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 DEFENDANT MARATHON OIL CORPORATION'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 Marathon Oil Corporation ("Marathon Oil")[1] and other defendants (with Marathon Oil, "Defendants"). In support of its individual motion to dismiss under Superior Court Civil Rule 12(b)(6) ("Motion"), Marathon Oil argues primarily that the State fails to meet Rule 9(b)'s particularity standard because it makes allegations applicable to all defendants and references Marathon Oil by name "only a few times in its Complaint." *State ex rel. Jennings v. Purdue Pharma L.P.*, 2019 WL 446382, at *8 (Del. Super. Feb. 4, 2019) ("*Purdue*"). But as the State explained in its Answering Brief in Opposition to Defendants' Joint Motion to Dismiss for Failure to State a Claim ("Joint Opposition"),[2] although Rule 9(b) does not apply to most of the State's claims, the Complaint satisfies Rule 9(b) for all claims. Joint Opp'n at Part V.A–C. Regardless, this Court already considered and rightly rejected analogous Rule 9(b) arguments in *Purdue*, denying a motion to dismiss where, as here, the complaint grouped

[1] For purposes of the Complaint, "Marathon" includes Marathon Oil Corporation, Marathon Oil Company, Marathon Petroleum Corporation ("MPC"), Marathon Petroleum Company LP ("MPCLP"), Speedway LLC ("Speedway"), and their predecessors, successors, parents, subsidiaries, affiliates, and divisions. Compl. ¶ 26(j).

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

defendants together for purposes of some allegations because they each engaged in the same wrongful conduct. *Purdue,* 2019 WL 446382, at *8.

Given the robust allegations of Marathon Oil's direct liability, the Court need not reach its arguments that the allegations against the American Petroleum Institute ("API") are not imputable to Marathon Oil. If the Court does reach the issue, API's knowledge and conduct may be imputed to Marathon Oil because the Complaint plausibly alleges that API acted as Marathon Oil's agent and that Marathon Oil and others engaged in a civil conspiracy with API.

QUESTIONS INVOLVED

1. Does the Complaint sufficiently notify Marathon Oil of the claims against it?
2. Are the Complaint's allegations against API imputable to Marathon Oil?
3. Does Marathon Oil justify dismissal with prejudice?

ARGUMENT

I. The Complaint Sufficiently Notifies Marathon Oil of the Claims Against It

Marathon Oil primarily faults the State's use of collective allegations and the number of times that Marathon Oil is named in the Complaint. But there is nothing improper in grouping Marathon Oil with other Defendants with respect to certain allegations, where multiple defendants engaged in the same conduct or engaged in a joint scheme of fraudulent conduct.

Although Marathon Oil contends that Rule 9(b)'s pleading standard applies to all claims against it, that standard applies only to the State's negligent failure to warn claim. *See* Joint Opp'n at Part V.A–B. Rule 9(b)'s purpose is to "provide defendants with enough notice to prepare a defense," along with "prevent[ing] plaintiffs from using complaints as fishing expeditions to unearth wrongs to which they had no prior knowledge" and protecting defendants "against baseless claims." *Purdue*, 2019 WL 446382, at *8.[3] Where the rule applies, "date, place and time allegations are not required to satisfy the particularity requirement." *Sammons v. Hartford Underwriters Ins. Co.*, 2010 WL 1267222, at *5 (Del. Super. Apr. 1, 2010) (quotation omitted). Here, whether Rule 8(a) or Rule 9(b) applies, the Complaint sufficiently notifies Marathon Oil of the claims against it.

A. Delaware Law Allows Plaintiffs to Plead Conduct Allegations That Apply to All Defendants

Marathon Oil primarily laments the number of times it is referenced individually by name in the Complaint. *See* Mot. 1, 4–9. This Court rejected a similar argument in *Purdue*. 2019 WL 446382, at *8. Although "[a]t the pleading stage, *a defendant* in a group of similar defendants *may attempt to distinguish its behavior* from other defendants," it is not the plaintiff's burden to do so. *Id.*

[3] Marathon Oil's Motion focuses primarily on notice concerns and does not argue that the case is a fishing expedition or wholly baseless as reasons for dismissing pursuant to Rule 9(b). This Opposition thus likewise focuses on Marathon Oil's notice.

(emphasis added). "[T]hat there [a]re no allegations of specific misrepresentations" by certain defendants, or that a defendant is "only referenced . . . specifically a few times in [the] [c]omplaint," is not a basis to dismiss claims against that defendant under Rule 9(b). *Id.*; *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," the complaint sufficiently notified defendants of their charged misconduct).

Instead, 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, "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, and thus provides Marathon Oil ample notice. *See* Joint Opp'n at Part V.C. The Complaint alleges that Marathon Oil and others had a duty to warn consumers about the climatic harms of their fossil

fuel products, which they researched and understood in depth. Defendants further failed to give adequate warnings, and instead waged a sophisticated campaign of deception and disinformation about their products' contribution to climate change, knowing that the intended use of their products would cause the harms they predicted. *See* Compl. ¶¶ 20–36, 46(b), 100–40, 160–97, 202–210, 226, 235–44, 246, 262. Marathon Oil is charged with the same misconduct as the other Fossil Fuel Defendants, because they engaged in the same conduct, and is on notice of what is alleged.

Group 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 nominally independent organizations like think tanks, citizen groups, 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 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.

Similarly, there is no flaw in grouping Marathon Oil with MPC, MPCLP, Speedway, and Marathon Oil Company as "Marathon." *See* Mot. 5, 11. Delaware courts permit such grouping when defendants are alleged to have "close-knit relationships," as further delineation can often occur only after "the development of a factual record after discovery." *In re WeWork Litig.*, 2020 WL 7343021, at *11 (Del. Ch. Dec. 14, 2020); *see Manti Holdings, LLC v. Carlyle Grp. Inc.*, 2022 WL 1815759, at *8 (Del. Ch. Jun. 3, 2022).

Here, the Complaint adequately alleges close relationships between the Marathon entities. The Complaint alleges that MPC "was spun off from the

operations of Marathon Oil Corporation in 2011,"[4] and that Marathon Oil Company[5] is a wholly owned subsidiary of Marathon Oil. Compl. ¶ 26(d)–(e). And it alleges that Marathon Oil tightly controlled its subsidiaries, including marketing, advertising, and communications strategies about the climate impacts of the subsidiaries' fossil fuel products. *See id.* ¶ 26(c). The Marathon entities have worked as one machine to further their joint deception campaigns. *See id.* ¶ 26(j). Because "each case of successor liability must turn on its particular facts," *Sheppard v. A.C. & S. Co.*, 484 A.2d 521, 526 (Del. Super. 1984), determining whether Marathon Oil is liable as a predecessor to MPC or as a parent to Marathon Oil Company is premature at the pleading stage. *Cf. State Farm Fire & Cas. Co. v. Ward Mfg., LLC*, 2017 WL 5665200, at *1 (Del. Super. Nov. 20, 2017); *Corp. Prop. Assocs. 8, L.P. v. Amersig Graphics, Inc.*, 1994 WL 148269, at *4–5 (Del. Ch. Mar. 31, 1994).

The cases Marathon Oil cites are distinguishable. Two were toxic tort cases, in which the courts expressly recognized the "unique difficulties presented in toxic

[4] Marathon Oil inaccurately states that "the Complaint admits [MPC] is not affiliated with [Marathon Oil]." Mot. 9. Rather, the Complaint alleges MPC was "spun off" from Marathon Oil's operations. Compl. ¶ 26(e). That the Complaint directs certain allegations toward MPC specifically does nothing to show that MPC is unaffiliated with Marathon Oil.

[5] Marathon Oil raises factual disputes about the existence of Marathon Oil Company. Mot. 4–5. But on a motion to dismiss, the Court must take the Complaint's allegations as true. *Savor, Inc. v. FMR Corp.*, 812 A.2d 894, 896 (Del. 2002).

tort litigation" that "may justify some departure from [typical] pleading standards." *In re Benzene Litig.*, 2007 WL 625054, at *7 (Del. Super. Feb. 26, 2007); *see Hupan v. All. One Int'l, Inc.*, 2015 WL 7776659, at *12 (Del. Super. Nov. 30, 2015) (relying on reasoning from *In re Benzene* and cabining its discussion to "the context of these [toxic] tort claims"), *aff'd sub nom. Aranda v. Philip Morris USA Inc.*, 183 A.3d 1245 (Del. 2018). A toxic tort plaintiff's harm may manifest years after the initial exposure, increasing the difficulty in determining which products or manufacturers caused the injuries. *See id.* In that narrow context, "[p]laintiffs must plead with specificity which defendant caused the alleged harm, what products caused the harm, how the harm occurred, and when that harm occurred." *Hupan*, 2015 WL 7776659, at *12.

The Complaint here alleges that all of Fossil Fuel Defendants' fossil fuel products emit greenhouse gases that contribute to the State's injuries. *See* Compl. ¶¶ 4, 21–36. It specifies the injuries Defendants' deceptive conduct caused, and the mechanism of causation. *See, e.g.*, *id.* ¶¶ 5–12, 47–61, 226–33. Unlike a toxic tort case, where the timing of exposure may differentiate one defendant's products from another's, the Complaint alleges that all greenhouse gas emissions resulting from Defendants' deceptive promotion have contributed to the State's injuries.

Marathon Oil also cites several cases in which courts dismissed claims that were far less detailed than those brought by the State here. *See ITW Glob. Invs. Inc.*

v. Am. Indus. Partners Cap. Fund IV, L.P. (*ITW*), 2015 WL 3970908, at *11–12 (Del. Super. June 24, 2015); *Banks v. E.I. du Pont de Nemours & Co.*, 2022 WL 3139087, at *12–13 (D. Del. Aug. 4, 2022); *Browne v. Robb*, 583 A.2d 949, 955 (Del. 1990); *Black v. New Castle Cnty.*, 2021 WL 4191453, at *1–2 (Del. Super. Sept. 14, 2021). In *ITW*, the complaint contained only the conclusory allegation that the grouped defendants "were actively involved in the fraud and were aware of the relevant facts" but failed to plausibly allege that the misrepresentations were "knowable and that the defendant[s] w[ere] in a position to know [them]." *ITW*, 2015 WL 3970908, at *10–11. Likewise, in *Banks*, the court dismissed a fraudulent concealment claim because the complaint failed to allege even the basic elements of fraud. *Banks*, 2022 WL 3139087, at *12–13. For instance, the complaint stated that the plaintiffs relied on the assumption that their drinking water was safe, but then failed to allege that any of the defendants knew otherwise. *See id.* at *13. And in *Browne*, the "complaint totally lack[ed] even a single particular or specific fact to support [the plaintiff's common-law] fraud claim" against a single defendant. *Browne*, 583 A.2d at 955.

Here, by contrast, the Complaint thoroughly explains the theory of deception at the heart of the State's claims. It details how Fossil Fuel Defendants learned about the climate impacts of their fossil fuel products starting in the 1950s, including through reports disseminated by API. *See* Compl. ¶¶ 62–103. And it alleges that

Marathon Oil and other Fossil Fuel Defendants knew the truth about their products' impacts on climate change, yet knowingly misrepresented the risks of using their products and failed to warn consumers. *See* Joint Opp'n at Part V.C.

Finally, *Black* involved gross negligence, wantonness, and recklessness claims against a single defendant based on its employee's alleged misconduct . *Black*, 2021 WL 4191453, at *1–2. To survive dismissal of such claims, respectively, a plaintiff "must plead facts that show an extreme departure from the standard of care," that the defendant's "conduct was so unreasonable and dangerous that [the d]efendant was on notice [the p]laintiff likely would be harmed," and "that the precise harm" suffered "was reasonably apparent and consciously ignored by [the d]efendant." *Id.* at *3. The case said nothing about the claims asserted here, or about the sufficiency of detailed, collective allegations against defendants alleged to have engaged in similar misconduct.

B. The Complaint States Cognizable Claims Against Marathon Oil

Marathon Oil argues in conclusory fashion that the Complaint fails to allege any of the elements of the claims against it. Mot. 14–16. Not so.

First, the Complaint plausibly alleges that Marathon Oil—like other Fossil Fuel Defendants—substantially contributed to the public nuisance. *See* Compl. ¶¶ 26(k), 255–58, 260; Joint Opp'n at Part IV.A.1. The Complaint alleges that, through their intentional campaigns of deception and disinformation, Marathon Oil

and other Defendants inflated fossil fuel consumption, causing exacerbated interferences with public health, safety, welfare, and convenience—quintessential public rights. As the Delaware Supreme Court recently held, "whether there is control of [a] product once sold" is "not [an] element[] of an environmental-based public nuisance or trespass claim" against a manufacturer. *State ex rel. Jennings v. Monsanto Co.*, __ A.3d __, 2023 WL 4139127, at *2 (Del. June 22, 2023) ("*Monsanto*"). Instead, a defendant is liable for public nuisance if it "substantially contributed to a public nuisance by misleading the public and selling a product it knew would eventually cause a safety hazard and end up contaminating the environment for generations when used by industry and consumers." *Id.* at *8. Here, the Complaint amply alleges this by pleading that Defendants like Marathon Oil intentionally deployed their campaigns of deception and disinformation and controlled every step of the supply chain for their fossil fuel products, while knowing that those products would create devastating climate-related impacts to Delaware's environment and population. *See* Joint Opp'n. at Part IV.A.2. Marathon Oil's protests to the contrary merely rehash its unpersuasive objections to the Complaint's collective allegations.

Second, Marathon Oil's passing argument that the trespass claim against it should be dismissed because it is premised on Defendants' campaign of deception, Mot. 15, merits little attention. To the extent Marathon Oil suggests that it did not

exercise control over the instrumentality of the trespass, the Supreme Court recently confirmed that control is not an element of Delaware trespass law. Instead, it suffices that a defendant "substantially contributed to the entry [of foreign matter] onto the State's land by supplying [its products] to Delaware manufacturers and consumers, knowing that their use would eventually trespass onto other lands." *Monsanto*, 2023 WL 4139127, at *12. Here, the Complaint plausibly alleges that Defendants—including Marathon Oil—knew to a substantial certainty that their intentional campaigns of deception and disinformation would cause foreign matter including saltwater to invade State property, causing damage. *See* Joint Opp'n at Part IV.B.2.

Third, the Complaint states a failure to warn claim against Marathon Oil. The Complaint alleges that Marathon Oil and other Fossil Fuel Defendants owed a duty to warn the State and other consumers of the climatic hazards of their fossil fuel products; that Defendants breached this duty by failing to warn, intentionally concealing the hazards of their products, and disseminating climate disinformation; and that these actions proximately caused the State's injuries, which were foreseeable to and foreseen by Defendants. *See* Joint Opp'n at Part IV.C.1. Contrary to its uncited assertions, the dangers of Marathon Oil's products were not open and obvious or otherwise "generally known by the public." Mot. 14; *see* Joint Opp'n at Part IV.C.2. At minimum, there is a factual dispute as to the open and obvious nature

of the dangers of Defendants' fossil fuel products, precluding dismissal on this basis. *See Williamson v. Wilmington Hous. Auth.*, 208 A.2d 304, 306 (Del. 1965).

Finally, the Complaint states a CFA claim against Marathon Oil by alleging that it, as a Fossil Fuel Defendant, misrepresented material facts about climate change and its fossil fuel products to Delaware consumers. *See* Joint Opp'n at Part IV.D. And the Complaint alleges that these misrepresentations caused injuries because Defendants' CFA violations have inflated fossil fuel consumption and exacerbated the resulting climate-related injuries to Delaware. *See* Compl. ¶¶ 58, 273.

II. The Allegations Against API Are Imputable to Marathon Oil

Next, Marathon Oil contends that the allegations against API cannot be imputed to Marathon Oil because it did not conspire with API. Mot. 12–14. The Court need not reach this issue, because it can deny Marathon Oil's Motion without imputing API's conduct or knowledge to Marathon Oil for the reasons described above. If the Court does reach the issue, API's conduct and knowledge are imputable to Marathon Oil under either a conspiracy or agent-principal theory.

Conduct can be imputed from one party to another by alleging the parties participated in a tortious activity in concert, *Kuczynski v. McLaughlin*, 835 A.2d 150, 156–57 (Del. Super. 2003), or pursuant to a common scheme, Restatement (Second) of Torts § 876(a) (1979). "[C]o-conspirators are jointly and severally liable for the

acts of their confederates committed in furtherance of the conspiracy." *Laventhol, Krekstein, Horwath & Horwath v. Tuckman*, 372 A.2d 168, 170 (Del. 1976); *see also Empire Fin. Servs., Inc. v. Bank of N.Y. (Del.)*, 900 A.2d 92, 97 n.16 (Del. 2006) (construing § 876(a) of the Restatement (Second) of Torts as applying to civil conspiracy under Delaware law). A civil conspiracy requires (1) a confederation of two or more persons; (2) an unlawful act done in furtherance of the conspiracy; and (3) actual damage. *Nicolet, Inc. v. Nutt*, 525 A.2d 146, 149–50 (Del. 1987). There need not be an express agreement between co-conspirators to show a person's knowing participation in a conspiracy, as "tacit ratification is sufficient." *Id.* at 148 (quotation omitted).

Here, the Complaint sufficiently alleges that Fossil Fuel Defendants, including Marathon Oil, engaged in a civil conspiracy with API to impute API's conduct to Marathon Oil. In addition to alleging that Marathon was a "core API member[]" at relevant times, Compl. ¶ 37(e), the Complaint alleges that:

> All Fossil Fuel Defendants, by and through API and other organizations . . . conspired 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. Through their own actions and through their membership and participation in organizations like API . . . , each Defendant was and is a member of that conspiracy.

Id. ¶ 46(b). Moreover, "Defendants committed substantial acts to further the conspiracy in Delaware by making misrepresentations and omissions to Delaware consumers and failing to warn them about the disastrous effects of fossil fuel use." *Id.*; *see also id.* ¶ 26(k) (describing the Marathon entities' conduct in furtherance of the deception and denial campaigns). And that conspiracy foreseeably resulted in damage in Delaware, including through the effects of sea level rise, flooding, erosion, loss of wetlands and beaches, and ocean acidification, about which Marathon Oil knew or should have known. *Id.* ¶ 46(b).[6]

Marathon Oil contends that its mere membership in API is insufficient, Mot. 6, but Delaware courts recognize that membership in a trade association, coupled with other conduct, can demonstrate a conspiracy, *see, e.g.*, *In re Asbestos Litig.*, 509 A.2d 1116, 1120–22 (Del. Super. 1986) (holding a jury could reasonably determine that company "both knew of the alleged harmful acts of [the association] and knowingly participated in the [association's] conspiracy" through letters from its executives downplaying dangers of asbestos), *aff'd sub nom. Nicolet*, 525 A.2d at 147. Although Marathon Oil seeks to distinguish itself because the Complaint

[6] Accordingly, the actions of Marathon Oil's other alleged co-conspirators, including Exxon, BP, Shell, and Chevron, are imputable to Marathon Oil. The Complaint contains ample allegations of specific misrepresentations by these Defendants, among others, *see, e.g.*, Compl. ¶¶ 172–95, further refuting Marathon Oil's arguments that the Complaint lacks allegations of specific misrepresentations attributable to it.

does not allege that its executives served on API's Executive Committee or as API Chairman, Mot. 6–7, Marathon Oil provides no support for the contention that such leadership is required to demonstrate a conspiracy.

To the extent some of the State's allegations about the relationship between Fossil Fuel Defendants and API group defendants together, that is understandable and permissible. "Delaware courts have recognized that the nature of conspiracies often makes it impossible to provide details at the pleading stage and that the pleader should be allowed to resort to the discovery process and not be subjected to dismissal." *Szczerba v. Am. Cigarette Outlet, Inc.*, 2016 WL 1424561, at *2 (Del. Super. Apr. 1, 2016) (cleaned up). Here, because API has been far from transparent, the State cannot be charged with knowledge of each defendant's precise role before engaging in discovery. Whether a conspiracy existed is a factual question best reserved for the jury after the record is developed. *Gannett Co. v. Irwin*, 1985 WL 189242, at *3 (Del. Super. 1985).

Additionally, an agent's conduct or knowledge can be imputed to a principal by establishing the existence of an agent-principal relationship between the two parties, and that the agent's actions were within the scope of its authority. *Grand Ventures, Inc. v. Whaley*, 622 A.2d 655, 665 (Del. Super. 1992) ("[L]iability for an agent's culpable conduct imputes to the principal if the act falls within the scope of the agent's authority."); *In re Am. Int'l Grp., Inc.*, 965 A.2d 763, 806 (Del. Ch. 2009)

("[T]he knowledge of an agent is normally imputed to the agent's principal."). Such a relationship exists when: (1) the agent has the power to act on behalf of the principal with respect to third parties; (2) the agent does something at the behest of the principal and for the principal's benefit; and (3) the principal has the right to control the agent's conduct. *See Fasciana v. Elec. Data Sys. Corp.*, 829 A.2d 160, 169 n.30 (Del. Ch. 2003). Agency may be express or implied, *J.E. Rhoads & Sons, Inc. v. Ammeraal, Inc.*, 1988 WL 32012, at *4 (Del. Super. Mar. 30, 1988), and an agent may have multiple coprincipals, *see NAMA Holdings, LLC v. Related WMC LLC*, 2014 WL 6436647, at *18 (Del. Ch. Nov. 17, 2014) (citing Restatement (Third) of Agency § 3.16 cmt. b (2006)).

Here, the Complaint alleges that API acted as Marathon Oil's agent. Fossil Fuel Defendants, including Marathon Oil, "employed and financed" API and other "front groups to serve their climate change disinformation and denial mission," and API acted on behalf of and under the control of Marathon Oil and other Fossil Fuel Defendants in implementing public relations campaigns, funding shoddy scientific research, denying the reality of climate change, and misrepresenting the link between fossil fuels and climate change. *See* Compl. ¶ 39. These "Defendants actively supervised, facilitated, consented to, and/or directly participated in the misleading messaging of these front groups" and profited from their activities. *Id.* And the Complaint details a wide range of examples of conduct API undertook on

behalf of Fossil Fuel Defendants. *See, e.g.*, *id.* ¶¶ 37, 39, 62–64, 69–72, 78–80, 92, 122–28, 152, 198–201. In other words, API had the power to act on behalf of Fossil Fuel Defendants by marketing their fossil fuel products and promoting disinformation. API did so at the behest of Fossil Fuel Defendants and for their benefit. And Fossil Fuel Defendants had the right to—and did—supervise and control API's conduct. API's deceptive conduct, which was within the scope of the agency relationship and intended to advance Fossil Fuel Defendants' "climate change disinformation and denial mission," *id.* ¶ 39, is therefore imputable to Marathon Oil. At minimum, whether an agent-principal relationship existed between Marathon Oil and API is a question of fact that is premature for resolution at the pleading stage. *See Lang v. Morant*, 867 A.2d 182, 186 (Del. 2005); *J.E. Rhoads & Sons*, 1988 WL 32012, at *21.

III. Any Dismissal Should Be Without Prejudice

Marathon Oil seeks dismissal with prejudice because of "the enormous scope of this sprawling lawsuit" and because the suit was filed by the State with the assistance of outside counsel. Mot. 16. However, Delaware courts freely grant leave to amend when, as here, the plaintiff can allege additional facts to state a claim and amendment is in the interest of justice. *See, e.g.*, *Cornell Glasgow, LLC v. La Grange Props., LLC*, 2012 WL 2106945, at *12 (Del. Super. June 6, 2012); *Ward v. CareFusion Sols., LLC*, 2018 WL 1320225, at *3 (Del. Super. Mar. 13, 2018).

Marathon Oil provides no support for its attempted justification for departing from that general rule here simply because the State is an experienced litigator. Defendants' fraudulent concealment has prevented the State—and its outside counsel—from uncovering further details about Marathon Oil's specific role in the campaigns of deception, without discovery. *See* Joint Opp'n at IV.D.1. Rather than justifying a departure from the general rule, the enormous scope of Defendants' conduct can be captured only by a lawsuit of similar scope.

If the Court dismisses any claims against Marathon Oil, the State respectfully requests leave to amend to reassert its claims, which seek to protect the health and welfare of Delawareans and vindicate other important public interests.

CONCLUSION

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

Respectfully submitted,

DELAWARE DEPARTMENT OF JUSTICE

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