard of Rule 9(b) applies to all of Plaintiff's claims. *See* Joint Opening Br., Legal Standard.

1. *Paragraph 26, identifying MRO as a Defendant, contains no well-pleaded allegation of unlawful conduct by MRO.*

MRO is first named in Subparagraphs 26(a)-(c) and (k) of Subsection II.B of the Complaint ("PARTIES/Defendants"). Subparagraph 26(a) describes MRO's business and subparagraphs 26(b) and (c) allege MRO's purported "control" over its own activities and those of its subsidiaries, which MRO would dispute but assumes to be true for purposes of this motion. These subsidiaries do not include the "Marathon Oil Company" named in the Complaint and alleged to be a Delaware

corporation. To MRO's knowledge, no such corporation currently exists or has been served, as MRO advised in its October 26, 2020 Consent to Remove Case to United States District Court. *Delaware v. B.P. America Inc.*, No. 1:20-cv-01429-LPS, Doc. 17 (D. Del. Apr. 6, 2021).

Paragraph 26(j) defines a purported defendant group, "Marathon," which deceptively includes not just MRO but an unaffiliated public corporation, Marathon Petroleum Company.[1] Subparagraph 26(k) is a textbook example of a set of conclusory, cookie-cutter, and fact-free statements that fail to satisfy even the notice-pleading standard, let alone the higher pleading standard applicable to Plaintiff's claims. Plaintiff alleges:

> Marathon wrongfully distributed, marketed, advertised, and promoted its products in Delaware, with knowledge that those products would cause climate crisis-related injuries in Delaware, including the State's injuries. Marathon'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 Marathon's products. That conduct was intended to reach and influence the State, as well as its residents, among others, to continue unabated use of Defendants' fossil fuel products, resulting in the State's injuries.

[1] "Marathon" is the only defined defendant group that includes unaffiliated public corporations – MRO and the separate and unaffiliated Marathon Petroleum Corporation. *See id.* ¶¶ 21(e), 22(f), 23(g), 24(g), 25(d), 27(e), 28(e), 29(d), 30(e), 31(e), 32(d), 33(d), 34(g), and 35(d).

Nearly identical rote allegations in the "Defendants" section of the Complaint appear against other defendants, like MRO, as to which specific allegations of fact are absent. *See*, *e,g.*, Compl. ¶¶ 25(e) and 29(e). Plaintiff has pleaded no "facts" regarding MRO in furtherance of the above conclusory allegations. Even under notice-pleading standards, a "[c]ourt will 'ignore conclusory allegations that lack specific supporting factual allegations."' *Black v. New Castle County*, 2021 WL 4191453, at *2 (Del. Super. Sept. 14, 2021) (quoting *Ramunno v. Cawley*, 705 A.2d 1029, 1034 (Del. 1998)).

2. *Paragraph 37, identifying "Marathon" as a member of a trade organization, contains no well-pleaded allegation of unlawful conduct by MRO*

Paragraph 37(e) identifies "Marathon" as one of thirteen defendant groups alleged to have been members of Defendant trade association American Petroleum Institute ("API") "at times relevant to this litigation." Compl. ¶ 37(e). Membership in a trade association—all that is alleged here—is not unlawful, of course, nor does it carry a reasonable implication of conspiracy. *See infra* Section I.a.4.c.

Plaintiff's own allegations focus, however, not just on membership in API, but on allegations that one or more defendants – not MRO – directed its actions: "Fossil Fuel Defendants have collectively steered the policies and trade practices of API through membership, Executive Committee roles, and/or budgetary funding." *Id.* ¶37(d). Membership on API's "Executive Committee" is the only active role

claimed to have influence. Plaintiff adds that service "on the API Executive Committee and/or as API Chairman, . . . is akin to serving as a corporate officer." *Id.* ¶ 37(e). Paragraph 37(e) of the Complaint identifies five defendant groups, comprising fourteen defendants, that had Executive Committee or Board chairman representation. MRO is not among them.

3. *Paragraph 72, identifying "Marathon" as having received a "status report" along with every other API member, contains no well-pleaded allegation of unlawful conduct by MRO*

Paragraph 72, in Section IV.B of the Complaint ("FACTUAL BACKGROUND/Defendants Went to Great Lengths to Understand, and Either Knew or Should Have Known About, the Dangers Associated with Their Fossil Fuel Products") alleges that, along with every other API member, "Marathon" received a "status report" on API-funded "environmental research projects" that included a summary of a then-four-year old Stanford Research Institute ("SRI") report. Receipt of such document would not be unlawful, and the allegations of Paragraph 69 demonstrate it would hardly even have been noteworthy: According to Paragraph 69, the report merely "endorsed the findings of President Johnson's Scientific

Advisory Council" announced publicly and made even three years further in the past, and it appears to have been based on research that was already publicly available.[2]

4. *Paragraph 265, identifying "Marathon" as a defendant in Plaintiff's DCFA claim, contains no well-pleaded allegation of unlawful conduct by MRO.*

MRO is also named in Paragraph 265, which introduces the defendants named in the Complaint's Fourth Cause of Action (DCFA). MRO is one of 18 named defendants subject to the allegation that "[i]n marketing and selling fossil fuel products, [they] have persistently misrepresented material facts, or suppressed, concealed, or omitted material facts, with the intent that consumers will rely thereon." Like Paragraph 26(k), it is a quintessential "conclusory" allegation which must be "ignore[d]," a treatment underscored by its cookie-cutter applicability to 18 defendants. *Black,* 2021 WL 4191453, at *2.

With this, the discussion of paragraphs of the Complaint mentioning MRO or even "Marathon" specifically is exhausted.

5. *Paragraph 196 relates to Marathon Petroleum Corporation, not MRO.*

Plaintiff's Complaint makes only one allegation anywhere about an alleged statement by "Marathon" about supposed "Greenwashing." Compl. ¶ 196. This

[2] Paragraph 69 provides a citation to the SRI report directing the reader to a private website. Only the cover and four pages of the SRI report are shown on that website, and they appear to reflect only published research.

allegation, however, refers to an independent public company, Marathon Petroleum Corporation, that the Complaint admits is not affiliated with MRO. *See* Compl. ¶¶ 168, 196 & nn.187 and 188.

II. ALLEGATIONS AGAINST GROUPS OF DEFENDANTS DO NOT SATISFY THE HEIGHTENED PLEADING STANDARD

Plaintiff's other allegations purportedly made against MRO arrive in the form of allegations made collectively against the thirty-one "Defendants" or the thirty "Fossil Fuel Defendants" (all Defendants less API).

These allegations are conclusory. Not one of them identifies MRO specifically, much less identifies any particularized misstatement or omission that allegedly would support liability. As this Court has recognized, these types of undifferentiated allegations against "defendants," untethered to any speaker or any factual specificity, should be disregarded. *See ITW Glob. Invs. Inc. v. Am. Indus. Partners Cap. Fund IV, L.P.*, 2015 WL 3970908, at *11 (Del. Super. June 24, 2015) (rejecting as conclusory the allegation "Defendants Marvin, Bamatter, and Baroyan were actively involved in the fraud and were aware of the relevant facts," and observing "[n]owhere does ITW plead any additional facts to support this conclusory statement").

The Complaint's allegations against "Defendants" are undifferentiated in any way despite the dozens of allegations made specifically against one defendant group or another, and that underscores their inadequacy. "[F]acts showing negligence on

the part of the defendant must be averred with that degree of particularity which the nature of the case reasonably permits[.]" *In re Benzene Litig*., 2007 WL 625054, at *6 n.65 (Del. Super. Feb. 26, 2007) (quoting *Hartford Accident & Indemnity Co. v. Anchor Hocking Glass Corp*., 55 A.2d 148, 150 (Del. Super. 1947)). Here, Plaintiff has itself set the standard of particularity that its omnibus allegations against unnamed Defendants fails to meet. The fact that the sweep of Plaintiff's allegations embraces a period of decades and includes every country on earth where fossil fuels have been and are burned "compounds the problem." *Benzene Litig*., 2007 WL 625054, at *14 (noting plaintiff's alleged exposure "occurred over a period of seven years").

Where, as here, a plaintiff has engaged in group pleading against multiple defendants, "[t]hese defendants 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." *Benzene Litig.*, 2007 WL 625054, at *7. "In order to assess the claim, the Court needs to understand (at a minimum) *for each named Defendant*: what particular material fact did the Defendant conceal or remain silent about . . . ." *Banks v. E.I. du Pont de Nemours & Co.*, 2022 WL 3139087, at *12 (D. Del. Aug. 4, 2022), *report and recommendation adopted*, 2022 WL 3577111 (D. Del. Aug. 19, 2022). A complaint that "leaves to the Defendants and the Court the burden of trying to match up a

particular Defendant and a particular concealed fact with the rest of the elements . . . . fails to put the Defendants on notice of what the alleged misconduct is and is therefore insufficient." *Id.*

Plaintiff tries to cover-up this deficiency with one allegation of purported "Greenwashing" against "Marathon." Compl. ¶ 196. Whatever the other infirmities of its allegation, the Complaint makes clear that it relates to Marathon Petroleum Corporation, which is not affiliated with MRO. *Id* n.187; *see also* ¶ 168. This kind of group pleading through use of a general misnomer for groups of defendants has been rejected by Delaware courts. *See Hupan v. Alliance One Int'l, Inc.*, 2015 WL 7776659, at *12 (Del. Super. Nov. 30, 2015), *aff'd sub nom. Aranda v. Philip Morris USA Inc.*, 183 A.3d 1245 (Del. 2018) ("Plaintiffs continue to refer to the separate entities as 'Monsanto Defendants,' leaving this remaining Monsanto to guess whether the alleged tortious act refers to them . . . . Plaintiffs cannot satisfy Rules 8 or 9(b) by engaging in the group pleading as to the Monsanto Defendants without providing Monsanto notice of what they allegedly did wrong.").

None of the vague allegations against "Defendants" should be taken as a well-pleaded allegation of fact against any one of them or that they support Plaintiff's claims. Still, through the allegations it purports to make against named defendants, Plaintiff advises the Court the characteristics it considers probative of participation in the alleged "campaign of deception." The absence of *any* of these allegations

against MRO demonstrates that a "meaningful or substantive distinction" exists between the knowledge and conduct alleged against it compared with what Plaintiff itself believes is common to the Defendant group and might otherwise support group pleading.[3] *State ex rel. Jennings v. Purdue Pharma L.P.*, 2019 WL 446382, at *8 (Del. Super. Feb. 4, 2019) ("*Del. Opioids*").

III. NO WELL-PLEADED ALLEGATIONS SUPPORT A REASONABLE INFERENCE THAT MRO CONSPIRED WITH ANY OTHER DEFENDANT

Plaintiff alleges that MRO, like every Defendant, is responsible for the conduct alleged against every other Defendant because all engaged in a conspiracy

[3] For most subsections of the "Factual Background" in the Complaint, Plaintiff makes no allegations of *any* kind against MRO. These include: Section IV.A ("Defendants Are Responsible for Causing and Accelerating Climate Change"), Section IV.C ("Defendants Did Not Disclose Known Harms Associated with the Extraction, Promotion, and Consumption of Their Fossil Fuel Products, and Instead Affirmatively Acted to Obscure Those Harms and Engaged in a Campaign to Deceptively Protect and Expand the Use of their Fossil Fuel Products"), Section IV.D ("In Contrast to Their Public Statements, Defendants' Internal Actions Demonstrate Their Awareness of and Intent to Profit from the Unabated Use of Fossil Fuel Products"), Section IV.E ("Defendants' Actions Have Exacerbated the Costs of Adapting to and Mitigating the Adverse Impacts of the Climate Crisis"), Section IV.F (and subsections) ("Defendants Continue to Mislead About the Impact of Their Fossil Fuel Products on Climate Change Through Greenwashing Campaigns and Other Misleading Advertisements in Delaware and Elsewhere"), Section IV.G ("Defendants Also Made Misleading Claims About Specific 'Green' or 'Greener' Fossil Fuel Products"), and Section IV.H ("Defendants Intended for Consumers to Rely on their Concealments and Omissions Regarding the Dangers of Their Fossil Fuel Products"), Section IV. I ("Defendants' Deceit Only Recently Became Discoverable, and Their Misconduct Is Ongoing"), and Section IV.J ("The State Has Suffered, Is Suffering, and Will Suffer Injuries from Defendants' Wrongful Conduct").

"through API and other Organizations like NMA [National Mining Association], ICE [Information Council for the Environment], and GCC [Global Climate Coalition]." Compl. ¶ 46(b). The alleged goal of the conspiracy was (and allegedly continues to be):

> to conceal and misrepresent the known dangers of fossil fuels, to knowingly withhold information regarding the effects of using fossil fuel products, to discredit climate change science and create the appearance such science is uncertain, and to engage in massive campaigns to promote heavy use of their fossil fuel products, which they knew would result in injuries to the State.

Id. Plaintiff has alleged no facts to support a reasonable inference that MRO was a member of any such conspiracy at any time.

Among other things, the Complaint must allege a party's "'knowing participation' in the wrongful conduct" to support an inference of conspiracy. *In re Asbestos Litig.*, 509 A.2d 1116, 1120 (Del Super. 1986), *aff'd sub nom. Nicolet, Inc. v. Nutt*, 525 A.2d 146 (Del. 1987). But no such allegations of fact have been made against MRO. As discussed *supra* Section I.A.2, Plaintiff itself has alleged roles necessary to have guided API's conduct – *i.e.*, service on the Executive Committee, which Plaintiff incorrectly tries to liken to service as an API officer. But Plaintiff never alleges that MRO occupied any such role. Nor does an allegation that MRO, like all API members, received a report summarizing a four-year old literature survey support a reasonable inference that MRO "knowing[ly] participat[ed]" in any

conduct, let alone wrongful conduct. The allegation is no more than that MRO was an API member, which in and of itself is entirely lawful. *Id.*

Potential activities of NMA, ICE, and GCC may be addressed even more summarily: MRO is not alleged to have been a member of any of them. *See* Compl. ¶¶ 40-42.

The broad scope of the alleged conspiracy underscores the inadequacy of the allegations against MRO. In Paragraph 46(b), Plaintiff has itself defined for the Court the "wrongful conduct" it must plead against MRO. As shown above, the Complaint pleads none of it against MRO.

IV. THE COMPLAINT SHOULD BE DISMISSED WITH PREJUDICE AGAINST MRO

Section IV of the Joint Opening Brief catalogues the Complaint's failure on its face to plead the elements of the four claims alleged. The Complaint's failure to allege well-pleaded facts against MRO supporting an inference of MRO's participation in a "campaign of deception" provides an independent ground for dismissal:

- The Negligent Failure to Warn claim should be dismissed because no well-pleaded facts reasonably support an inference of a duty to warn, "what act or failure to act breached the [alleged] duty," MRO's knowledge of facts not generally known by the public, or that any alleged injuries can reasonably be attributed to MRO's conduct. Compl. ¶¶ 237-239; *Del. Opioids*, 2019 WL 446382, at *7-8; *State*

ex rel. Jennings v. Monsanto Co., 2022 WL 2663220, at *2-4 (Del. Super. July 11, 2022) (dismissing public nuisance claims against manufacturers of PCBs for alleged contamination of waterways). In particular, Plaintiff cannot allege particularized facts showing that MRO "exercises control over the instrumentality that caused the nuisance at the time of the nuisance." Del. Opioids, 2019 WL 446382, at *13. Plaintiff merely recites that "Fossil Fuel Defendants," as a group, "controlled the instrumentality of the nuisance at the time of the nuisance by flooding the marketplace with disinformation concerning their products, and by controlling every step of the fossil fuel product supply chain . . . ." Compl. ¶ 261. That conclusory allegation does not provide MRO with sufficient information to "isolate the wrong [it] is alleged to have committed, and to distinguish [its] behavior . . . from the behavior of the other defendants," which is fatal to Plaintiff's public nuisance claim against MRO. Benzene Litig., 2007 WL 625054, at *7.

- The Trespass claim should be dismissed because Plaintiff posits the "campaign of deception" as the "cause[]" of the alleged entry onto land and the cause of its alleged damages. Compl. ¶¶ 249, 251; *O'Bier v. JBS Const*., LLC, 2012 WL 1495330, at *2 (Del. Super. Apr. 20, 2012).

- The Nuisance claim should be dismissed because well-pleaded allegations do not support a reasonable inference that MRO created or contributed to an unreasonable interference with public rights, controlled the instrumentality of

Plaintiff's alleged injury, or indeed caused any alleged injury. *Compl*. ¶¶ 255-262; *Del. Opioids*, 2019 WL 446382, at *13.

- The DCFA claim should be dismissed because well-pleaded allegations do not support a reasonable inference that MRO misrepresented any material fact to any Delaware consumer or caused any alleged injury. *Id*. ¶¶ 265-279; *Teamsters Loc. 237 Welfare Fund v. AstraZeneca Pharm. LP*, 136 A.3d 688, 693 (Del. 2016).

The Complaint should be dismissed with prejudice. Dismissal with prejudice is warranted on the grounds cited in the Joint Opening Brief. It would independently be prudent as to MRO alone. Plaintiff's failure to allege claims against MRO is not for want of trying. Plaintiff was armed with the full resources of the State and private counsel that boasts experience in bringing substantially similar climate change litigation starting more than three years before the present action was filed.[4] And yet only four legally insignificant paragraphs of the Complaint—two just identifying MRO as a Defendant—appear. The Court should also not turn a blind eye toward the enormous scope of this sprawling suit, and the burdens it places on the Court and litigants alike. No cause exists to reopen that investigation.

[4] *See Climate Change Litigation Experience,* Sher Edling LLP at 7 (Feb. 2022), https://www.sheredling.com/wp-content/uploads/2022/02/SELLP-QUALIFICATIONS-Envtl-General-Feb-2022.pdf.

V. CONCLUSION

For the foregoing reasons, the Complaint should be dismissed with prejudice against MRO.

DATED: May 18, 2023

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