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Case No. N20C-09-097 MMJ CCLD

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, INC., and AMERICAN PETROLEUM INSTITUTE,

Defendants.

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

DEFENDANTS BP P.L.C. AND BP AMERICA INC.'S MEMORANDUM IN SUPPORT OF MOTION TO DISMISS THE COMPLAINT FOR FAILURE TO STATE A CLAIM

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STATEMENT OF THE CASE

This Court should dismiss all of Plaintiff's claims against BP p.l.c. and BP America Inc. (together, "BP") for the reasons set forth in Defendants' Joint Opening Brief. BP writes separately here to provide additional reasons to dismiss the Delaware Consumer Fraud Act ("DCFA") claim pleaded against it. As shown below, nowhere in Plaintiff's sprawling Complaint does Plaintiff identify a single actionable statement by BP, compelling dismissal of the DCFA claim against BP.

First, Plaintiff's "climate-denial" theory fails to state a claim against BP. Despite blunderbuss accusations that "Defendants" *en masse* engaged in a "campaign" to deny climate change, Plaintiff fails to identify any statement *by BP* that was part of this supposed "campaign." And for good reason: the Complaint flatly refutes the notion that Plaintiff's "group" pleading vis-à-vis "climate-denial" applies to BP. While Plaintiff purports to identify certain specific "climate-denial" statements, it does not identify even one such statement by BP. To the contrary, Plaintiff admits that BP publicly acknowledged the risks of climate change some quarter-century ago—including a 1997 speech to the public by its former chief executive recognizing an "effective consensus" that "there is a discernible human influence on the climate." Compl. ¶ 151. In short, the "climate-denial" theory fails against BP.

Second, Plaintiff's "greenwashing" theory—that oil and gas company Defendants purportedly falsely promote themselves as sustainable businesses committed to solving climate change—fails to state a claim against BP. The handful of "greenwashing" statements Plaintiff attributes to BP, including statements that BP is "working to make energy that's cleaner and better," *id.* ¶ 185, are classic examples of non-actionable puffery that convey the company's goals and aspirations. None is an actionable statement of fact under the DCFA. Moreover, the statements at issue do not concern "merchandise" within the meaning of the DCFA, as the statute requires.

Third, Plaintiff's allegations that BP made misleading statements about Invigorate (a gasoline additive) and BP Diesel fuel fail to state a claim. These allegations grossly misrepresent the actual statements BP made—omitting key portions of the statements, as well as surrounding language that provides crucial context. The actual statements, read in context, come nowhere close to violating the DCFA.

For all these reasons, the Court should dismiss the DCFA claim against BP.

STATEMENT OF THE QUESTIONS INVOLVED

1. Whether Plaintiff states a DCFA claim against BP based on alleged "climate-denial" statements where the Complaint fails to identify a single such statement made by BP.

2. Whether Plaintiff states a DCFA claim against BP based on alleged "greenwashing" statements where the statements identified convey the company's general aspirations and do not concern merchandise.

3. Whether Plaintiff states a DCFA claim against BP based on alleged statements about Invigorate gasoline and BP Diesel where the actual statements made by BP bear little resemblance to the selectively-quoted phrases in the Complaint.

LEGAL STANDARD

A court must dismiss a complaint for failure to state a claim under Rule 12(b)(6) where the plaintiff fails to allege facts supporting a "reasonably conceivable set of circumstances" under which it would be entitled to relief. *Cent. Mort. Co. v. Morgan Stanley Mort. Cap. Holdings LLC*, 27 A.3d 531, 536 (Del. 2011). The trial court "is not required to accept every strained interpretation of the allegations proposed by the plaintiff." *Malpiede v. Townson*, 780 A.2d 1075, 1083 (Del. 2001). Nor does it "credit conclusory allegations that are not supported by specific facts, or draw unreasonable inferences in the plaintiff's favor." *Norton v. K-Sea Transp. Partners L.P.*, 67 A.3d 354, 360 (Del. 2013). When the plaintiff "fails to plead facts supporting an element of its claim," "[d]ismissal is warranted." *Brightstar Corp. v. PCS Wireless, LLC*, 2019 WL 3714917, at *3 (Del. Super. Ct. Aug. 7, 2019).

ARGUMENT

Plaintiff's DCFA claim against BP targets three types of alleged statements, which Plaintiff refers to as (1) "climate-denial" statements, (2) "greenwashing" statements, and (3) statements about Invigorate (a gasoline additive) and BP Diesel. As shown below, each of these theories fails to state a DCFA claim against BP. Because Plaintiff has not identified any actionable statement made by BP, the DCFA claim against BP must be dismissed.

I. PLAINTIFF DOES NOT ALLEGE A SINGLE "CLIMATE-DENIAL" STATEMENT MADE BY BP

In wholly conclusory fashion, Plaintiff asserts that all thirty-one "Defendants individually and collectively played leadership roles in denialist campaigns to mis-inform and confuse consumers" about the role of fossil fuels in causing global warming and generally references BP's "campaign of deception and denial." Compl. ¶¶ 9, 21(g). But, as to BP, the Complaint fails to support these conclusory assertions with a single allegation of fact. *See Norton*, 67 A.3d at 360 (Delaware courts do not "credit conclusory allegations that are not supported by specific facts"). Nowhere in its sprawling Complaint does Plaintiff identify a single purported climate-denial statement made by BP. To the contrary, Plaintiff concedes that BP publicly acknowledged the risks of climate change decades ago. The Complaint cites BP's 1991 film, "The Earth—What Makes Weather?," which described climate change as an "urgent concern[]," as well as a 1997 speech at Stanford University by BP's

then-chief executive recognizing the "effective consensus" that "there is a discernible human influence on the climate." Compl. ¶¶ 99, 151. Plaintiff thus fails to allege facts showing that BP made "climate-denial" statements. *See Diamond Elec., Inc. v. Delaware Solid Waste Auth.*, 1999 WL 160161, at *7 (Del. Ch. Mar. 15, 1999) (dismissing fraud claim where plaintiff "d[id] not allege any misrepresentations of fact" and, "[i]nstead, the complaint state[d] that [defendant] was quite straightforward in its actions"). Indeed, these "climate-denial" allegations fail to state a claim against BP under any pleading standard, let alone under the heightened pleading standard of Rule 9(b), which applies here. *See* Defs.' Joint Opening Brief, Argument § V.

Nor may Plaintiff rely on undifferentiated "group" pleading against "Defendants" to fill the void of actionable "climate-denial" allegations against BP. *See Raj & Sonal Abhyanker Fam. Tr. ex rel. UpCounsel, Inc. v. Blake*, 2021 WL 2477025, at *4 (Del. Ch. June 17, 2021) ("To the extent that the allegations encompass [a specific defendant] by nature of Plaintiff's reference to 'Defendants,' that constitutes impermissible group pleading."); *Genworth Fin., Inc. Consol. Derivative Litig.*, 2021 WL 4452338, at *22 (Del. Ch. Sept. 29, 2021) ("'[G]roup pleading' will not suffice."). In fact, the Complaint refutes the notion that any groupwide "climate-denial" assertions apply to BP. Although the Complaint purports to identify certain specific "climate-denial" statements, Plaintiff does not identify any such statements

by BP. *See In re Swervepay Acquisition, LLC*, 2022 WL 3701723, at *10–11 (Del. Ch. Aug. 26, 2022) ("[Plaintiffs] . . . fail to explain why group pleading should be permitted here."). Instead, Plaintiff concedes that BP publicly acknowledged the risk of climate change decades ago. Compl. ¶¶ 99, 151.[1]

For all these reasons, Plaintiff fails to state a DCFA claim against BP based on alleged "climate-denial" statements.

II. THE "GREENWASHING" ALLEGATIONS AGAINST BP TARGET NON-ACTIONABLE ASPIRATIONAL STATEMENTS, OPINIONS, AND PUFFERY

Under controlling precedent, the DCFA "must be interpreted in light of established common law definitions and concepts of fraud and deceit." *Stephenson v. Capano Dev., Inc.*, 462 A.2d 1069, 1074 (Del. 1983). Consistent with that settled principle, neither puffing nor aspirational statements about future events are actionable under the DCFA. *See Schaefer v. Byler*, 1997 WL 33471239, at *2 (Del. Com. Pl. Mar. 13, 1997) (dismissing DCFA claim in part because the term "Satisfaction

[1] For similar reasons, Plaintiff's groupwide assertion that any Defendant's mere membership in a trade association renders such Defendant liable for all statements by the trade association fails to state a claim against BP. *See* Compl. ¶¶ 37–42, 110–41. It is well settled that a company's mere membership in a trade association does not render it liable for all statements made by the association. Far more particularized (and Defendant-specific) allegations are required, including a particularized showing that *each* Defendant "held a specific intent to further" the alleged "illegal aims" of the trade association. *See In re Asbestos School Litig.*, 46 F.3d 1284, 1289 (3d Cir. 1994).

Guaranteed" was "not a misrepresentation, but the puffing by a seller in an advertisement"). Here, Plaintiff's "greenwashing" theory—that oil and gas company Defendants falsely portray themselves as sustainable businesses committed to solving climate change—fails to state a claim against BP because the few statements Plaintiff targets are classic examples of non-actionable puffery and/or statements of opinion.

Plaintiff attributes just two supposed "greenwashing" advertisements to BP, both from BP's "Possibilities Everywhere" campaign.[2] *See* Compl. ¶¶ 185–86. The first advertisement, titled "[b]etter fuels to power your busy life," expresses BP's *opinion* that the world needs cleaner energy, *see id.* ¶ 185 ("We want—and need—energy to be kinder to the planet"); describes BP's *goals* and *aspirations* to deliver cleaner energy and contribute to the energy transition, *see id.* ("we're working to make energy that's cleaner and better"); and highlights its wind and solar businesses, *see id.* ("We're bringing solar and wind energy to homes from the US to India"). The second advertisement, titled "[b]lade runners," unremarkably describes BP as "one of the major wind energy businesses in the US." *Id.* ¶ 186.

[2] To the extent that Plaintiff relies on BP's "Beyond Petroleum" campaign to support its "climate-denial" and/or "greenwashing" theories as to BP, the Complaint fails to identify a single statement from that campaign and, in any event, alleges that the campaign ran "from 2000 to 2008," Compl. ¶ 183, well outside the five-year limitations period. *See* Defs.' Joint Opening Brief, Argument § IV(D).

Contrary to Plaintiff's strained assertion, none of these statements makes any claim about the relative balance of the company's energy portfolio (alternative energy vs. fossil fuels). *See id.* ¶ 182 (alleging these advertisements are "misleading[]" because BP's "alternative energy portfolio is," in Plaintiff's view, "negligible compared to the company's . . . fossil fuel portfolio"). To the contrary, the statements in BP's "[b]etter fuels to power your busy life" advertisement—about *wanting* or *working to make* "cleaner" and "better" energy, and *seeing possibilities everywhere*—are quintessential aspirational expressions of opinion that cannot support a DCFA claim. *See Trenwick Am. Litig. Tr. v. Ernst & Young, LLP*, 906 A.2d 168, 209 (Del. Ch. 2006), *aff'd sub nom. Trenwick Am. Litig. Tr. v. Billett*, 931 A.2d 438 (Del. 2007) (dismissing fraud claim because "statements of expectation or opinion about the future of the company and the hoped for results of business strategies" are "the softest of information[]"); *Mooney v. E. I. du Pont de Nemours & Co.*, 2017 WL 5713308, at *6 (Del. Super. Ct. Nov. 28, 2017), *aff'd*, 192 A.3d 557 (Del. 2018) (statements about anticipated financial prospects of spinoff were "forward-looking, nonactionable statements").

Nor do statements in BP's "blade runners" advertisement support a "greenwashing"-based DCFA claim. Saying BP is "one of the major wind energy businesses in the US" is not akin to asserting that BP "owns" some specific "gigawatt

. . . of wind capacity" in the "United States," as Plaintiff claims. Compl. ¶ 186 (alleging deception on the ground that "BP owns only approximately 1 gigawatt . . . of wind capacity, which is dwarfed by other companies" in the U.S.). Rather, the statement that BP is "*one of* the major wind energy businesses in the US," *id.* (emphasis added), is precisely the sort of "vague statement boosting the appeal of a service or product that" Delaware courts have long held to be non-actionable "puffery." *Airborne Health, Inc. v. Squid Soap, LP*, 2010 WL 2836391, at *8 (Del. Ch. July 20, 2010) (internal citations omitted); *see also Aureus Holdings, LLC v. Kubient, Inc.*, 2021 WL 3891733, at *9 (Del. Super. Ct. Aug. 31, 2021) (dismissing fraudulent inducement claim because statements about defendant's ability to maximize revenue "are the kind of vague statements that a commercial party routinely makes during a deal-making courtship" (internal quotation marks omitted)).

Finally, Plaintiff's "greenwashing" theory against BP fails for another independent reason: the statements at issue do not address "merchandise," as the DCFA requires. *See* 6 *Del. C.* § 2513; *Willis v. City of Rehoboth Beach*, 2005 WL 1953028, at *5–6 (Del. Super. Ct. June 24, 2005) (dismissing DCFA claim because representation did not concern merchandise). Aspirational statements about BP's efforts to contribute to the energy transition are not about "merchandise." *See* 6 *Del. C.* § 2511 ("'Merchandise' means any objects, wares, goods, commodities, intangibles, real estate or services."). And statements about BP's efforts to develop wind or solar

energy do not address "merchandise" allegedly available to Delaware consumers. As Plaintiff tells it, the only BP "merchandise" available to Delaware consumers is retail gasoline "at gas station locations throughout Delaware" and "lubricant products for sale at locations throughout Delaware." Compl. ¶ 21(i). None of the purported "greenwashing" statements Plaintiff targets says anything about gasoline or lubricants, nor was any such statement alleged to have been made on a product label, gas pump, or otherwise at the point of sale where a consumer buys BP gasoline or lubricants. In short, none of the statements at issue addresses "merchandise" within the meaning of the DCFA.

III. ALLEGED STATEMENTS ABOUT INVIGORATE GASOLINE AND BP DIESEL DO NOT SUPPORT A CLAIM

Plaintiff erroneously alleges that statements about Invigorate gasoline and BP Diesel are misleading because they "falsely convey . . . that the use of these products benefits the environment." Compl. ¶ 209. Plaintiff fatally misrepresents the statements at issue by selectively quoting certain phrases and omitting important context; in fact, as the chart below shows, Plaintiff's allegations bear little resemblance to the actual statements BP made. When the actual statements are read in context, they plainly fail to establish a DCFA claim.

Plaintiff's Allegations	**Complete BP Statement**
"BP markets its Invigorate gasoline as a 'cleaning agent that helps . . . give you more miles per tank.'" Compl. ¶ 209 (alteration in original).	"All grades of bp gasoline have Invigorate®—a cleaning agent that helps **defend your engine against dirt to** give you more miles per tank."

	Exhibit A[3] (BP *Our Fuels* webpage, archived Aug. 21, 2020) (omission bolded).[4]
BP markets "its BP Diesel as 'a powerful, reliable, and efficient fuel made . . . to help reduce emissions.'" Compl. ¶ 209 (alteration in original).	"bp Diesel® is a powerful, reliable, and efficient fuel made **with the perfect mix of low sulfur and additives** to help reduce emissions **and protect your engine**." Exhibit A (BP's *Our Fuels* webpage, archived Aug. 21, 2020) (omission bolded).[5]

The complete statements make clear that BP did not "falsely convey" that either Invigorate gasoline or BP Diesel "benefits the environment." Compl. ¶ 209. In fact, the statements say nothing about the environment or climate change *at all*. The clear focus of the statements is eliminating dirt in the engine and using low-sulfur fuels,

[3] Exhibit A is a copy of the entirety of BP's *Our Fuels* webpage (archived August 21, 2020), which Plaintiff cites in the Complaint. *See* Compl. ¶ 209 n.198. The attachment does not convert this motion to one for summary judgment because the webpage is not "outside the pleadings"—it is "integral to plaintiff's claim and it is incorporated into the complaint." *Willis v. City of Rehoboth Beach*, 2004 WL 2419143, at *4 n.1 (Del. Super. Ct. Oct. 14, 2004).

[4] This statement is also accompanied by the following footnote: "Compared to minimum detergent gasoline. Requires continuous use over 5000 miles. Based on fleet testing representative of the U.S. car population. Fuel economy can be affected by many factors. Benefits may be more significant in older-model vehicles." Exhibit A (BP's *Our Fuels* webpage, archived Aug. 21, 2020).

[5] This statement is also accompanied by the following footnote: "Compares diesel engine performance vs. a gasoline engine with similar displacement, and the higher torque and efficiency typical of a diesel engine. Refers to meeting the appropriate ASTM specifications for this fuel. Refers to modern technology incorporating newer diesel engines, advanced emissions after-treatment systems, and the ultra-low sulfur diesel that enables them to help lower harmful emissions." *Id.*

not (as Plaintiff erroneously alleges) the reduction of greenhouse gas emissions that "benefits the environment." *Id.*

Nor do Plaintiff's passing references to supposed omissions save its DCFA claim as to BP. Plaintiff's novel theory that BP—as a condition of making *any* statement about its fossil fuel products—must include an additional statement that the products "caus[e] 'catastrophic' climate change," *see* Compl. ¶ 203, is not viable because companies are not required to provide consumers with information they already possess. *See RHA Constr., Inc. v. Scott Eng'g, Inc.*, 2013 WL 3884937, at *4 (Del. Super. Ct. July 24, 2013) (granting summary judgment on DCFA claim "[b]ecause [p]laintiffs were aware of the underlying facts" giving rise to the alleged fraud); *DCV Holdings, Inc. v. Conagra, Inc.*, 2002 WL 508343, at *8 (Del. Super. Ct. Apr. 1, 2002) (granting summary judgment on fraud claim because plaintiff "was aware of the material issues . . . and therefore has no basis for a fraud claim"); *see also* Defs.' Joint Opening Brief, Argument § IV(C).[6]

[6] To the extent Plaintiff's novel "omissions" theory is an attempt to re-cast its deeply flawed failure-to-warn claim, that effort goes nowhere. No matter how Plaintiff frames its allegations, a duty to warn is a threshold requirement for its failure-to-warn claim, and, as shown in Defendants' Joint Opening Brief, Plaintiff has failed to allege facts giving rise to a cognizable duty, thus foreclosing its failure-to-warn theory. *See* Defs.' Joint Opening Brief, Argument § IV(C). Put differently, Plaintiff cannot use its DCFA "omissions" theory to impose a duty to warn that does not exist.

CONCLUSION

The Court should grant this motion and dismiss the DCFA claim against BP with prejudice.

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