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*Attorneys for Defendants  
BP p.l.c. and BP America Inc.*

CITY OF HOBOKEN,

Plaintiff,

v.

EXXON MOBIL CORP., EXXONMOBIL OIL  
CORP., ROYAL DUTCH SHELL PLC, SHELL  
OIL COMPANY, BP P.L.C., BP AMERICA  
INC., CHEVRON CORP., CHEVRON U.S.A.  
INC., CONOCOPHILLIPS, CONOCOPHILLIPS  
COMPANY, PHILLIPS 66, PHILLIPS 66  
COMPANY, AMERICAN PETROLEUM  
INSTITUTE,

Defendants.

SUPERIOR COURT OF NEW JERSEY  
LAW DIVISION: HUDSON COUNTY

Docket No.: HUD-L-3179-20

CIVIL ACTION  
CBLP ACTION

**NOTICE OF DEFENDANTS BP P.L.C.  
AND BP AMERICA INC.'S MOTION  
TO DISMISS PURSUANT TO  
RULES 4:6-2(E) AND 4:5-8(A)**

TO: Gerald Krovatin  
KROVATIN NAU LLC  
60 Park Place, Suite 1100  
Newark, NJ 07102  
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*Attorneys for Plaintiff City of Hoboken*

**PLEASE TAKE NOTICE** that following the completion of briefing of dismissal motions pursuant to the June 7, 2023 Case Management Order of the Court and as soon thereafter as counsel may be heard, the undersigned attorneys for Defendants BP p.l.c. and BP America Inc., (collectively, "BP") will move before the Superior Court of New Jersey, Law Division, Hudson County, for an Order dismissing Count Five for violations of New Jersey's Consumer Fraud Act,

N.J.S.A. § 56:8-1, *et seq.*, and Count Six for violations of New Jersey's Racketeer Influenced and Corrupt Organizations Act, N.J.S.A. § 2C:41-2, *et seq.*, of Plaintiff's Amended Complaint against BP, pursuant to Rules 4:6-2(e) and 4:5-8(a).

**PLEASE TAKE FURTHER NOTICE** that in support of this motion, BP shall rely upon the Brief and Certification of Paul J. Fishman with Exhibits annexed thereto. A proposed form of Order accompanies these papers.

**PLEASE TAKE FURTHER NOTICE** that the discovery end date in this matter is June 30, 2024, pursuant to the June 7, 2023 Case Management Order of the Court; upon information and belief, this matter has not been assigned a trial date.

**PLEASE TAKE FURTHER NOTICE** that, pursuant to R. 1:6-2, oral argument is requested if timely opposition is filed.

Dated: July 7, 2023

By: /s/ Paul J. Fishman  
Paul J. Fishman

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SUPERIOR COURT OF NEW JERSEY  
LAW DIVISION: HUDSON COUNTY

Docket No.: HUD-L-3179-20

CIVIL ACTION  
CBLP ACTION

**[PROPOSED] ORDER  
DISMISSING COUNTS FIVE AND  
SIX OF THE AMENDED  
COMPLAINT AS AGAINST  
DEFENDANTS BP P.L.C. AND BP  
AMERICA INC.**

**THIS MATTER** having come before the Court by way of Motion of Defendants BP p.l.c. and BP America Inc., (collectively, “BP”), pursuant to R. 4:6-2(e) and R. 4:5-8(a), for the entry of an Order dismissing Counts Five and Six of the Amended Complaint against BP, and the Court having considered the written submissions of the parties and the arguments presented, if any, and good cause having been shown,

**IT IS ON THIS** \_\_\_\_\_ day of \_\_\_\_\_, 2023;

**ORDERED** that BP’s Motion be and is hereby **GRANTED** in its entirety; and it is further

**ORDERED** that Count Five of Plaintiff's Amended Complaint for violations of New Jersey's Consumer Fraud Act under N.J.S.A. § 56:8-1, *et seq.*, against BP is **DISMISSED WITH PREJUDICE**; and it is further

**ORDERED** that Count Six of Plaintiff's Amended Complaint for violations of New Jersey's Racketeer Influenced and Corrupt Organizations Act, N.J.S.A. § 2C:41-2, *et seq.*, against BP is **DISMISSED WITH PREJUDICE**.

---

HON. ANTHONY V. D'ELIA, J.S.C.

☐ Opposed

☐ Unopposed

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CHEVRON U.S.A. INC.,  
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SUPERIOR COURT OF NEW JERSEY  
LAW DIVISION: HUDSON COUNTY

Docket No. HUD-L-3179-20

CIVIL ACTION  
CBLP ACTION

**CERTIFICATION OF PAUL J.  
FISHMAN IN SUPPORT OF  
DEFENDANTS BP P.L.C. AND BP  
AMERICA INC.'S MOTION TO  
DISMISS PURSUANT TO  
RULES 4:6-2(E) AND 4:5-8(A)**

I, Paul J. Fishman, certify:

1. I am an attorney admitted to practice in the State of New Jersey and a partner with Arnold & Porter Kaye Scholer LLP, counsel for BP p.l.c. and BP America Inc. ("BP Defendants") in this matter. I submit this certification in support of BP Defendants' Motion to Dismiss.

2. A copy of the Amended Complaint and Jury Demand filed in this case is attached as **Exhibit 1.**

3. Pursuant to Rule 1:36-3, I have attached the following unpublished opinions cited in the BP Defendants' Brief in support of their motion to dismiss. Counsel is not aware of any contrary unpublished opinions.

- a. *Prospect Med., P.C. v. Horizon Blue Cross Shield of New Jersey, Inc.*, No. A-3690-09T3, 2011 WL 3629180 (N.J. Super. Ct. App. Div. Aug. 19, 2011) (**Exhibit 2**).
- b. *Wade v. Amanda Rinkleur & Assoc., Inc.*, No. HNT-L-161-05, 2006 WL 709607 (N.J. Super. Ct. App. Div. Mar. 17, 2006) (**Exhibit 3**).
- c. *Kolar v. Preferred Real Est. Invs., Inc.*, 361 F. App'x 354 (3d Cir. 2010) (**Exhibit 4**).
- d. *Salit Auto Sales, Inc. v. CCC Info. Servs. Inc.*, Civil Action No. 19-18107 (JMV) (MF), 2020 WL 5758008 (D.N.J. Sept. 28, 2020) (slip opinion slated for publication) (**Exhibit 5**).
- e. *Southward v. Elizabeth Bd. of Educ.*, Civ. No. CV 15-3699 (KM), 2017 WL 4392038 (D.N.J. Oct. 2, 2017) (**Exhibit 6**).
- f. *Mar Acquisition Grp., LLC v. Oparaji*, No. A-2160-21, 2023 WL 3032156 (N.J. Super. Ct. App. Div. Apr. 21, 2023) (**Exhibit 7**).
- g. *Grippi v. Spalliero*, No. A-2842-07T3, 2008 WL 4963978 (N.J. Super. Ct. App. Div. Nov. 24, 2008) (**Exhibit 8**).
- h. *Otilio v. Valley National Bancorp*, No. A-0723-17T3, 2019 WL 1496188 (N.J. Super. Ct. App. Div. Apr. 3, 2019) (**Exhibit 9**).
- i. *Delaney v. First Hope Bank, N.A.*, No. A-4272-19, 2022 WL 38850 (N.J. Super. Ct. App. Div. Jan. 5, 2022) (**Exhibit 10**).



j. *In re Toshiba Am. HD DVD Mktg. & Sales Pract. Litig.*, Civ. No. 08-939 (DRD),  
2009 WL 2940081 (D.N.J. Sept. 11, 2009) (**Exhibit 11**).

4. I certify that the foregoing statements made by me are true and correct. I am aware that if  
any of the foregoing statements are willfully false, I may be subject to punishment.

Dated: July 7, 2023

By: /s/ Paul J. Fishman  
Paul J. Fishman

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CIVIL ACTION  
CBLP ACTION

**CERTIFICATE OF SERVICE**

I, Paul J. Fishman, certify:

1. I am a partner at Arnold & Porter Kaye Scholer LLP, counsel for Defendants BP p.l.c. and BP America Inc., (collectively, "BP Defendants"), in this matter.
2. Today, I caused to be filed with the Clerk of the Superior Court, Hudson Vicinage via eCourts:
  - a. BP Defendants' Notice of Motion to Dismiss Pursuant to Rules 4:6-2(e) and 4:5-8(a);
  - b. a Brief in support of that motion;

- c. the accompanying Certification of Paul J. Fishman, with Exhibits;
  - d. a Proposed Order; and
  - e. this Certificate of Service.
3. I also arranged for delivery by priority United States mail of a courtesy copy of these documents to:

Hon. Anthony V. D'Elia, J.S.C.  
Superior Court of New Jersey – Hudson Vicinage  
William Brennan Court House  
583 Newark Avenue, Room 2B  
Jersey City, New Jersey 07306

4. I also arranged for service of these documents upon counsel of record via eCourts and e-mail.

#### **CERTIFICATION**

I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

Dated: July 7, 2023

By: /s/ Paul J. Fishman  
Paul J. Fishman

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CIVIL ACTION  
CBLP ACTION

**BRIEF IN SUPPORT OF DEFENDANTS BP P.L.C. AND  
BP AMERICA INC.'S MOTION TO DISMISS  
PURSUANT TO RULES 4:6-2(E) AND 4:5-8(A)**

## **TABLE OF CONTENTS**

	<b><u>Page</u></b>
INTRODUCTION .....	1
LEGAL STANDARD.....	2
ARGUMENT.....	2
I. Plaintiff’s NJ RICO Claim Fails Against BP .....	2
A. Plaintiff Has Not Alleged that BP Participated in GCC or API “Through a Pattern of Racketeering Activity” .....	3
1. Trade Association Membership and Participation Are Not Predicate Acts of Racketeering .....	4
2. The Receipt of Information Is Not a Predicate Act of Racketeering .....	5
3. Plaintiffs Cannot Use Group Pleadings to Satisfy the Heightened Pleading Requirements for Fraud Allegations.....	6
B. Plaintiff Has Not Adequately Pleaded That BP Conspired to Violate the NJ RICO Statute .....	7
II. Plaintiff’s CFA Claim Fails Against BP .....	8
A. Plaintiff Has Not Alleged a Single “Climate Denial” Statement by BP .....	9
B. BP’s Alleged “Greenwashing” Statements Are Not Actionable Statements of Fact Under the CFA.....	10
CONCLUSION.....	15

**TABLE OF AUTHORITIES**

	<b><u>Page(s)</u></b>
<b><u>Cases</u></b>	
<i>In re Asbestos Sch. Litig.</i> , 46 F.3d 1284 (3d Cir. 1994).....	4, 9
<i>Castro v. NYT Television</i> , 370 N.J. Super. 282 (App. Div. 2004) .....	14, 15
<i>City of Edinburgh Council v. Pfizer, Inc.</i> , 754 F.3d 159 (3d Cir. 2014).....	12, 13
<i>Dabush v. Mercedes-Benz USA, LLC</i> , 378 N.J. Super. 105 (App. Div. 2005) .....	10
<i>Delaney v. First Hope Bank, N.A.</i> , No. A-4272-19, 2022 WL 38850 (N.J. Super. Ct. App. Div. Jan. 5, 2022) .....	9
<i>First Nat. Bank of Bos. v. Bellotti</i> , 435 U.S. 765 (1978).....	13
<i>Gennari v. Weichert Co. Realtors</i> , 148 N.J. 582 (1997) .....	10, 11
<i>Grippi v. Spalliero</i> , No. A-2842-07T3, 2008 WL 4963978 (N.J. Super. Ct. App. Div. Nov. 24, 2008) .....	7, 8
<i>Hoffman v. Hampshire Labs, Inc.</i> , 405 N.J. Super. 105 (App. Div. 2009) .....	9, 10
<i>Joe Hand Promotions, Inc. v. Mills</i> , 567 F. Supp. 2d 719 (D.N.J. 2008) .....	14, 15
<i>Kolar v. Preferred Real Est. Invs., Inc.</i> , 361 F. App'x 354 (3d Cir. 2010) .....	5
<i>Lieberson v. Johnson &amp; Johnson Consumer Cos., Inc.</i> , 865 F. Supp. 2d 529 (D.N.J. 2011) .....	10, 12, 13
<i>Mar Acquisition Grp., LLC v. Oparaji</i> , No. A-2160-21, 2023 WL 3032156 (N.J. Super. Ct. App. Div. Apr. 21, 2023).....	6, 7, 9
<i>Maxim Sewerage Corp. v. Monmouth Ridings</i> , 273 N.J. Super. 84 (Law. Div. 1993) .....	2

<i>Myska v. New Jersey Mfrs. Ins. Co.</i> , 440 N.J. Super. 458 (App. Div. 2015) .....	13
<i>New Jersey Citizen Action v. Schering-Plough Corp.</i> , 367 N.J. Super. 8 (App. Div. 2003) .....	<i>passim</i>
<i>Otilio v. Valley National Bancorp.</i> , No. A-0723-17T3, 2019 WL 1496188 (N.J. Super. Ct. App. Div. Apr. 3, 2019) .....	7, 8
<i>Printing-Mart Morristown v. Sharp Elecs. Corp.</i> , 116 N.J. 739 (1989) .....	2
<i>Prospect Med., P.C. v. Horizon Blue Cross Shield of New Jersey, Inc.</i> , No. A-3690-09T3, 2011 WL 3629180 (N.J. Super. Ct. App. Div. Aug. 19, 2011) .....	3, 4, 6
<i>Rebish v. Great Gorge</i> , 224 N.J. Super. 619 (App. Div. 1988) .....	3, 4, 6
<i>Rodio v. Smith</i> , 123 N.J. 345 (1991) .....	10, 11, 12, 13
<i>Salit Auto Sales, Inc. v. CCC Info. Servs. Inc.</i> , Civil Action No. 19-18107 (JMV) (MF), 2020 WL 5758008 (D.N.J. Sept. 28, 2020) .....	6, 7
<i>Scheidt v. DRS Techns., Inc.</i> , 424 N.J. Super. 188 (App. Div. 2012) .....	2
<i>Sickles v. Cabot Corp.</i> , 379 N.J. Super. 100 (App. Div. 2005) .....	2
<i>Southward v. Elizabeth Bd. of Educ.</i> , Civ. No. 15-3699 (KM), 2017 WL 4392038 (D.N.J. Oct. 2, 2017) .....	6, 7
<i>State v. Ball</i> , 141 N.J. 142 (1995) .....	<i>passim</i>
<i>State, Dep't of Treasury, Div. of Inv. ex rel. McCormac v. Qwest Commc'ns Int'l,</i> <i>Inc.</i> , 387 N.J. Super. 469 (App. Div. 2006) .....	4
<i>In re Toshiba Am. HD DVD Mktg. &amp; Sales Pracs. Litig.</i> , Civ. No. 08-939 (DRD), 2009 WL 2940081 (D.N.J. Sept. 11, 2009) .....	11, 12, 13



<i>Wade v. Amanda Rinkleur &amp; Assoc., Inc.</i> , No. HNT-L-161-05, 2006 WL 709607 (N.J. Super. Ct. App. Div. Mar. 17, 2006) .....	4
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## **Statutes**

18 U.S.C.	
§ 1341.....	3, 6
§ 1343.....	3, 6
N.J. Stat.	
§ 2C:21-7(e) .....	3, 5, 7
§ 2C:41-1 .....	1, 3
§ 2C:41-2(c).....	<i>passim</i>
§ 2C:41-2(d).....	1, 2, 7, 8
§ 56:8-2 .....	2, 10, 14

## **Other Authorities**

N.J. Ct. R.	
4:5-8 .....	4, 6
4:5-8(a).....	4, 6, 7, 9
4:6-2(e).....	2

## **INTRODUCTION**

The Court should dismiss all of Plaintiff's claims against BP p.l.c. and BP America Inc. (collectively, "BP") for the reasons set forth in Defendants' Joint Opening Brief.<sup>1</sup> BP writes separately to provide additional reasons why Plaintiff's claims under the New Jersey Racketeer Influenced and Corrupt Organizations Act ("NJ RICO") and the New Jersey Consumer Fraud Act ("CFA") should be dismissed against BP. As demonstrated below, Plaintiff has not pleaded facts necessary to support either cause of action against BP.

Plaintiff's NJ RICO claim fails against BP for two reasons. First, Plaintiff has not alleged that BP participated in the Global Climate Coalition ("GCC") or the American Petroleum Institute ("API") "through a pattern of racketeering activity," as is required to state a claim under N.J. Stat. § 2C:41-2(c). Indeed, Plaintiff has not alleged that BP performed a single racketeering act, as enumerated in N.J. Stat. § 2C:41-1, in connection with either trade association. Second, Plaintiff has not alleged facts to support its claim that BP conspired to violate the NJ RICO statute. Plaintiff's reliance on conclusory allegations of conspiracy is insufficient to state a claim under N.J. Stat. § 2C:41-2(d). Because Plaintiff has not adequately pleaded that BP violated the NJ RICO statute, Plaintiff's NJ RICO claim against BP must be dismissed.

Plaintiff's CFA claim against BP suffers from three fatal defects and must be dismissed. First, Plaintiff bases its CFA claim against BP on purported "climate denial" and "greenwashing"; however, Plaintiff has not alleged a single "climate denial" statement made by BP. Second, BP's alleged "greenwashing" statements are not actionable statements of fact under the CFA. Rather, they are quintessential examples of puffery that cannot support a CFA claim. Third, none of BP's

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<sup>1</sup> BP incorporates by reference herein the factual background set forth in Defendants' Joint Opening Brief.

alleged statements were made “in connection with the sale or advertisement of any merchandise,” as is required to state a claim under the CFA. N.J. Stat. § 56:8-2.

### **LEGAL STANDARD**

In reviewing a motion to dismiss for failure to state a claim pursuant to Rule 4:6-2(e), a court must evaluate the “legal sufficiency of the facts alleged on the face of the Complaint.” *Printing-Mart Morristown v. Sharp Elecs. Corp.*, 116 N.J. 739, 746 (1989). For a claim to survive, a plaintiff must allege the essential facts supporting the cause of action and may not rely on “conclusory allegations.” *Scheidt v. DRS Techns., Inc.*, 424 N.J. Super. 188, 193 (App. Div. 2012). A court “must dismiss the plaintiff’s complaint if it has failed to articulate a legal basis entitling plaintiff to relief.” *Sickles v. Cabot Corp.*, 379 N.J. Super. 100, 106 (App. Div. 2005).

### **ARGUMENT**

#### **I. Plaintiff’s NJ RICO Claim Fails Against BP**

Plaintiff’s NJ RICO claim against BP is based on two theories: (1) BP participated in GCC and API “through a pattern of racketeering activity” in violation of N.J. Stat. § 2C:41-2(c), and (2) BP conspired with others to do the same in violation of N.J. Stat. § 2C:41-2(d). Plaintiff has not pleaded facts sufficient to support either theory. First, Plaintiff has not alleged that BP committed a single act of racketeering activity in connection with GCC or API. Second, Plaintiff has not pleaded any facts to show that BP entered into an agreement to violate the NJ RICO statute. Plaintiff instead relies on conclusory allegations of conspiracy, which are insufficient to state a claim under N.J. Stat. § 2C:41-2(d). Indeed, New Jersey courts have long recognized that “the heavy penalties provided by RICO, along with its potential for encouraging ‘strike suits,’ require careful scrutiny of the pleadings.” *Maxim Sewerage Corp. v. Monmouth Ridings*, 273 N.J. Super.

84, 91 (Law. Div. 1993). Accordingly, Plaintiff's NJ RICO claim against BP fails as a matter of law and should be dismissed.

**A. Plaintiff Has Not Alleged that BP Participated in GCC or API "Through a Pattern of Racketeering Activity"**

To maintain a claim under N.J. Stat. § 2C:41-2(c), a plaintiff must allege that the defendant participated in an enterprise "through a pattern of racketeering activity," not merely that it participated in an enterprise. *State v. Ball*, 141 N.J. 142, 181 (1995). To establish a "pattern of racketeering activity," a plaintiff must allege that the defendant's participation in the enterprise involved at least two incidents of predicate acts, as enumerated in N.J. Stat. § 2C:41-1, and that those acts are "related." *Ball*, 141 N.J. at 169. Failure to allege a pattern of racketeering activity requires dismissal of a NJ RICO claim. *See, e.g., Rebish v. Great Gorge*, 224 N.J. Super. 619, 627 (App. Div. 1988) (affirming grant of motion to dismiss NJ RICO claim where complaint "never refers to any pattern of racketeering"); *Prospect Med., P.C. v. Horizon Blue Cross Shield of New Jersey, Inc.*, No. A-3690-09T3, 2011 WL 3629180, at \*5 (N.J. Super. Ct. App. Div. Aug. 19, 2011) (affirming grant of motion to dismiss NJ RICO claim where plaintiff did not "allege that [defendant] engaged in necessary predicate criminal conduct") (**Fishman Cert., Ex. 2**).

Here, Plaintiff broadly alleges that Defendants engaged in racketeering activity with respect to two alleged "enterprises," API and GCC. Plaintiff alleges that Defendants committed three types of racketeering activity in connection with those two trade associations: (1) "deceptive business practices" under N.J. Stat. § 2C:21-7(e), which prohibits making "a false or misleading statement in any advertisement addressed to the public or to a substantial segment thereof for the purpose of promoting the purchase or sale of property or services"; (2) federal mail fraud under 18 U.S.C. § 1341; and (3) federal wire fraud under 18 U.S.C. § 1343. Am. Compl. ¶¶ 397–99 (**Fishman Cert., Ex. 1**). Because each of the alleged offenses sounds in fraud, Plaintiff must plead

its NJ RICO claim against BP with particularity under Rule 4:5-8(a). *See State, Dep't of Treasury, Div. of Inv. ex rel. McCormac v. Qwest Commc'ns Int'l, Inc.*, 387 N.J. Super. 469, 484 (App. Div. 2006) (“A complaint sounding in fraud, must on its face, satisfy the requirements of *Rule 4:5-8*.”); *Wade v. Amanda Rinkleur & Assoc., Inc.*, No. HNT-L-161-05, 2006 WL 709607, at \*2 (N.J. Super. Ct. App. Div. Mar. 17, 2006) (applying Rule 4:5-8(a) where plaintiff’s “RICO claim, in essence, alleges fraud”) (**Fishman Cert., Ex. 3**).

Plaintiff’s NJ RICO claim must be dismissed as to BP because Plaintiff has not alleged that BP committed a single predicate act of racketeering activity in connection with either trade association.

1. Trade Association Membership and Participation Are Not Predicate Acts of Racketeering

Plaintiff’s attempt to plead a NJ RICO claim against BP based on its historic membership and participation in GCC and API, *see* Am. Compl. ¶ 127 (GCC); *id.* ¶¶ 24(a), (e), (f) (API), fails. It is well established that mere participation in an enterprise—absent any racketeering activity—cannot support a claim under N.J. Stat. § 2C:41-2(c). *See Ball*, 141 N.J. at 181 (to establish a violation under N.J. Stat. § 2C:41-2(c), the defendant must have *both* “participated in the conduct of the affairs of the enterprise” *and* “participated **through a pattern of racketeering activity**” (emphasis added)); *see also Rebish*, 224 N.J. Super. at 627; *Prospect Med.*, 2011 WL 3629180, at \*5. Moreover, permitting a NJ RICO claim against BP to proceed based solely on its membership and participation in a trade association “has implications that broadly threaten [BP’s] First Amendment rights,” because “[j]oining organizations that participate in public debate, making contributions to them, and attending their meetings are activities that enjoy substantial First Amendment protection.” *In re Asbestos Sch. Litig.*, 46 F.3d 1284, 1294 (3d Cir. 1994). Because

Plaintiff's only BP-specific allegation regarding GCC is that BP was a member, Plaintiff's NJ RICO claim based on GCC as the enterprise fails as a matter of law.

2. The Receipt of Information Is Not a Predicate Act of Racketeering

As to API, Plaintiff further alleges that, in the 1970s and early 1980s, BP's predecessors participated in API task forces and committees that received information regarding the link between fossil fuel combustion and climate change from external sources and prepared an internal summary of that information. Am. Compl. ¶¶ 87–88, 98–100, 237. Plaintiff does not allege that BP specifically made any public statements, let alone *fraudulent* public statements, in connection with those API task forces or committees. Rather, Plaintiff merely alleges that BP's predecessors received and summarized information about the connection between fossil fuel combustion and climate change and that “Defendants” collectively did not publicly share that information. *Id.* ¶ 395(d).

Such alleged *inaction* is not a violation of New Jersey's deceptive business practices statute, or the federal mail and wire fraud statutes, and therefore cannot serve as a predicate act of racketeering under the NJ RICO statute. Violation of New Jersey's deceptive business practices statute requires that a person make “a false or misleading statement in any advertisement addressed to the public or to a substantial segment thereof for the purpose of promoting the purchase or sale of property or services.” N.J. Stat. § 2C:21-7(e). Plaintiff does not allege that BP specifically made *any* public statements—much less a “false or misleading” one—in connection with the API task forces and committees. Similarly, the federal mail and wire fraud statutes prohibit “use of the mail or interstate wires for purposes of carrying out any scheme or artifice to defraud.” *Kolar v. Preferred Real Est. Invs., Inc.*, 361 F. App'x 354, 362–63 (3d Cir. 2010) (**Fishman Cert., Ex. 4**). Plaintiff does not allege that BP specifically made or caused *any* use of the mail or wires—

fraudulent or otherwise—in connection with the API task forces and committees. Thus, because Plaintiff has not pleaded that BP participated in those task forces and committees “through a pattern of racketeering activity,” Plaintiff has failed to state a claim against BP under N.J. Stat. § 2C:41-2(c). *See Ball*, 141 N.J. at 181; *Rebish*, 224 N.J. Super. at 627; *Prospect Med.*, 2011 WL 3629180, at \*5.

3. Plaintiffs Cannot Use Group Pleadings to Satisfy the Heightened Pleading Requirements for Fraud Allegations

Nor can Plaintiff rely on “impermissible group pleadings” to save its claim against BP. *Salit Auto Sales, Inc. v. CCC Info. Servs. Inc.*, Civil Action No. 19-18107 (JMV) (MF), 2020 WL 5758008, at \*7 (D.N.J. Sept. 28, 2020) (**Fishman Cert., Ex. 5**). “To satisfy the [NJ RICO] pleading standard, plaintiffs must provide *each* defendant with individual notice—by *specific* factual allegations—of his or her purported participation in the racketeering enterprise.” *Southward v. Elizabeth Bd. of Educ.*, Civ. No. 15-3699 (KM), 2017 WL 4392038, at \*13 (D.N.J. Oct. 2, 2017) (emphasis in original) (**Fishman Cert., Ex. 6**). “Mere conclusory allegations against defendants as a group which fail to allege the personal involvement of any defendant are insufficient to survive a motion to dismiss.” *Salit*, 2020 WL 5758008, at \*7 (citations omitted). Indeed, “[w]hen different defendants are named in a complaint, [P]laintiff cannot refer to all defendants who occupied different positions and presumably had distinct roles in the alleged misconduct without specifying *which* defendants engaged in what wrongful conduct.” *Id.* (emphasis in original) (citations omitted). This is particularly true here given the heightened pleading requirements for fraud under New Jersey Rule 4:5-8. *See Mar Acquisition Grp., LLC v. Oparaji*, No. A-2160-21, 2023 WL 3032156, at \*2–3 (N.J. Super. Ct. App. Div. Apr. 21, 2023) (affirming dismissal of fraud claims under Rule 4:5-8(a) because the plaintiff’s “allegations combined several parties without explaining which party did what”) (**Fishman Cert., Ex. 7**).

Here, Plaintiff has not alleged any specific instances in which BP used the mail or wires in connection with GCC or API or in furtherance of a fraudulent scheme, as required by the federal mail and wire fraud statutes. *See* 18 U.S.C. §§ 1341, 1343. Nor has Plaintiff alleged any specific instances in which BP made “a false or misleading statement in any advertisement addressed to the public” in connection with GCC or API, as required by New Jersey’s deceptive business practices statute. *See* N.J. Stat. § 2C:21-7(e). Instead, Plaintiff engages in impermissible group pleading by alleging collective misconduct on the part of all “Defendants” without identifying which particular Defendants engaged in which specific acts of alleged wrongdoing. *See* Am. Compl. ¶¶ 397–414; *Mar*, 2023 WL 3032156, at \*2–3; *Salit*, 2020 WL 5758008, at \*7; *Southward*, 2017 WL 4392038, at \*13. Because Plaintiff relies on “conclusory allegations against defendants as a group which fail to allege the personal involvement of [BP],” Plaintiff has not alleged sufficient facts to support a claim against BP under N.J. Stat. § 2C:41-2(c). *Salit*, 2020 WL 5758008, at \*7; *see also Mar*, 2023 WL 3032156, at \*2; *Southward*, 2017 WL 4392038, at \*13; N.J. Ct. R. 4:5-8(a).

**B. Plaintiff Has Not Adequately Pleaded That BP Conspired to Violate the NJ RICO Statute**

To state a NJ RICO conspiracy claim under N.J. Stat. § 2C:41-2(d), a plaintiff must plead that the “defendant agreed to participate directly or indirectly in the conduct of the affairs of the enterprise by agreeing to commit, or to aid other members of the conspiracy to commit, at least two racketeering acts.” *Ball*, 141 N.J. at 180 (citations omitted). In addition, a plaintiff must allege that the defendant “acted knowingly and purposely with knowledge of the unlawful objective of the conspiracy and with the intent to further its unlawful objective.” *Id* (citations omitted). A NJ RICO conspiracy claim cannot survive a motion to dismiss when the plaintiff “failed to allege sufficient facts to show that there was an agreement by defendants” to violate the NJ RICO statute.



*Grippi v. Spalliero*, No. A-2842-07T3, 2008 WL 4963978, at \*8 (N.J. Super. Ct. App. Div. Nov. 24, 2008) (**Fishman Cert., Ex. 8**); *see also Otilio v. Valley National Bancorp*, No. A-0723-17T3, 2019 WL 1496188, at \*5 (N.J. Super. Ct. App. Div. Apr. 3, 2019) (affirming grant of motion to dismiss NJ RICO conspiracy claim where “the allegations are insufficient to prove” that defendants “participated in the affairs [of the enterprise] ‘with knowledge of the unlawful objective of the conspiracy’”) (**Fishman Cert., Ex. 9**).

Here, Plaintiff has not alleged any facts to show that BP agreed to violate the NJ RICO statute. Plaintiff does not allege that BP agreed to commit or to aid others in committing *any* acts of racketeering activity in connection with GCC or API. Nor does Plaintiff allege any facts to support the conclusion that BP “acted knowingly and purposely with knowledge of” and with “the intent to further” an unlawful objective of either trade association, each of which is required to state a NJ RICO conspiracy claim. *Ball*, 141 N.J. at 180. Instead, Plaintiff bases its conspiracy claim against BP exclusively on conclusory group pleading that all “Defendants” conspired to violate the NJ RICO statute,<sup>2</sup> which is insufficient to withstand a motion to dismiss. *See Grippi*, 2008 WL 4963978, at \*7; *Otilio*, 2019 WL 1496188, at \*5.

## II. Plaintiff’s CFA Claim Fails Against BP

Plaintiff’s CFA claim against BP is based on two sets of allegations, neither of which is sufficient to state a claim. First, Plaintiff alleges that BP violated the CFA by engaging in “climate denial,” but Plaintiff does not identify a single BP statement to support that allegation. Second, Plaintiff alleges that BP engaged in “greenwashing” by misrepresenting the extent of its investment in clean energy. However, none of those alleged statements is an actionable statement of fact

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<sup>2</sup> *See, e.g.,* Am. Compl. ¶ 397 (“Defendants have conducted or participated, *or conspired to conduct or participate*, in [API and GCC] through a pattern of racketeering activity in violation of N.J. Stat. § 2C:41-2(c) and (d)” (emphasis added)).

under the CFA, nor were they made in connection with the sale or advertisement of merchandise, as the CFA requires. Accordingly, Plaintiff's CFA claim against BP should be dismissed.

**A. Plaintiff Has Not Alleged a Single "Climate Denial" Statement by BP**

To state a claim under the CFA, a plaintiff "must allege each of three elements: (1) unlawful conduct by the defendants; (2) an ascertainable loss on the part of the plaintiff; and (3) a causal relationship between the defendants' unlawful conduct and the plaintiff's ascertainable loss." *New Jersey Citizen Action v. Schering-Plough Corp.*, 367 N.J. Super. 8, 12–13 (App. Div. 2003). Because "a claim under the CFA is essentially a fraud claim," it must comply with Rule 4:5-8(a), which requires that "any complaint alleging fraud set forth the 'particulars of the wrong, with dates and items if necessary, . . . insofar as practicable.'" *Hoffman v. Hampshire Labs, Inc.*, 405 N.J. Super. 105, 112 (App. Div. 2009) (quoting N.J. Ct. R. 4:5-8(a)); *see also Delaney v. First Hope Bank, N.A.*, No. A-4272-19, 2022 WL 38850, at \*4 (N.J. Super. Ct. App. Div. Jan. 5, 2022) (affirming dismissal of fraud claim where plaintiff "failed to allege specifically what the misrepresentations were and when they were made") (**Fishman Cert., Ex. 10**). Failure to plead a CFA claim with the requisite particularity warrants dismissal. *Hoffman*, 405 N.J. Super. at 114 (affirming grant of motion to dismiss where "plaintiff failed to allege sufficient facts to state a claim under the CFA").

Here, Plaintiff alleges generally that "Defendants fomented uncertainty about climate science," Am. Compl. ¶ 162, but general allegations against "Defendants" do not satisfy the particularity requirements of Rule 4:5-8(a) and, therefore, fail to state a claim against BP. *See Mar*, 2023 WL 3032156, at \*2–3.<sup>3</sup> Moreover, Plaintiff does not support its general allegation with

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<sup>3</sup> Similarly, Plaintiff's allegations regarding statements made by trade associations, Am. Compl. ¶¶ 126–60, fail to state a claim against BP because 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

any specific references to BP's conduct. Rather, after describing alleged "climate denial" statements *unrelated* to BP, Plaintiff merely alleges that, "[o]n information and belief, . . . BP . . . made a similar shift away from acknowledging the reality of anthropogenic climate change, to actively working to undermine scientific consensus and public trust." Am. Compl. ¶ 177. Plaintiff does not, however, identify even a single statement that was purportedly made by BP in support of that allegation.<sup>4</sup> Thus, Plaintiff has "failed to allege sufficient facts to state a claim under the CFA" against BP. *Hoffman*, 405 N.J. Super. at 114.

**B. BP's Alleged "Greenwashing" Statements Are Not Actionable Statements of Fact Under the CFA**

As the New Jersey Supreme Court has emphasized, "[n]ot just 'any erroneous statement' will constitute a misrepresentation prohibited by [the CFA]. The misrepresentation has to be one which is material to the transaction and which is a statement of fact, found to be false, made to induce the buyer to make the purchase." *Gennari v. Weichert Co. Realtors*, 148 N.J. 582, 607 (1997). New Jersey courts "recognize[] a distinction between misrepresentations of fact actionable under the CFA" and "mere puffery" that "will not support relief." *Dabush v. Mercedes-Benz USA, LLC*, 378 N.J. Super. 105, 115 (App. Div. 2005); *see also Lieberman v. Johnson & Johnson Consumer Cos., Inc.*, 865 F. Supp. 2d 529, 540 (D.N.J. 2011) ("The distinguishing characteristics of puffery are vague, highly subjective claims as opposed to specific, detailed factual assertions." (citations omitted)). CFA claims based on "nothing more than puffery" cannot withstand a motion to dismiss. *Rodio v. Smith*, 123 N.J. 345, 352 (1991); *see also Schering-Plough*, 367 N.J. Super.

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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*, 46 F.3d at 1289.

<sup>4</sup> Because Plaintiff has not alleged a single "climate denial" statement by BP, Plaintiff necessarily has failed to allege a "climate denial" statement made by BP "in connection with the sale or advertisement of merchandise" as the CFA requires. N.J. Stat. § 56:8-2; *see infra* Section II.B.

at 13–14 (affirming grant of motion to dismiss CFA claim where statements at issue are “not statements of fact, but are merely expressions in the nature of puffery and thus are not actionable”); *In re Toshiba Am. HD DVD Mktg. & Sales Pracs. Litig.*, Civ. No. 08-939 (DRD), 2009 WL 2940081, at \*10 (D.N.J. Sept. 11, 2009) (granting motion to dismiss NJ CFA claim based on statements that are “too general, vague, or exaggerated to be anything more than puffery”) (**Fishman Cert., Ex. 11**). Nor can a subjective statement on a “matter of opinion” support a CFA claim. *Toshiba*, 2009 WL 2940081, at \*9.

Here, Plaintiff’s “greenwashing” allegations against BP fail to identify any actionable statements of fact under the CFA. First, Plaintiff alleges that, in 2004, BP changed its name from “British Petroleum” to “BP” and adopted “a green and yellow logo,” which purportedly “concealed the company’s continuation of its core business in fossil fuels.” Am. Compl. ¶ 190. However, neither of those actions constitutes a statement of fact—let alone a “false” statement of fact—that is actionable under the CFA. *Gennari*, 148 N.J. at 607.

Second, Plaintiff alleges that BP’s use of the “Beyond Petroleum” and “Possibilities Everywhere” taglines in 2004 and 2019, respectively, constituted “greenwashing” because the taglines misrepresented the extent of BP’s investment in and commitment to “clean energy.” Am. Compl. ¶¶ 190–91. But those taglines are quintessential examples of nonactionable puffery, not actionable statements of fact. *See Toshiba*, 2009 WL 2940081, at \*9–10. The Supreme Court of New Jersey considered a similar issue in *Rodio*, where plaintiffs claimed that Allstate Insurance Company’s tagline, “You’re in good hands with Allstate,” violated the CFA because it was “a false representation of fact that Allstate was looking out for plaintiffs’ best interests.” 123 N.J. at 352. The Supreme Court affirmed dismissal of plaintiff’s CFA claim, concluding that the tagline was not “a deception, false promise, misrepresentation, or any other unlawful practice within the ambit

of the Consumer Fraud Act. However persuasive, ‘You’re in good hands with Allstate’ is nothing more than puffery.” *Id.*

Here, as in *Rodio*, BP’s “Beyond Petroleum” and “Possibilities Everywhere” taglines are not false promises, misrepresentations, or any other type of actionable statement of fact under the CFA. *See id.* They are not “specific, detailed factual assertions,” *see Lieberman*, 865 F. Supp. 2d at 540, regarding the extent of BP’s financial investment in or commitment to clean energy sources, as Plaintiff seemingly alleges,<sup>5</sup> but are, instead, general, “vague” statements regarding BP’s aspirations, which constitutes puffery. *Lieberman*, 865 F. Supp. 2d at 540; *see also City of Edinburgh Council v. Pfizer, Inc.*, 754 F.3d 159, 172 (3d Cir. 2014) (stating in the securities fraud context that a “vague and general statement[] of optimism [] constitute[s] no more than puffery” (internal quotation marks omitted)). Taglines that are “nothing more than puffery” cannot support a CFA claim. *Rodio*, 123 N.J. at 352; *see also Schering-Plough*, 367 N.J. Super. at 13 (affirming dismissal of CFA claim because the statement “you . . . can lead a normal nearly symptom-free life again” constituted nonactionable puffery); *Toshiba*, 2009 WL 2940081, at \*10 (dismissing CFA claim because the statement “For Today, Tomorrow and Beyond” constituted nonactionable puffery).

Third, Plaintiff targets two statements from BP’s “Possibilities Everywhere” campaign, which purportedly “misleadingly claimed that BP was heavily invested in clean energy like solar and wind power.” Am. Compl. ¶ 192. Yet, neither statement asserts any fact regarding the nature

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<sup>5</sup> *See* Am. Compl. ¶ 190 (alleging that BP tried “to create the impression that it was committed to a clean energy future”); *id.* (comparing BP’s 2008 investment in alternative energy to its overall energy investments); ¶ 191 (alleging that BP “h[e]ld itself out as a clean energy company”); ¶ 192 (claiming that BP said it “was heavily invested in clean energy like solar and wind power”); ¶ 193 (alleging that “BP’s advertised focus on clean energy is belied by its conduct” and noting the breakdown of BP’s energy portfolio).

or extent of the company’s financial investment in clean energy sources. The first statement simply describes BP’s aspiration to provide “‘more energy’ with ‘less footprint.’” *Id.* That clause is not a “specific, detailed factual assertion[]” regarding the level of BP’s financial investment in solar and wind power. *Lieberson*, 865 F. Supp. 2d at 540. It is the kind of “vague and general statement[] of optimism” that “constitute[s] no more than puffery,” *City of Edinburgh*, 754 F.3d at 172, and thus cannot support a CFA claim. *Rodio*, 123 N.J. at 352; *see also Schering-Plough*, 367 N.J. Super. at 13; *Toshiba*, 2009 WL 2940081, at \*10.<sup>6</sup>

Nor does the second statement from “Possibilities Everywhere”—which purportedly “trumpeted BP’s investment in windfarms in Indiana, [while] noting that natural gas was a backup in the event that wind power failed”<sup>7</sup>—support Plaintiff’s greenwashing-based CFA claim. Significantly, Plaintiff does not allege that the statement is false. The text of the ad—which Plaintiff characterizes but does not quote in the Amended Complaint—states: “Welcome to Fowler, Indiana. Home to three of BP’s wind farms. If the wind stops blowing, our natural gas can keep lights shining. We see possibilities everywhere.” *See* Am. Compl. ¶ 192 n.164.<sup>8</sup> Merely

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<sup>6</sup> Moreover, the First Amendment fully protects BP’s right to engage in speech regarding matters of public concern, such as the energy transition. *See First Nat. Bank of Bos. v. Bellotti*, 435 U.S. 765, 776–77 (1978) (“The freedom of speech and of the press guaranteed by the Constitution embraces at the least the liberty to discuss publicly and truthfully all matters of public concern without previous restraint or fear of subsequent punishment. . . . [A]nd this is no less true because the speech comes from a corporation rather than an individual.” (citation and internal quotation marks omitted)).

<sup>7</sup> Am. Compl. ¶ 192.

<sup>8</sup> In reviewing a motion to dismiss under R. 4:6-2, “a court may consider documents specifically referenced in the complaint,” even where “the complaint does not describe those documents in detail, [but] its provisions . . . reference them.” *Myska v. New Jersey Mfrs. Ins. Co.*, 440 N.J. Super. 458, 482 (App. Div. 2015) (citations omitted).

highlighting a wind project is not an assertion that BP “was heavily invested in” wind power. Am. Compl. ¶ 192.<sup>9</sup>

Moreover, Plaintiff’s CFA claim fails for the independent reason that none of BP’s alleged statements were made “in connection with the sale or advertisement of any merchandise” as the CFA requires. N.J. Stat. § 56:8-2. To state a claim under the CFA, “a plaintiff must allege the commission of a deception, fraud, misrepresentation, etc., ‘in connection with’ the sale of merchandise or services.” *Castro v. NYT Television*, 370 N.J. Super. 282, 294 (App. Div. 2004). To satisfy this requirement, “[t]he misrepresentation has to be one which is material to the transaction . . . made to induce the buyer to make the purchase.” *Id.* (affirming grant of motion to dismiss CFA claim where “defendant’s alleged statements and actions were not ‘made to induce [plaintiffs] to purchase’” any merchandise or services); *see also Joe Hand Promotions, Inc. v. Mills*, 567 F. Supp. 2d 719, 724 (D.N.J. 2008) (granting motion to dismiss CFA claim where plaintiff failed to “allege facts that establish that the alleged fraudulent conduct induced or lured the plaintiff into purchasing merchandise”).

Here, Plaintiff has not identified a single statement or omission that was made in connection with the sale or advertisement of BP merchandise to Plaintiff—or to the general

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<sup>9</sup> Plaintiff’s suggestion that BP violated the CFA by merely referencing “natural gas” without simultaneously stating “that natural gas is itself a fossil fuel that emits large quantities of greenhouse gases into the atmosphere when combusted,” Am. Compl. ¶ 192, goes nowhere. As Plaintiff concedes, by the time this advertisement was released in 2019, Plaintiff and the general public were well aware of the connection between fossil fuels and climate change. *See, e.g., id.* ¶¶ 6, 115; *see also* Defs.’ Joint Opening Br. at Section III.F.4. Because Plaintiff and the general public already knew the purportedly omitted information, Plaintiff has not pleaded (because it cannot) “a causal nexus between the alleged act of consumer fraud and [any] damages sustained,” as is required to state a CFA claim. *Schering-Plough*, 367 N.J. Super. at 15.

public.<sup>10</sup> The only types of BP “merchandise” identified in the Amended Complaint are BP gasoline, engine lubricant, motor oil, and “other fossil fuel products.” Am. Compl. ¶¶ 20(h), (i). Plaintiff does not allege that any of BP’s purported “greenwashing” statements relate to the sale or advertisement of those products, which is the end of the analysis. Indeed, Plaintiff does not allege that any of BP’s statements were made on a product label, gas pump, or otherwise at the point of sale where a consumer purchases those products. Rather, the alleged statements at issue—which “appeared on national television networks” and “digital and print media outlets,” Am. Compl. ¶ 191—merely conveyed the company’s goals and aspirations to contribute to the energy transition and highlighted a wind energy project. Notably, wind energy is not “merchandise” that Plaintiff alleges BP offered for sale to the New Jersey public. Thus, because Plaintiff has not alleged that BP’s statements were made “in connection with the sale or advertisement of any merchandise,” as the CFA requires, the CFA claim fails against BP and should be dismissed. *See Castro*, 370 N.J. Super. at 294–95; *Joe Hand*, 567 F. Supp. 2d at 724.

### **CONCLUSION**

For the foregoing reasons, the Court should grant this motion and dismiss Plaintiff’s NJ RICO and CFA claims against BP with prejudice.

Dated: July 7, 2023

By: /s/ Paul J. Fishman  
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<sup>10</sup> In fact, the Amended Complaint does not identify a single instance in which Plaintiff ever purchased a BP product. *See* Am. Compl. ¶ 371 (alleging vaguely that Plaintiff “has purchased products marketed and produced by *some* or all of Defendants” (emphasis added)).



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