



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 MARATHON PETROLEUM CORPORATION'S,  
MARATHON PETROLEUM COMPANY LP'S, AND SPEEDWAY LLC'S  
MEMORANDUM OF LAW IN SUPPORT OF  
MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM**

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## I. STATEMENT OF THE CASE

Defendants Marathon Petroleum Corporation (“MPC”), Marathon Petroleum Company LP (“MPCLP”), and Speedway LLC (“Speedway”), respectfully submit this Memorandum in Support of their Motion to Dismiss for failure to state a claim and failure to plead facts sufficient to support a claim specifically against these defendants. For the reasons set forth below and in Defendants’ Joint Opening Brief in Support of Motion to Dismiss, Plaintiff’s claims should be dismissed as against MPC, MPCLP, and Speedway.<sup>1</sup>

Plaintiff’s 280-paragraph, 218-page Complaint scarcely alleges any *facts* with respect to MPC, MPCLP, and Speedway. Instead, the Complaint relies almost entirely on mixing sensational legal conclusions and vague group pleading. The limited facts alleged as to MPC, MPCLP, and Speedway are, as a matter of law, insufficient to maintain the asserted causes of action against these defendants.

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<sup>1</sup> This memorandum is submitted subject to and without waiving any right, defense, affirmative defense, claim or objection, including lack of jurisdiction. As the Third Circuit recognized, Plaintiff’s Complaint “belie[s] th[e] suggestion” that Plaintiff’s claims are based solely on misrepresentations. *City of Hoboken v. Chevron Corp.*, 45 F.4th 699, 712 (3d Cir. 2022). In fact, as set forth in Defendants’ Joint Opening Brief, Plaintiff’s claims hinge on alleged contributions to worldwide greenhouse-gas emissions and, as such, are preempted. But if this Court accepts (*arguendo* or otherwise) Plaintiff’s misrepresentation theory of liability, the claims still must be dismissed as to MPC, MPCLP, and Speedway because the Complaint fails to plead *facts* that, if taken as true, would be sufficient to state a misrepresentation claim against MPC, MPCLP, or Speedway.

## II. STATEMENT OF THE QUESTIONS INVOLVED

Whether the Complaint should be dismissed under Rule 12(b)(6) because it fails to allege facts as to MPC, MPCLP, and Speedway sufficient to meet Rule 9(b)'s heightened particularity pleading requirement for claims sounding in fraud or misrepresentation.

## III. THE COMPLAINT'S STATEMENTS AS TO MPC, MPCLP, AND SPEEDWAY

The vast majority of the Complaint's statements regarding MPC, MPCLP, and Speedway are set forth in Paragraph 26(e)-(i) and (j). Subparagraphs (e), (h), and (i) are merely statements about corporate structure and the relationship between these entities, which have no bearing on this motion. Compl. ¶ 26(e), (h), (i).

Subparagraphs (f) and (g) are bald, generic, boilerplate assertions of *legal conclusion* identical to those the Complaint asserts against other Defendants,<sup>2</sup> namely that "MPC" "controls and has controlled companywide decisions" both "about the quantity and extent of fossil fuel production and sales ... of its subsidiaries" and "related to marketing, advertising, climate change and greenhouse gas emissions from its fossil fuel products." *Id.* ¶ 26(f)-(g). The Complaint sets forth no *facts* that, if taken as true, would show such control.

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<sup>2</sup> See, e.g., Compl. ¶ 21(b)-(c) (BP); ¶ 22(c)-(d) (Chevron); ¶ 23(b)-(c) (Conoco); ¶ 24(e)-(f) (Exxon); ¶ 25(b)-(c) (Hess); ¶ 27(b)-(c) (Murphy); ¶ 28(b)-(c) (Shell); ¶ 29(b)-(c) (CITGO); ¶ 30(b)-(c) (Total); ¶ 31(b)-(c) (Occidental); ¶ 32(b)-(c) (Devon); ¶ 33(b)-(c) (Apache); ¶ 34(b)-(c) (CNX); ¶ 35(b)-(c) (Ovintiv).

Subparagraph (k) sets forth the same bald, generic, boilerplate assertions of legal conclusion the Complaint asserts against other Defendants (again largely verbatim)<sup>3</sup> with respect to the claims of “misrepresentation,” namely that “Marathon”<sup>4</sup> made “statements in and outside of Delaware ... in furtherance of its campaign of deception and denial” and “fail[ed] to warn consumers of global

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<sup>3</sup> See, e.g., Compl. ¶ 21(g) (BP); ¶ 22(h) (Chevron); ¶ 23(h) (Conoco); ¶ 24(j) (Exxon); ¶ 25(e) (Hess); ¶ 27(f) (Murphy); ¶ 28(g) (Shell); ¶ 29(e) (CITGO); ¶ 30(g) (Total); ¶ 31(f) (Occidental); ¶ 32(e) (Devon); ¶ 33(e) (Apache); ¶ 34(h) (CNX); ¶ 35(e) (Ovintiv).

<sup>4</sup> The Complaint treats MPC, MPCLP, and Speedway as one. In addition, the Complaint further groups those defendants together with two other defendants that are not affiliated with MPC, MPCLP, or Speedway, namely Marathon Oil Corporation and Marathon Oil Company. The Complaint refers to this five-defendant group as “Marathon.” *Id.* ¶ 26(j). The Complaint then uses this term “Marathon” to combine that group with (i) a subgroup of defendants Plaintiff denominates the “CFA Defendants,” *id.* ¶ 265, and (ii) another partially overlapping group the Complaint refers to as “Fossil Fuel Defendants” who had “involvement in trade associations such as API,” ¶¶ 36-38.

*For purposes of this Motion only*, MPC, MPCLP, and Speedway have construed those terms as if the Complaint made such statements with respect to each of them. And Plaintiff’s pleading contrivance does not cure the deficiencies because there remains a dearth of *facts* in the Complaint to support the claims as to MPC, MPCLP, and Speedway. To be clear, grouping the “Marathon” defendants, their “predecessors, successors, parents, subsidiaries, affiliates, and divisions,” and other defendants is improper. See, e.g., *Raj & Sonal Abhyanker Fam. Tr. ex. rel. UpCounsel, Inc. v. Blake*, 2021 WL 2477025, at \*4 (Del. Ch. June 17, 2021) (dismissing claim on ground of “impermissible group pleading”); *Hupan v. Alliance One Int’l, Inc.*, 2015 WL 7776659, at \*12 (Del. Super. Ct. Nov. 30, 2015) (granting dismissal because Complaint’s allegations only against group made it “impossible . . . to evaluate which allegations” were directed at each defendant). And the decision to construe the Complaint for purposes of this motion as addressing each individually does not waive this defect.

warming-related hazards when it marketed, advertised, and sold its products.” *Id.* ¶ 26(k). But, again, no such statement to consumers or failure by MPC, MPCLP, or Speedway is identified in the Complaint.

At most, the Complaint includes “Marathon” among the list of “CFA Defendants” that Plaintiff claims had a duty to communicate information about the risks of climate change “to Delaware consumers in order to prevent their advertising and marketing statements from being misleading, and their failure to do so constituted a misrepresentation and/or omission in violation of the CFA.” Compl. ¶ 269. The Complaint, however, is devoid of any *facts* as to what statements by MPC, MPCLP, or Speedway “constituted a misrepresentation and/or omission in violation of the CFA.” *Id.*

The only specific identification of any actual statement or act by MPC, MPCLP, or Speedway relates to a 2018 publication to MPC shareholders<sup>5</sup> entitled “Perspectives on Climate-Related Scenarios” (“Climate Perspectives Report”). There, the then-MPC Chairman and CEO Gary R. Heminger wrote that the company had “invested billions of dollars to make our operations more energy efficient [and]

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<sup>5</sup> While this Motion does not in any way turn on this fact, but instead accepts the Complaint’s statement on its face, it is remarkable that—in a purported “consumer fraud” case—the Complaint does not cite a single ad or other consumer-facing sale communication from MPC, MPCLP, or Speedway. The 2018 Climate Perspectives Report is directed specifically to “shareholders.” Climate Perspectives Report at 1.



reduce our emissions.”<sup>6</sup> Compl. ¶¶ 168, 196. The Complaint quibbles that “only 1% of the company’s capital spend from 2010—2018 was on low carbon energy sources, all of which was in carbon capture and storage.” *Id.* The Complaint, of course, does not allege that, as a factual matter, the 2018 statement somehow led consumers to believe that purchasing and using oil and gasoline from Marathon Petroleum Corporation affiliates for consumer needs would lead to consumers generating fewer emissions from their own use than they would have expected had they not seen such a statement. Nor could it. Indeed, Plaintiff’s Complaint sets forth no facts supporting how the 2018 statement about MPC’s investments is actionable as a “misrepresentation,” “fraud,” or “deception” upon consumers.

#### IV. LEGAL STANDARD

“When reviewing a Rule 12(b)(6) motion, a trial court must accept as true all of the well-pleaded allegations of *fact*,” but must “ignore conclusory allegations that lack specific supporting factual allegations.” *Page v. Oath Inc.*, 270 A.3d 833, 842 (Del. 2022) (emphasis added, internal quotation marks and citation omitted);

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<sup>6</sup> The full statement is: “We have invested billions of dollars to make our operations more energy efficient, reduce our emissions, diversify our business, and harden our facilities against extreme weather like hurricane-force winds and floods.” MARATHON PETROLEUM CORP., PERSPECTIVES ON CLIMATE-RELATED SCENARIOS (Oct. 2018) at 1, [https://www.marathonpetroleum.com/content/documents/Responsibility/2018\\_Climate\\_Related\\_Scenarios.pdf](https://www.marathonpetroleum.com/content/documents/Responsibility/2018_Climate_Related_Scenarios.pdf). The Court may consider the full statement because it is specifically referenced in the Complaint. *See Bredberg v. Boston Sci. Corp.*, 2021 WL 2816897, at \*3 (Del. Super. Ct. July 2, 2021).

*Ramunno v. Cawley*, 705 A.2d 1029, 1034 (Del. 1998).

To survive a motion to dismiss for claims predicated on misrepresentations—whether pleaded under the Delaware Consumer Fraud Act (“DCFA”) or another theory—the Complaint must set forth the “circumstances constituting fraud,” including “the time, place, and contents of the false representations, as well as the identity of the person making the misrepresentation as well as what he obtained thereby.” *Nutt v. A.C. & S., Inc.*, 466 A.2d 18, 23 (Del. Super. Ct. 1983); Del. Civ. R. 9(b) (“In all averments of fraud, negligence or mistake, the circumstances constituting fraud, negligence or mistake shall be stated with particularity.”); *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); *see Rinaldi v. Iomega Corp.*, 1999 WL 1442014, at \*8–9 (Del. Super. Ct. Sept. 3, 1999) (holding claims under the Delaware Consumer Fraud Act and for 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 premised on fraud).

## V. ARGUMENT

### A. **The Complaint Should Be Dismissed Under Rule 12(b)(6) for Failure to Allege Facts Sufficient as to MPC, MPCLP, and Speedway to Meet Rule 9(b)’s Heightened Particularity Requirement for Claims Sounding in Fraud or Misrepresentation.**

Superior Court Civil Rule 9(b) requires plaintiffs, when “aver[ring] fraud, negligence, or mistake,” to state the “circumstances constituting fraud, negligence

or mistake” with particularity. Del. Civ. R. 9(b); *Toner v. Allstate Ins. Co.*, 821 F. Supp. 276, 283 (D. Del. 1993) (“[T]he requirements of the [similar Federal Rule 9(b)] apply to all cases where the gravamen of the claim is fraud even though the theory supporting the claim is not technically termed fraud.”).<sup>7</sup> Here, Plaintiff’s Complaint fails to satisfy the particularity requirement of Rule 9(b) with respect to MPC, MPCLP, and Speedway.

Plaintiff’s Complaint asserts as to “Marathon” the same bald, generic, boilerplate assertions of *legal conclusion* the Complaint asserts against other Defendants—namely, that each has engaged in a “campaign of deception and denial,” *supra* n.3, in which it “misrepresented material facts, or suppressed, concealed, or omitted material facts, with the intent that consumers will rely thereon,” *id.* ¶ 265. Plaintiff’s sweeping statements are no doubt sensational.

But when a Complaint “avers fraud, negligence, or mistake,” sensational legal conclusions do not excuse the obligation to state the “circumstances constituting fraud, negligence or mistake” with particularity. Del. Civ. R. 9(b). “[C]onclusory allegations unsupported by specific facts” are insufficient to withstand dismissal

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<sup>7</sup> Plaintiff cannot deny that its purported misrepresentation claims sound in fraud. As Plaintiff recently told the U.S. Supreme Court, it purports to bring this action “under its own consumer protection statutes and common law,” on the theory that Defendants “*misled consumers and the public* about their products . . . , and that *those misrepresentations*” are allegedly the source of its injuries. Resp. Opp. to Pet. at 1, *BP America Inc., et al. v. State of Delaware*, No. 22-821 (S. Ct. 2023) (emphasis added).

under Rule 12(b)(6). *Clinton v. Enterprise Rent-A-Car Co.*, 977 A.2d 892, 895 (Del. 2009). Rather, the Complaint must plead *facts* setting forth “the time, place, and contents of the false representations, as well as the identity of the person making the misrepresentation.” *Nutt*, 466 A.2d at 23.

Here, the Complaint identifies only one specific statement or act by MPC, MPCLP, or Speedway: that in 2018, MPC published its Climate Perspectives Report to shareholders in which its then-Chairman and CEO wrote that the company had “invested billions of dollars to make our operations more energy efficient [and] reduce our emissions,” which Plaintiff’s Complaint does not dispute, but complains “only 1% of the company’s capital spend from 2010–2018 was on low carbon energy sources, all of which was in carbon capture and storage.” Compl. ¶¶ 168, 196. The Complaint does not allege that this statement actually led consumers to believe that purchasing and using oil and gasoline from MPC affiliates for consumer needs would lead to consumers generating fewer emissions from their own use than they would have expected had they not seen such a statement. Nor does Plaintiff’s Complaint otherwise set forth facts showing how the 2018 statement about MPC’s investments is actionable as a “misrepresentation,” “fraud,” or “deception” upon consumers. Its lack of particular factual allegations to support its consumer fraud theory mandates dismissal.

Plaintiff’s Complaint also fails to allege facts that would suffice to establish

reasonable reliance by the recipient of supposed (but unpled) communications or to show injury attributable to MPC, MPCLP, or Speedway. The Complaint fails to identify anyone who in fact relied on or acted upon the (unstated) advertisements or statements by MPC, MPCLP, or Speedway. Compl. ¶¶ 26k, 265-79; *Otto Candies, LLC v. KPMG LLP*, 2019 WL 994050, at \*22 n.199 (Del. Ch. Feb. 28, 2019) (complaint must allege facts showing what the plaintiff or others “did, or refrained from doing, in justifiable reliance upon” the alleged statements). These absences are fatal to Plaintiff’s claims against MPC, MPCLP, and Speedway. *See Rinaldi*, 1999 WL 1442014, at \*8 (finding that plaintiffs had failed to plead with particularity by not pleading what the alleged “false advertising was, where it was located, the contents of the statements and the reliance that ensued from those statements which caused the damage”); *Nutt*, 466 A.2d at 23 (dismissing amended complaints where plaintiffs failed to plead with particularity the necessary factual support for its claim of fraud, including “dates of when the alleged misrepresentations occurred; when the harm was discovered; . . . and what medical-related information was concealed”).

## VI. CONCLUSION

For the foregoing reasons, Plaintiff’s claims against MPC, MPCLP, and Speedway should be dismissed.

Respectfully submitted,

Dated: May 18, 2023

**MARON MARVEL BRADLEY  
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*/s/ Antoinette D. Hubbard*

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