IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

STATE OF DELAWARE, *ex rel.* KATHLEEN JENNINGS, Attorney General of the State of Delaware,	)	
Plaintiff,	)	C.A. No. N20C-09-097 MMJ CCLD
v.	)	**TRIAL BY JURY OF 12 DEMANDED**
BP AMERICA INC., *et al.*,	)	
Defendants.	)	

PLAINTIFF'S ANSWERING BRIEF IN OPPOSITION TO DEFENDANTS BP P.L.C. AND BP AMERICA INC.'S MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM

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INTRODUCTION

The State of Delaware filed a 217-page Complaint with numerous, detailed allegations about corporate misconduct by BP p.l.c. and BP America Inc. (collectively, "BP")[1] and other defendants (with BP, "Defendants"). The State alleges BP and other Defendants deployed sophisticated, multidecadal campaigns of deception to misrepresent and conceal the risks of using their fossil fuel products; spread disinformation about the link between those products and climate change; and falsely portray themselves as environmentally responsible companies through "greenwashing" advertisements. In doing so, BP and others have violated the Delaware Consumer Fraud Act, 6 *Del. C.* § 2511, *et seq.* ("CFA"), among other tortious conduct.

BP filed a motion to dismiss the State's CFA claim against it under Superior Court Civil Rule 12(b)(6) ("Motion"). As detailed in the State's Answering Brief in Opposition to Defendants' Joint Motion to Dismiss for Failure to State a Claim ("Joint Opposition"),[2] the Complaint amply notifies BP and others of the claims against them. Joint Opp'n at Part V.C. Nevertheless, BP contends the CFA claim

[1] For purposes of the Complaint, "BP" includes BP p.l.c., BP America Inc., and their predecessors, successors, parents, subsidiaries, affiliates, and divisions. Compl. ¶ 21(e).

[2] The State incorporates by reference all arguments it asserts in its Joint Opposition as if fully set forth herein.

should be dismissed because the Complaint does not contain "allegations of specific misrepresentations" by BP as part of Defendants' campaigns of climate denial. *See State ex rel. Jennings v. Purdue Pharma L.P.*, 2019 WL 446382, at *8 (Del. Super. Feb. 4, 2019) ("*Purdue*"). This Court already considered and rightly rejected analogous arguments in *Purdue*, denying a motion to dismiss where, as here, the complaint grouped defendants together for purposes of some allegations because they engaged in the same wrongful conduct. *Id.*

Additionally, the Court should not entertain BP's premature arguments that certain greenwashing advertisements are—as a matter of law—nonactionable puffery, opinions, or aspirational statements or not misleading. These are quintessentially factual questions for a jury to resolve.

QUESTIONS INVOLVED

1. Do the Complaint's allegations regarding Defendants' deceptive campaigns sufficiently notify BP of the claims against it?
2. Are BP's arguments regarding its greenwashing statements inappropriate for resolution on the pleadings?

ARGUMENT

The Court should deny BP's Motion because the Complaint amply notifies BP of the CFA claim against it, and it is for a jury to determine if BP's alleged misstatements are misleading.

I. The Complaint's Allegations Regarding Defendants' Campaigns of Deception and Denial Notify BP of the Claims Against It

The Complaint clearly notifies BP of the CFA (and other) claims against it. *See* Joint Opp'n at Part V.C; Compl. ¶¶ 21, 46(b), 160, 265–79. Indeed, the Complaint alleges numerous specific statements by BP misleadingly portraying its fossil fuel products as "help[ing to] reduce emissions" and inaccurately painting BP as moving "beyond petroleum," when in reality it remains overwhelmingly invested in fossil fuels. *See* Compl. ¶¶ 157, 209; *see also id.* ¶¶ 21, 182–87, 210. The Complaint explains how those statements are misleading, and how they were intended to—and did—deceive Delaware consumers, *see id.* ¶¶ 182–87, 209–18, inflating demand for fossil fuels, *id.* ¶ 58. And it extensively details Defendants' multidecadal campaigns to discredit climate science, spread disinformation about the links between their fossil fuel products and climate change, and conceal their products' hazards. *See id.* ¶¶ 37–42, 62–160. Still, BP laments that the Complaint does not isolate a specific misrepresentation by BP pertaining to these campaigns of denial and disinformation. *See* Mot. 4–6.

This Court rejected a similar argument in *Purdue*, for good reason. 2019 WL 446382, at *8 ("[T]hat there were no allegations of specific misrepresentations" by certain defendants and that a defendant was "only referenced . . . specifically a few times in [the] [c]omplaint" was not a basis to dismiss claims against that defendant under Rule 9(b)); *see also Grant v. Turner*, 505 F. App'x 107, 112 (3d Cir. 2012)

(vacating dismissal of fraud-based claims because "[a]lthough Plaintiffs d[id] not allege who, specifically, made misrepresentations to whom in all cases," complaint sufficiently notified defendants of their charged misconduct); *Swartz v. KPMG LLP*, 476 F.3d 756, 764 (9th Cir. 2007) ("[T]here is no absolute requirement that where several defendants are sued in connection with an alleged fraudulent scheme, the complaint must identify *false statements* made by each and every defendant."). Here, similarly, whether Rule 8(a) or Rule 9(b) applies,[3] the Complaint provides BP with ample notice, even without a specific alleged misrepresentation of climate denial by BP. For this reason, BP's challenge to allegations regarding its "Beyond Petroleum" campaign as failing to identify specific statements, *see* Mot. 7 n.2, are meritless.[4]

Nor is there anything improper in grouping BP with other Defendants as to certain allegations. Delaware courts permit group pleading "so long as individual defendants are on notice of the claim against them." *River Valley Ingredients, LLC v. Am. Proteins, Inc.*, 2021 WL 598539, at *3 (Del. Super. Feb. 4, 2021). In fact,

[3] Although Rule 9(b) does not apply to the State's CFA, public nuisance, or trespass claims, the Complaint satisfies Rule 9(b) as to all claims. *See* Joint Opp'n at Part V.A–C.

[4] BP also argues that these statements fall outside the CFA's statute of limitations. *Id.* But BP's fraudulent concealment of the deceptive nature of its advertisements tolled the limitations period until the State could reasonably uncover the basis for its claim. *See* Joint Opp'n at Part IV.D.1.

"nothing in Rule 9"—nor Rule 8, for that matter—"*per se* prohibits group pleading." *Id.* Because the cornerstone of Rule 9(b) is notice, a complaint that notifies defendants of the "precise misconduct with which they are charged" suffices even if it charges multiple defendants with the same conduct. *Grant*, 505 F. App'x at 111 (citation omitted).

Here, the collective allegations referencing "Fossil Fuel Defendants" are permissible because the State alleges that each Fossil Fuel Defendant engaged in the same wrongful conduct and fraudulent scheme—campaigns to deceive consumers and the public about the link between their fossil fuel products and climate change. *See, e.g.*, Compl. ¶¶ 20–36, 46(b), 160, 226, 246, 262. This provides BP with ample notice. *See* Joint Opp'n at Part V.C. That the Complaint alleges specific climate denial misrepresentations by certain Defendants, but not BP, does not change this conclusion. *See Purdue*, 2019 WL 446382, at *8.

Collective pleading is particularly appropriate where, as here, defendants are alleged to have deliberately concealed facts regarding their misconduct, leaving the plaintiff unable to further specify a defendant's actions "absent discovery." *Grant*, 505 F. App'x at 112. Group allegations are likewise appropriate where "information that would permit greater particularity is exclusively within the possession of a defendant, and defendants are alleged to have acted together to facilitate a general

scheme." *Hawk Mountain LLC v. Mirra*, 2016 WL 4541032, at *2 (D. Del. Aug. 31, 2016). Both factors are alleged here.

The State alleges that Fossil Fuel Defendants relied on third parties like API to conceal their participation in their campaigns of deception. *See, e.g.*, Compl. ¶¶ 37(b), 39–42, 134–35. Defendants "deliberately obscured" their efforts to conceal and misrepresent their fossil fuel products' known dangers, *id.* ¶ 134, including through use of nominally independent organizations like think tanks and foundations advancing a skeptical view of climate change the Fossil Fuel Defendants knew to be misleading and false, *see id.* ¶ 135. These groups disseminated climate disinformation "from a misleadingly objective source" on Fossil Fuel Defendants' behalf, *id.* ¶ 37(b), helping to deliberately conceal their misconduct, *see Grant*, 505 F. App'x at 112. The State's allegations to that effect against all Fossil Fuel Defendants are appropriate here.

The cases BP cites are distinguishable. Two involved breach of fiduciary duty claims, which are subject to a heightened pleading standard. As a matter of Delaware corporate law, "each director has a right to be considered individually when the directors face claims for damages in a suit challenging board action." *In re Cornerstone Therapeutics Inc, Stockholder Litig.*, 115 A.3d 1173, 1182 (Del. 2015). In that narrow context, "group pleading will not suffice" and specific allegations must be made as to each director or officer defendant. *Genworth Fin.*,

2021 WL 4452338, at *22 (Del. Ch. Sept. 29, 2021) (cleaned up); *see In re Tangoe, Inc. Stockholders Litig.*, 2018 WL 6074435, at *12 (Del. Ch. Nov. 20, 2018) (citing *In re Cornerstone*, 115 A.3d at 1179). In the cases BP cites, plaintiffs failed to allege individual defendants participated in the challenged conduct.[5] There is no such burden in pleading the State's CFA or other claims. Regardless, the Complaint exhaustively details Defendants' wrongful conduct in furtherance of their campaigns of climate denial and deception, notifying BP of the claims against it. *See* Joint Opp'n at Part V.C.

The other case BP cites, *In re Swervepay Acquisition, LLC*, recognized that "Delaware law does not expressly forbid [group pleading]." 2022 WL 3701723, at *10 (Del. Ch. Aug. 26, 2022). However, the plaintiffs "fail[ed] to explain why [it] should be permitted" there, providing no reason to impute a single email to others. *Id.* The State, meanwhile, clearly explains why group pleading is permissible in the context of Defendants' coordinated, sophisticated, and decades-long campaigns of deception.

[5] *See Genworth Fin.*, 2021 WL 4452338, at *22 (noting plaintiffs grouped officers as "Executive Defendants" but directed no specific allegations against that group and "barely mention[ed]" the group at all); *Abhyanker Fam. Tr. ex rel. UpCounsel, Inc. v. Blake*, 2021 WL 2477025, at *4 (Del. Ch. June 17, 2021) (dismissing claim against one defendant where complaint "fail[ed] . . . to allege a single fact related to [his] weeklong stint as CEO" and focused collective allegations on actions before or after his tenure).

To distract from the Complaint's allegations of its deception, BP cites allegations about a 1991 film it released about climate change and a 1997 speech by its former CEO mentioning climate impacts. *See* Mot. 4–5 (citing Compl. ¶¶ 99, 151). BP's argument is a red herring. The Complaint alleges that BP (and at least six entities that have since been absorbed into BP) received detailed reports on API's research into global warming as early as 1972. *See* Compl. ¶ 72. Yet BP obscured and denied that reality for decades and, when denial became impossible, gave misleading public assurances that it would invest in reversing the harms caused by its products—when in fact it did virtually nothing. *See id.* ¶¶ 182–87. If anything, the film's existence underscores that BP *knowingly* made false and misleading statements about the link between its products and climate change after 1991. Unlike the case BP cites, these two isolated allegations do not "state[] that [BP] was quite straightforward in its actions," *Diamond Elec., Inc. v. Del. Solid Waste Auth.*, 1999 WL 160161, at *7 (Del. Ch. Mar. 15, 1999), or otherwise absolve BP of liability. To the extent BP contends that its 1991 film and 1997 speech were accurate as a matter of law, this raises a factual issue inappropriate for resolution on the pleadings and cannot refute the many other instances of BP's alleged misrepresentations.

Finally, BP argues in passing that allegations against API cannot be imputed to it. *See* Mot. 6 n.1. The Court need not reach this issue because it can deny BP's Motion without imputing API's conduct or knowledge to BP for the reasons

described above. If the Court does reach the issue, API's conduct and knowledge are imputable to BP under either an agent–principal or conspiracy theory for the reasons stated in the State's Answering Brief in Opposition to Citgo Petroleum Corporation and Murphy USA Inc.'s Motion to Dismiss for Failure to State a Claim, among others.[6]

II. BP's Arguments Regarding Its Greenwashing Statements Are Inappropriate for Resolution on the Pleadings

Next, BP attempts to recast some of its greenwashing statements as nonactionable or simply not misleading. Mot. 6–12. In doing so, BP largely rehashes arguments made by its co-defendant Exxon Mobil Corporation ("Exxon") in a similar climate-deception case brought by the State of Massachusetts asserting violations of its consumer protection statute. *See Massachusetts v. Exxon Mobil Corp.*, 2021 WL 3493456, at *13 (Mass. Super. Ct. June 22, 2021). But as a Massachusetts court held, determining whether the kinds of deceptive statements alleged here are actionable or misleading is "not appropriate at a motion to dismiss stage." *Id.* BP's arguments similarly must be rejected because making such determinations as a matter of law would improperly invade the jury's province.

[6] In addition to the conduct tying Fossil Fuel Defendants to API, BP's CEO served as API's chairman in 1988, 1989, and 1998—during the decade Defendants' campaigns of deception began in earnest. Compl. ¶¶ 37(e), 92–131.

A. It Is for a Jury to Decide Whether BP's Statements Were Puffery, Opinions, or Aspirational

BP contends two of its advertisements are nonactionable because they merely express BP's opinions, aspirations, or puffery. Mot. 7–9.

"Although an expression of opinion cannot form the basis of a fraud claim, the mere fact that a material statement is in the form of an opinion . . . is not necessarily conclusive as to whether it must be treated as such." *Wal-Mart Stores, Inc. v. AIG Life Ins. Co.*, 901 A.2d 106, 115 (Del. 2006). Importantly, whether a statement is opinion, puffery, or aspirational are factual questions improper for resolution on the pleadings. *See Mentis v. Del. Am. Life Ins. Co.*, 1999 WL 744430, at *7 (Del. Super. July 28, 1999) (whether a defendant "expressed 'opinions' or outright misleading facts is a question of fact, and cannot be determined on a Motion to Dismiss"); *RHA Constr., Inc. v. Scott Eng'g, Inc.*, 2013 WL 3884937, at *4 (Del. Super. May 24, 2013) ("Whether a statement constitutes an opinion, however, or is a material misstatement of fact is usually a question for the trier of fact."); *Knapp v. McCleary*, 1987 WL 14864, at *2 (Del. July 9, 1987) (explaining that it is generally for a jury to determine whether statements "constitute[] mere 'puffing'").

BP's crude attempt at casting its greenwashing statements as nonactionable fails for three primary reasons. *First*, guidance from the Federal Trade Commission ("FTC") indicates that statements about greenwashing cannot constitute puffery. Delaware's CFA "stem[s] from the 1914 Federal Trade Commission Act." *State ex*

rel. Brady v. Publishers Clearing House, 787 A.2d 111, 116 (Del. Ch. 2001). The FTC has promulgated "Guides for the Use of Environmental Marketing Claims," codified at 16 C.F.R. § 260.1, *et seq.* ("Green Guides"), to "help marketers avoid making environmental marketing claims that are unfair or deceptive," *id.* § 260.1(a). According to the FTC, "[u]nqualified general environmental benefit claims . . . likely convey that the product . . . has specific and far-reaching environmental benefits and may convey that the item . . . has no negative environmental impact." *Id.* § 260.4(b). Courts have relied on this provision in determining that statements about general environmental benefits cannot constitute puffery as a matter of law and may be actionable under state consumer protection laws. *See, e.g.*, *Rawson v. ALDI, Inc.*, 2022 WL 1556395, at *3 (N.D. Ill. May 17, 2022); *White v. Kroger Co.*, 2022 WL 888657, at *2 (N.D. Cal. Mar. 25, 2022); *cf. McGinity v. Procter & Gamble Co.*, __ F.4th __, 2023 WL 3911531, at *6–7 (9th Cir. June 9, 2023) (Gould, J., concurring) (noting that defendant's labeling "resembles a concerning practice known as 'greenwashing'" and "sounds alarm bells similar to those sounded in the Green Guides"). Here, the Green Guides indicates that BP's statements about its products' purported environmental benefits cannot constitute puffery or, at minimum, that the question cannot be resolved on the pleadings.

Second, BP improperly cherry-picks clauses from its "Better fuels to power your busy life" advertisement. *See* Mot. 7 (quoting Compl. ¶ 185). But to determine if a statement is puffery or otherwise nonactionable, courts must review statements in the full context alleged in a complaint. *See, e.g.*, *Williams v. Gerber Prods. Co.*, 552 F.3d 934, 939 n.3 (9th Cir. 2008) (declining to dismiss claim on puffery grounds because although allegedly misleading statement that defendant's snack products were "nutritious . . . could arguably constitute puffery" when considered alone, it "contribute[d] . . . to the deceptive context of the [product] as a whole"); *cf. Garner v. Global Plasma Sols., Inc.*, 590 F. Supp. 3d 738, 746 (D. Del. 2022) (explaining that plaintiff "plausibly identifie[d] a misrepresentation" based on manufacturer's statement that air purifier was "proven tool in the fight against COVID-19" in light of scientific studies contracting the statement).

Here, the Complaint alleges that the advertisement as a whole is misleading. The statements from the advertisement that BP conveniently omits include:

> At BP, we're working to make our energy cleaner and better. […] At BP, we're leaving no stone unturned to provide [the] extra energy the world needs while finding new ways to produce and deliver it with 53 [%] fewer emissions. We're boosting supplies of cleaner burning natural gas. […] More energy with fewer emissions? We see possibilities everywhere to help the world keep advancing.

Compl. ¶ 185. Read in context with the other statements in that advertisement—which BP does not contend are aspirational, opinion, or puffery—a jury could reasonably conclude that BP's excerpted statements are misleading.

Third, the statements BP excerpts are themselves actionable. BP points to (1) the title of the "Better fuels to power your busy life" advertisement, as well as three clauses from the ad: (2) "[W]e're working to make energy that's cleaner and better," (3) "We're bringing solar and wind energy to homes from the US to India," and (4) "We want—and need—energy to be kinder to the planet." Mot. 7–8 (quoting Compl. ¶ 185).

These statements are actionable because they make misleading statements about BP's products or current business activities. The advertisement's title misleadingly portrays natural gas as a "[b]etter fuel[]." And given that the advertisement describes BP's *fuels* and supposedly "cleaner burning *natural gas*," BP's second statement also implies that natural gas is "cleaner and better." Compl. ¶ 185 (emphasis added). These are not aspirational statements or puffery about BP's business aims or future financial prospects, but rather, statements misleadingly presented as fact. *Cf. Trenwick Am. Litig. Tr. v. Ernst & Young, LLP*, 906 A.2d 168, 209 (Del. Ch. 2006) ("[S]tatements . . . that the [defendant] believed that the [] acquisition would generate good results" were nonactionable); *Mooney v. E.I. du Pont de Nemours & Co.*, 2017 WL 5713308, at *6 (Del. Super. Nov. 28, 2017) (making the same point for statements about anticipated financial prospects of spinoff). As alleged, natural gas is neither "clean" nor "better" for the environment, and BP is primarily expanding fossil fuel production over renewable energy

production. *See* Compl. ¶¶ 183, 187. To the extent the word "better" expresses an opinion, the first and second statements BP excerpts plausibly allege "misrepresentation[s] of implied fact" given that natural gas is a fossil fuel product that produces greenhouse gas emissions. *Wal-Mart*, 901 A.2d at 116. The third statement BP cherry-picks from this ad is likewise portrayed as a fact, yet is misleading. While it may be "facially true" that BP is bringing some residential solar and wind energy to certain countries, a jury could find this statement "causes a false impression as to the true state of affairs" given BP's overwhelming investments in fossil fuels, which BP fails to correct. *Id.* at 115.

The fourth statement BP excerpts is also misleading because it portrays BP as a company that is *presently* prioritizing investments in energy that is "kinder to the planet," despite "[t]he vast majority of [BP's] capital expenditure" being geared toward fossil fuels. Compl. ¶ 183. Even if this statement qualified as opinion (which it does not), a jury must decide if this represents a "misrepresentation of implied fact." *Wal-Mart*, 901 A.2d at 116.

The same goes for BP's "Blade Runners" advertisement describing BP as "one of the major wind energy businesses in the US." Compl. ¶ 186. BP contends this is puffery, Mot. 9, but the statement is plausibly misleading in the context of the paragraph's remaining allegations regarding BP's miniscule share of the wind energy market—i.e., that "BP's installed wind capacity is a mere 1% of the [U.S.]

market." Compl. ¶ 186. In this light, a jury could find BP's statement false, or at minimum, misleading. This statement does not pertain to BP's "ability to maximize revenue" or its workforce's skills, *Aureus Holdings, LLC v. Kubient, Inc.*, 2021 WL 3891733, at *9 (Del. Super. Aug. 31, 2021) (quotation omitted), or represent "vague statements of corporate optimism designed to boost the appeal of [BP] as a potential transaction partner . . . during deal-making courtship," *Airborne Health, Inc. v. Squid Soap, LP*, 2010 WL 2836391, at *8 (Del. Ch. Jul. 20, 2010). Instead, it is a specific statement about BP's current business that is deceptive because 1% certainly does not represent a "major" share of the U.S. wind energy business.

Ultimately, jurors could find each of these statements misleading, and the Court should not wrest this factual question from them. *See Massachusetts*, 2021 WL 3493456, at *13.

B. A Jury Must Decide Whether BP's Greenwashing Statements Were Intended to Induce Purchases of Its Products

Next, BP insists its statements about renewable energy are nonactionable because they do not pertain to "'merchandise' allegedly available to Delaware consumers." Mot. 9–10. BP invents nonexistent limitations to the CFA and again seeks premature adjudication of factual issues.

Advertisements under the CFA include deceptive statements that "attempt . . . to induce, directly *or indirectly*, any person to" purchase "any merchandise." 6 *Del. C.* § 2511(1) (emphasis added). "[T]he inducement may be

direct or indirect as a matter of law." *Barba v. Bos. Sci. Corp.*, 2015 WL 6336151, at *4 (Del. Super. Oct. 9, 2015) (interpreting "advertisement" to include statements not made directly to consumers but to doctors because such statements can indirectly induce consumers to purchase medical products).

Here, the Complaint alleges that BP's statements about its investments in wind and solar energy, and about the renewable energy transition, are deceptive because they paint a misleading picture of BP and tend to deceive consumers into believing BP is more sustainable than reality reflects. This greenwashing, in turn, persuades Delaware consumers to buy more of BP's *fossil fuel* products—which BP does not dispute are merchandise—than consumers otherwise would. *See, e.g.*, Compl. ¶¶ 161, 164–71, 182–87, 213–14, 218. A jury could reasonably conclude that BP's advertisements about renewable energy seek to indirectly induce consumers to buy more of its fossil fuel products, or to buy BP's products over a competitor's. Indeed, a Massachusetts court rejected a similar argument by Exxon "that it did not make the challenged 'greenwashing' statements in connection with the sale or offer to sell any 'services' or 'property'" because the complaint "sufficiently alleged that . . . Exxon's 'greenwashing' campaign is designed to 'induce consumers to purchase its products.'" *Massachusetts*, 2021 WL 3493456, at *13 (quoting G.L.C. 93A § 1).

The sole case BP cites is distinguishable. In *Willis v. City of Rehoboth Beach*, the court decided at summary judgment that a city building permit was not "merchandise" under the CFA but rather "a license, which is revocable." 2005 WL 1953028, at *6 (Del. Super. June 24, 2005). Although a permit might qualify as an "object" under the CFA definition of merchandise "[i]n the abstract, . . . it would be illogical to find it is merchandise" within the context of the statute's purpose and surrounding words in the definition of merchandise, which pertain to "items generally traded in a commercial market." *Id.*; *see* 6 *Del. C.* § 2511(6) (defining "merchandise" as "any objects, wares, goods, commodities, intangibles, real estate or services"). Ultimately, the court concluded that "[t]he CFA protects consumers and business enterprises, not citizens from the acts of a government carried out pursuant to its police power." *Willis*, 2005 WL 1953028, at *6. BP's statements regarding renewable energy unquestionably pertain to "goods, commodities, [or] intangibles" traded in the commercial market, either directly to consumers or through utilities. *Id.* And BP is a classic example of a commercial entity that sells products to consumers, not a government body exercising its police power to issue building permits.

C. It Is for a Jury to Decide Whether BP's Statements Were Misleading

Finally, BP argues its statements about its Invigorate gasoline and BP Diesel products are not misleading—as a matter of law—considering additional language

not specifically cited in the Complaint. *See* Mot. 10–12. Yet again, BP inappropriately seeks determination of issues unripe for resolution on the pleadings.

First, BP fails to explain how its expanded quotes render its statements any less misleading. BP's statement about its Invigorate gasoline, Compl. ¶ 209, still implies this product is more environmentally beneficial than it is by saying the product renders gasoline more fuel-efficient ("gives you more miles per tank"). That the product allegedly does so by "defending your engine against dirt" does not change the asserted benefit of increased fuel-efficiency. *See* Mot. 10. Nor does the fact that BP represents that its BP Diesel protects engines detract from its misleading statement that this product "help[s] reduce emissions." *Id.* at 11. BP's insistence that the statements do not directly mention "climate change" or "environment" is beside the point. A jury must review these statements in context—including the footnotes BP cites—to determine if they are misleading. *See id.* at 11 & nn.4–5; *supra* Part III.A.

BP also says it need not warn consumers about the climate change impacts of its products because consumers supposedly "already possess" sufficient information on the subject. Mot. 12. But this uncited assumption contradicts the State's allegations—which the Court must take as true at the pleading stage, *see Savor, Inc. v. FMR Corp.*, 812 A.2d 894, 896 (Del. 2002)—particularly given BP's decades-long efforts to conceal the hazards of its products, *see* Compl. ¶¶ 104–41, 182–87,

209. The cases BP cites are inapposite because they were decided at summary judgment based on *evidence* or *undisputed facts* that plaintiffs were already aware of the relevant facts. *See RHA Constr.*, 2013 WL 3884937, at *4; *DCV Holdings, Inc. v. Conagra, Inc.*, 2002 WL 508343, at *8 (Del. Super. Apr. 1, 2002).[7]

Even if these statements were nonactionable, the Complaint alleges far more misrepresentations by BP, *see, e.g.*, Compl. ¶¶ 182–87, so there is no basis to wholly dismiss the CFA claim against BP.

CONCLUSION

For the foregoing reasons, and those in the Joint Opposition, the Court should deny BP's Motion.

Respectfully submitted,

DELAWARE DEPARTMENT OF JUSTICE

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[7] As to BP's passing contention that allegations challenging omissions are nonactionable because BP lacked a duty to warn, Mot. at 12 n.6, the Joint Opposition explains why BP and others had a duty to warn the State and other consumers of their products' hazards. Joint Opp'n at Part IV.C.1.

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