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Counsel for Defendants Shell plc (f/k/a Royal Dutch Shell plc) and Shell USA, Inc. (f/k/a Shell Oil Company)

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

NOTICE OF MOTION BY SHELL PLC AND SHELL USA, INC. TO DISMISS PLAINTIFF'S AMENDED COMPLAINT

TO: ALL COUNSEL OF RECORD

PLEASE TAKE NOTICE that, pursuant to the Initial Case Management Order entered on June 7, 2023, at a date to be determined by the Court during the Case Management Conference scheduled for November 9, 2023, the undersigned, counsel for Defendants Shell plc (f/k/a Royal Dutch Shell plc) and Shell USA, Inc. (f/k/a Shell Oil Company) (together, the "Shell Defendants"), shall move before the Hon. Anthony V. D'Elia, J.S.C., at the Superior Court of New Jersey, Law Division, Hudson County, W.J. Brennan Courthouse, 583 Newark Avenue, 2nd Floor, Jersey City, New Jersey, for an order dismissing Plaintiff's Amended Complaint as to the Shell Defendants for failure to state a claim pursuant to Rule 4:6-2(e) and Rule 4:5-8(a).

PLEASE TAKE FURTHER NOTICE that, in support hereof, the Shell Defendants rely upon (i) the Brief in Support of Defendants' Motion To Dismiss for Failure To State a Claim and (ii) Defendants Shell plc and Shell USA, Inc.'s Brief in Support of Their Motion To Dismiss Amended Complaint, submitted herewith; the Certification of Loly G. Tor, with exhibits; and all pleadings filed in this matter.

PLEASE TAKE FURTHER NOTICE that a proposed form of order is enclosed herewith.

PLEASE TAKE FURTHER NOTICE that the Shell Defendants request oral argument if this motion is opposed.

PLEASE TAKE FURTHER NOTICE that the discovery end date is June 30, 2024, and no trial date has been set.

Dated: July 7, 2023

s/ Loly G. Tor
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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 **ORDER**

THIS MATTER having been brought before the Court by Defendants Shell plc (f/k/a Royal Dutch Shell plc) and Shell USA, Inc. (f/k/a Shell Oil Company) (together, the "Shell

Defendants") for an order dismissing Plaintiff's Amended Complaint for failure to state a claim pursuant to Rule 4:6-2(e) and Rule 4:5-8(a), the Court having considered the moving papers, any timely opposition thereto, and oral argument, if any, and good cause having been shown,

IT IS on the ____ day of _____ 2023

ORDERED that the Shell Defendants' Motion To Dismiss Plaintiff's Amended Complaint be and hereby is **GRANTED**; and it is further

ORDERED that Plaintiff's Amended Complaint is hereby **DISMISSED** as to the Shell Defendants; and it is further

ORDERED that a copy of this Order shall be served upon all counsel of record within 7 days of counsel's receipt of same.

_____
Hon. Anthony V. D'Elia, J.S.C.

__Opposed

__Unopposed

CITY OF HOBOKEN, *Plaintiff*, v. EXXON MOBIL CORP., *et al.*, *Defendants*.	SUPERIOR COURT OF NEW JERSEY LAW DIVISION: HUDSON COUNTY DOCKET NO. HUD-L-3179-20

DEFENDANTS SHELL PLC AND SHELL USA, INC.'S BRIEF IN SUPPORT OF THEIR MOTION TO DISMISS AMENDED COMPLAINT

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I. INTRODUCTION

This Court should dismiss all of Plaintiff the City of Hoboken's claims for the reasons set forth in Defendants' Joint Opening Briefs. Shell plc and Shell USA, Inc. (together, the "Shell Defendants"[1]) write separately to highlight additional reasons requiring dismissal of Plaintiff's claims against them.

First, Plaintiff does not allege any facts supporting its extraordinary claim that the Shell Defendants participated in a decades-long "fraudulent scheme" among a dozen members of the energy industry "to deceive the world" regarding the climate risks of burning coal, oil, and natural gas—thereby "pos[ing] grave threats to society." Am. Compl. ¶¶ 1-2, 395 (Tor Cert., Ex. A). Because all of Plaintiff's claims sound in fraud, the heightened pleading standard of Rule 4:5-8(a) of the New Jersey Rules of Court applies. Plaintiff does not meet that standard as to the Shell Defendants because—despite alleging a "[s]cheme to [d]efraud *the [p]ublic*," *id.* at 40 (emphasis added)—Plaintiff does not identify a single false or misleading statement that the Shell Defendants made. Nor does Plaintiff plead any actionable omission by the Shell Defendants, because Plaintiff does not allege that the Shell Defendants had any unique notice or knowledge regarding climate risks relative to the scientific community or the general public, or a legal duty to disclose those risks. All of Plaintiff's claims should be dismissed for this reason alone.

Second, Plaintiff's New Jersey Consumer Fraud Act ("CFA") claim against the Shell Defendants fails because Plaintiff does not allege any deception in connection with the sale of products in the *consumer* marketplace—Plaintiff's allegations instead concern "liquefied natural

[1] The Amended Complaint erroneously conflates the activities of Shell plc with those of Shell USA, and the activities of both of these entities with separately organized predecessors, subsidiaries, and affiliates. The Shell Defendants do not waive, and expressly reserve, the right to challenge this error in the future, but do not do so for purposes of the present motion.

gas," "hydrogen fuel cells," and "airplane[ ] . . . biofuels," which Plaintiff does not allege are sold to consumers. *Id.* ¶ 199.

Third, Plaintiff's New Jersey Racketeer Influenced and Corrupt Organizations ("RICO") Act claim—which Plaintiff added in an attempt to distinguish its case from the State of New Jersey's parallel case that precludes this one—lacks merit. Plaintiff does not have statutory standing because the necessary proximate causal connection is so clearly lacking, and Plaintiff does not allege that the Shell Defendants committed any predicate racketeering acts or agreed to enter a conspiracy.

The Court should dismiss all of Plaintiff's claims against the Shell Defendants with prejudice.

II. BACKGROUND

Plaintiff alleges that the "Fossil Fuel Company Defendants"—a dozen companies in the energy industry—have known about the climate risks of burning fossil fuels "for decades" and "conspired to deceive the world," partly by participating in the American Petroleum Institute ("API"), an industry association that is also named as a Defendant. Am. Compl. ¶¶ 1, 23.

Plaintiff claims that this deception drove Defendants' "increased production and sale of fossil fuels that caused Plaintiff's injuries." Pl.'s Reply Mem. in Support of Its Mot. To Remand at 4, *City of Hoboken v. Chevron Corp., et al.*, No. 20-14243 (D.N.J. Feb. 26, 2021) (Tor Cert., Ex. B). Accordingly, Plaintiff has represented that its liability theory depends on a defendant having engaged in deception and—even then—that it is limited to damages for an *incremental increase* in climate-related harms purportedly attributable to that deception. *See*, *e.g.*, City of Hoboken Br. in Opp. at 6, *Chevron Corp., et al. v. City of Hoboken, et al.*, No. 22-821 (U.S. Mar. 31, 2023) (Tor Cert., Ex. C) ("Petitioners' deception has caused lasting harm to Hoboken. This damage includes an increased frequency of flooding in the city[.]") (citation omitted); *City of*

Hoboken v. Chevron Corp., 45 F.4th 699, 706 (3d Cir. 2022) (noting Plaintiff's argument that "the oil companies had worsened climate change"), *cert. denied*, No. 22-821 (U.S. May 15, 2023).[2]

Despite Plaintiff's deception theory, the Amended Complaint does not identify any specific false or misleading statement that the Shell Defendants made anywhere, much less in Hoboken. It instead refers to the Shell Defendants' unspecified "propaganda and advertising campaigns to consumers in and around New Jersey, including in Hoboken." Am. Compl. ¶ 19(n). Nor does the Amended Complaint allege that the Shell Defendants—as opposed to "the Fossil Fuel Company Defendants" as an undifferentiated group, *id.* ¶ 238—had any special notice or knowledge of climate risks that they failed to disclose.

The few specific allegations about the Shell Defendants do not involve the deception needed to support Plaintiff's theory of incremental harm. One paragraph of the Amended Complaint devoted to the Shell Defendants contains allegations about their corporate structure and business activities. *Id.* ¶ 19(a)-(n). The Amended Complaint's other allegations about the Shell Defendants fall into three categories:

1. Public statements regarding the energy transition and fuels of the future. Plaintiff alleges that the Shell Defendants ran an advertising campaign "designed to hold [themselves] out as an environmentally conscious energy company," when—in fact—"Shell dedicated just 1% of its capital spending to low carbon energy sources" between 2010 and 2018, and it spent an estimated $55 million on "climate branding" annually. *Id.* ¶¶ 198-202; *see id*. ¶ 199 ("Reimagining the Future of Transportation" advertisement regarding liquefied natural gas, hydrogen fuel cells, and airplane biofuels; "A Path to Net-Zero Emissions by 2070" advertisement that the Shell Defendants are "changing how tomorrow's transport is fueled" and inviting readers to "explore the possibilities").

[2] *See also* Am. Compl. ¶ 15 (alleging that "Defendants' lies about the risks of fossil fuels[ ] are the cause of both the escalating climate harms experienced by Hoboken and the enormous costs the City now must undertake to abate them"); *id.* ¶ 239 (deception is "at the heart of Defendants' unlawful conduct"); *id*. ¶ 320 ("Without Defendants' actions, climate change effects from fossil fuel manufacturing, sale, and marketing would not exist in the form they exist today or would be much less severe.").

Plaintiff alleges that the Shell Defendants published a 2016 report titled "A Better Life with a Healthy Planet: Pathways to Net-Zero Emissions," even though a "fine-print disclaimer" said that they had "no immediate plans to move to a net-zero emissions portfolio," and their oil production has increased over the last decade. *Id.* ¶¶ 219-220.

2. Knowledge of climate risks. Plaintiff alleges that the Shell Defendants prepared: (1) a 1988 report noting "reasonable scientific agreement that increased levels of greenhouse gases would cause global warming," *id.* ¶¶ 109-110; (2) a 1994 report noting that climate skeptics had not "achieved widespread acceptance in the [Intergovernmental Panel on Climate Change ("IPCC")] scientific community," *id.* ¶ 164; and (3) a 1998 report predicting lawsuits if the United States government and energy companies neglected the views of scientists, *id.* ¶¶ 170-171.

   Plaintiff alleges that the Shell Defendants "received" a 1972 API report, *id.* ¶¶ 5, 87-88, and joined a 1979 API task force that "monitor[ed] and share[d] climate research," *id.* ¶¶ 98-99.

   Plaintiff alleges that the Shell Defendants "obtained a patent" "for drilling in previously unreachable areas" in the Arctic in 1984, *id.* ¶¶ 181-182, and, in 1989, redesigned an offshore oil platform to account for climate-related sea-level rise, *id.* ¶ 184; *see also id.* ¶¶ 186-187 (describing the Europipe and Sable gas field joint ventures).

3. Industry association memberships. Plaintiff alleges that the Shell Defendants belonged to industry associations. *Id.* ¶ 24 (API; service on board of directors from 2004-2017; payment of membership dues in 2022); *id.* ¶¶ 127, 134 (Global Climate Coalition ("GCC")). Plaintiff accuses some associations of wrongdoing, but does not specify what role it claims the Shell Defendants played.

Based on these allegations, Plaintiff seeks to impose liability on the Shell Defendants and recover damages for injuries allegedly caused by global climate change. *See*, *e.g.*, *id.* ¶¶ 15, 45. As explained below, none of these allegations states a claim against the Shell Defendants.

III. LEGAL STANDARD

A party can move to dismiss for failure to state a claim upon which relief can be granted. *See* Rule 4:6-2(e). New Jersey "is a 'fact' rather than a 'notice' pleading jurisdiction, which means that a plaintiff must allege facts to support his or her claim rather than merely reciting the elements of a cause of action." *Nostrame v. Santiago*, 420 N.J. Super. 427, 436 (App. Div. 2011), *aff'd as modified*, 213 N.J. 109 (2013). "Conclusory allegations do not provide an

adequate basis to deny a motion to dismiss under Rule 4:6-2." *Berger v. Frazier*, 2018 WL 3402115, at *3 (N.J. Super. Ct. App. Div. July 13, 2018). Separately, a plaintiff must plead allegations of fraud with particularity. *See* Rule 4:5-8(a) ("In all allegations of misrepresentation, fraud, mistake, breach of trust, willful default or undue influence, particulars of the wrong, with dates and items if necessary, shall be stated insofar as practicable.").

IV. ARGUMENT

A. Plaintiff Fails To Plead With Particularity That The Shell Defendants Made Any Deceptive Statements Or Omissions

By its terms, Rule 4:5-8(a) applies to all of Plaintiff's claims against the Shell Defendants because the claims rest on "allegations of . . . fraud." Plaintiff alleges, for example, that "Defendants Coordinated A Half-Century Illegal Scheme to *Defraud* the Public" about climate change. Am. Compl. at 40 (Heading; emphasis added). Case law also confirms that Rule 4:5-8(a)—like its federal counterpart[3]—applies to claims that sound in fraud. *See*, *e.g.*, *Delaney v. First Hope Bank, N.A.*, 2022 WL 38850, at *4-6 (N.J. Super. Ct. App. Div. Jan. 5, 2022) (applying heightened pleading standard to tortious-interference claim based on allegations of fraud); *Hoffman v. Hampshire Labs, Inc.*, 405 N.J. Super. 105, 112 (App. Div. 2009) (Rule 4:5-8(a) "requires that [CFA] claims be pled with specificity"); *Wade v. Amanda Rinkleur & Assoc., Inc.*, 2006 WL 709607, at *2 (N.J. Super. Ct. Law Div. Mar. 17, 2006) (applying Rule 4:5-8(a) because plaintiff's "RICO claim, in essence, allege[d] fraud").[4]

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[3] *See Freeman v. Lincoln Beach Motel*, 82 N.J. Super. 483, 485 (Law Div. 1981) ("Since our court rules are based on the Federal Rules of Civil Procedure, it is appropriate to turn to federal case law for guidance.").

[4] *See also Lum v. Bank of Am.*, 361 F.3d 217, 223 (3d Cir. 2004) ("[w]here, as here, plaintiffs rely on mail and wire fraud as a basis for a RICO violation, the allegations of fraud must comply with Federal Rule of Civil Procedure 9(b)"), *abrogated on other grounds by In re Insurance Brokerage Antitrust Litig.*, 618 F.3d 300 (3d Cir. 2010); *id.* at 229 (holding that Rule 9(b) applied to antitrust claim "[b]ecause plaintiffs have alleged fraud as a basis for" the claim);

Rule 4:5-8(a) requires Plaintiff to allege "specifically what the misrepresentations were and when they were made," *Delaney*, 2022 WL 38850, at *4, and "specific facts that, if proven, would show that defendants' representations were false," *Hoffman*, 405 N.J. Super. at 116. Moreover, Plaintiff must allege that the Shell Defendants—not other Defendants or "the Fossil Fuel Company Defendants" generally, let alone non-parties—made a deceptive statement or omission. *See Mar Acquisition Grp., LLC v. Oparaji*, 2023 WL 3032156, at *2 (N.J. Super. Ct. App. Div. Apr. 21, 2023) (affirming finding that plaintiff's "fraud claims lacked particularity, noting that his allegations combined several parties without explaining which party did what").

1. Plaintiff fails to allege that the Shell Defendants made any false or misleading statements

All of Plaintiff's claims fail because Plaintiff does not allege that the Shell Defendants made a single false or misleading statement. Plaintiff instead resorts to innuendo or group-pleading, which is insufficient as a matter of law. *See Hoffman*, 405 N.J. Super. at 115-16. This defect alone warrants dismissal.

Plaintiff's allegations fail for at least four additional and independent reasons.

First, Plaintiff's allegations violate *Delaney*'s instruction to specify "what the misrepresentations were." 2022 WL 38850, at *4. Plaintiff's generalized allegation (at ¶ 198) that the Shell Defendants ran an advertising campaign "designed to hold [themselves] out as an environmentally conscious energy company" is illustrative. Rule 4:5-8(a) does not permit a plaintiff to challenge an entire advertising campaign generally. Plaintiff must plead specific statements it believes are false or misleading. *See id*.

Kievit v. Rokeach, 1987 U.S. Dist. LEXIS 16131, at *20 (D.N.J. Oct. 29, 1987) (stating New Jersey's RICO statute "is identical in all material respects" to the federal RICO statute).

Second, underscoring Plaintiff's failure to plead that the Shell Defendants made any false or misleading statements, Plaintiff actually pleads that some of the statements of which it complains are true. For example, Plaintiff alleges that Shell "published" a 1998 scenario report, which Plaintiff suggests was prescient because it warned that lawsuits could result if the United States government and fossil-fuel companies neglected the views of scientists. Am. Compl. ¶¶ 170-171. Plaintiff also cites "a report titled 'A Better Life with a Healthy Planet: Pathways to Net-Zero Emissions' " that contained a "fine-print disclaimer" stating that the Shell Defendants "have no immediate plans" to move to a net-zero emissions portfolio over the next 10-20 years—which, again, Plaintiff suggests is true. *Id.* ¶ 219.

Third, Plaintiff does not allege certain statements were published such that they could even begin to support Plaintiff's blanket assertion that the Shell Defendants deceived "the world" about climate change for decades. *Id.* ¶ 1. For example, Plaintiff alleges that the Shell Defendants produced a 1994 report titled "The Enhanced Greenhouse Effect," but Plaintiff does not allege that any statements in the report were false or misleading. *Id.* ¶ 164.[5] And Plaintiff alleges the report was "internal," *id.*, so it could not have played a part in a "disinformation campaign to deceive the public," *id.* ¶ 78.

Fourth, Plaintiff challenges statements that are not "statement[s] of fact," so they "cannot rise to the level of . . . fraud." *Rodio v. Smith*, 123 N.J. 345, 352 (1991). Plaintiff cites one alleged *New York Times* publication "titled 'Reimagining the Future of Transportation' suggest[ing] that Shell is committed to a cleaner energy future"; and another allegedly "positing

[5] For example, Plaintiff suggests that the 1994 report "emphasized" the " 'minority' view that 'concerns over global warming [are] exaggerated and misguided' "—yet states that the report "acknowledged" that " 'none' of the explanations casting doubt on fossil fuels' central role in climate change 'has so far achieved widespread acceptance in the IPCC scientific community.' " Am. Compl. ¶ 164 (brackets in original).

'A Path to Net-Zero Emissions by 2070' by 'changing how tomorrow's transport is fueled' and inviting readers to 'explore the possibilities.'" Am. Compl. ¶ 199. Invitations to "[r]eimagin[e] the [f]uture" and "explore the possibilities" do not support an accusation of fraud because they are not statements of fact. *See Rodio*, 123 N.J. at 352 (slogan proclaiming that "'You're in good hands'" with defendant was "not a statement of fact"); *see also New Jersey Citizen Action v. Schering-Plough Corp.*, 367 N.J. Super. 8, 13 (App. Div. 2003) (affirming dismissal of claims premised on statements that were not "statements of fact").

2. Plaintiff fails to allege that the Shell Defendants committed fraud by omission

Plaintiff likewise fails to plead that the Shell Defendants committed fraud by omission or that they omitted any information they had a legal duty to disclose. Rule 4:5-8(a) applies equally to misrepresentations and omissions: a plaintiff must "specify what [a defendant] concealed or omitted." *Vercammen v. LinkedIn Corp.*, 2022 WL 221388, at *5 (N.J. Super. Ct. App. Div. Jan. 26, 2022). Federal courts require a plaintiff to plead: "(1) precisely what was omitted; (2) who should have made a representation; (3) the content of the alleged omission and the manner in which the omission was misleading; and (4) what [the defendant] obtained as a consequence of the alleged fraud." *Republic Bank & Tr. Co. v. Bear Stearns & Co*., 683 F.3d 239, 256 (6th Cir. 2012).

Plaintiff's claims fail because it does not plead that any information was "concealed or omitted." *Vercammen*, 2022 WL 221388, at *5. For example, Plaintiff alleges (at ¶¶ 109-110) that the Shell Defendants produced "an internal . . . report" in 1988 called "The Greenhouse Effect." But Plaintiff acknowledges that the report informed Shell about areas of preexisting "scientific agreement," *id.* ¶ 110, and that the information was publicized *that same year*, *id.* ¶¶ 115-116 (alleging that, in the late 1980s, "reputable scientific sources confirmed to the public

that fossil fuel combustion was warming the planet," including James Hansen's 1988 congressional testimony that "received front-page coverage in *The New York Times*"). Likewise, Plaintiff does not allege (because it cannot) that the Shell Defendants failed to disclose patents that the Shell Defendants allegedly obtained—those patents are a matter of public record, as Plaintiff acknowledges. *See id.* ¶ 182 & n.154. Finally, Plaintiff does not plead that the alleged design changes to the Shell Defendants' North Sea platform and other energy-related facilities in which the Shell Defendants are alleged to have had an interest were done in secret. Plaintiff cites a newspaper article stating that the Shell Defendants publicly announced the redesign of the North Sea platform and the reason for that redesign. *See id.* ¶ 184 & n.155; Tor Cert., Ex. D, Amy Lieberman & Susanne Rust, "Big Oil braced for global warming while it fought regulations," L.A. Times, Dec. 31, 2015 ("In 1989, before Shell Oil joined the Global Climate Coalition, the company announced it was redesigning a $3-billion North Sea natural gas platform that it had been developing for years. The reason it gave: Sea levels were going to rise as a result of global warming.").

Independently, Plaintiff's claims fail because the Shell Defendants had no duty to disclose information about climate risks. No New Jersey court has ever recognized a duty to warn "the world" about climate risks, Am. Compl. ¶ 1—or anything like it. New Jersey courts instead recognize a "basic duty to warn," which "exists . . . to *protect* and alert *product users*." *Coffman v. Keene Corp.*, 133 N.J. 581, 599 (1993) (emphases added). Accordingly, Plaintiff's claims fail because it does not allege, as it must, that the Shell Defendants violated a duty to warn *users* of fossil-fuel products from dangers presented by *use* of those products; it instead alleges that the Shell Defendants violated a duty to warn "the world" about risks affecting users and non-users of fossil fuels alike. No such duty exists under New Jersey law, so Plaintiff's claims fail at the outset.

Regardless, the widespread public discussion of climate risks during the relevant period would vitiate any duty this Court might recognize in the first instance. At common law, a defendant's duty to warn does not apply to "obvious and generally known risks." *Mathews v. University Loft Co*., 387 N.J. Super. 349, 362 (App. Div. 2006). Liability under the CFA and RICO is similarly limited. *See*, *e.g.*, *In re Toshiba Am. HD DVD Mktg. & Sales Practices Litig.*, 2009 WL 2940081, at *12 (D.N.J. Sept. 11, 2009) (dismissing CFA claim and explaining "the notion that [defendant] could 'conceal' something that was so well covered in the media defies logic"); *Lundy v. Hochberg*, 79 F. App'x 503, 505 (3d Cir. 2003) (affirming dismissal of mail and wire fraud predicates where the "available public record" belied the alleged "scheme to defraud").

Here, the Amended Complaint makes clear that climate risks were obvious and generally known. For example, Plaintiff acknowledges that by the late 1980s at the latest—around the same time or before any of the alleged internal reports that Plaintiff claims the Shell Defendants prepared—"reputable scientific sources confirmed to the public that fossil fuel combustion was warming the planet." Am. Compl. ¶ 115; *see also id*. ¶ 116 (in 1988, James Hansen "testified to the U.S. Congress that climate change was caused by human activities," which "received front-page coverage in *The New York Times*"); *id.* ¶ 117 ("members of the U.S. Congress introduced The National Energy Policy Act of 1988, intended to 'establish a national energy policy that will quickly reduce the generation of carbon dioxide' "); *id.* ¶ 118 ("the world's nations joined together to create the IPCC to provide a scientific basis for policy action on climate change" in 1988; and the IPCC published its first report in 1990). The Amended Complaint does not allege that the Shell Defendants had any special knowledge that the public or scientific community

lacked[6]—and, therefore, the Shell Defendants could not have omitted material information. Dismissal is warranted.

3. The statements of other Defendants and industry organizations cannot be attributed to the Shell Defendants

Plaintiff's allegation that the "Fossil Fuel Company Defendants" acted similarly or through industry associations does not change the analysis. Am. Compl. ¶ 120.

A plaintiff may not impose collective liability by making "collectivized allegations against defendants as a group"; "instead, a plaintiff must plead fraud with particularity with respect to each defendant, thereby informing each defendant of the nature of its alleged participation in the fraud." *Premier Pork L.L.C. v. Westin, Inc*., 2008 WL 724352, at *10 (D.N.J. Mar. 17, 2008) (cleaned up); *see also Mar*, 2023 WL 3032156, at *2 ("allegations [that] combine[ ] several parties without explaining which party did what" fail). Even if a plaintiff makes defendant-specific allegations, courts refuse to impose liability where the plaintiff's sole contention is that a defendant belonged to an industry association, contributed to it, or attended meetings.[7] In *In re Asbestos School Litigation*, for example, the plaintiffs argued that the

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[6] Plaintiff does not make this allegation because it cannot. *See Massachusetts v. EPA*, 549 U.S. 497, 507 (2007) (explaining that "the U.S. Weather Bureau began monitoring atmospheric carbon dioxide levels" in 1959 and that, by "the late 1970's, the Federal Government began devoting serious attention to the possibility that carbon dioxide emissions associated with human activity could provoke climate change"); *Juliana v. United States*, 947 F.3d 1159, 1166 (9th Cir. 2020) ("[T]he federal government has long understood the risks of fossil fuel use and increasing carbon dioxide emissions."); *id.* at 1164 ("[T]he federal government has long promoted fossil fuel use despite knowing that it can cause catastrophic climate change[.]"); *City of Oakland v. BP P.L.C.*, 325 F. Supp. 3d 1017, 1019 (N.D. Cal. 2018) ("The science dates back 120 years."), *vacated & remanded*, 960 F.3d 570 (9th Cir.), *op. am. & superseded on denial of reh'g*, 969 F.3d 895 (9th Cir. 2020); *California v. General Motors Corp.*, 2007 WL 2726871, at *8 (N.D. Cal. Sept. 17, 2007) ("As early as 1978, . . . the elected branches of government have addressed the issues of climate change and global warming.").

[7] *See Taylor v. Airco, Inc*., 503 F. Supp. 2d 432, 446-47 (D. Mass. 2007) (granting defendants summary judgment on conspiracy and aiding-and-abetting theories because "Plaintiffs can do no more than offer evidence that individual Defendants sent representatives

defendant had joined a civil conspiracy of asbestos manufacturers to, among other things, "disseminate[ ] misleading information about the danger of asbestos," by becoming an "associate member" of an industry association. 46 F.3d 1284, 1287 (3d Cir. 1994). The Third Circuit (with then-Judge Alito writing) disagreed and granted a writ of mandamus—an " 'extraordinary' remedy"—requiring the district court to enter summary judgment for the defendant. *Id*. at 1288-90. The Third Circuit explained that the district court's decision was "far outside the bounds of established First Amendment law" 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." *Id.* at 1289, 1294.

Applying these standards, industry-association conduct cannot be attributed to the Shell Defendants. Plaintiff does not specify what role (if any) the Shell Defendants played in any action by GCC or API, and relies on impermissible group pleading. *See*, *e.g*., Am. Compl. ¶ 78(a) ("The Fossil Fuel Company Defendants and API together created numerous front groups, most prominently the misleadingly-named Global Climate Coalition, to publish false advertisements, op-eds, and faux-scientific articles fraudulently claiming that action to curb emissions was unnecessary and would not benefit the environment."). Plaintiff's few Shell-specific allegations do not support the imposition of collective liability either. Plaintiff does not allege that the Shell Defendants participated in the dissemination of any specific false or misleading statements by industry associations. Instead, Plaintiff merely alleges that the Shell Defendants belonged to, participated in, and contributed financially to associations. *See*, *e.g.*,

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to meetings"), *aff'd sub nom*. *Taylor v. American Chemistry Council*, 576 F.3d 16 (1st Cir. 2009); *Payton v. Abbott Labs*, 512 F. Supp. 1031, 1038 (D. Mass. 1981) ("There is nothing inherently wrong with membership in an industry-wide trade association[or] with participating in scientific conferences . . . . Indeed, these practices are probably common to most industries.").

id. ¶ 24 ("API's members include all of the Fossil Fuel Company Defendants"; service on API's Board of Directors from 2004-2017; payment of membership dues in 2022); *id.* ¶¶ 127, 134 (GCC). But because "[a] member of a trade group . . . does not necessarily endorse everything done by that organization or its members," *Asbestos*, 46 F.3d at 1290, mere membership or participation in API and GCC is insufficient to plead liability against the Shell Defendants as a matter of law. *See In re Municipal Stormwater Pond*, 429 F. Supp. 3d 647, 655 (D. Minn. 2019) (dismissing complaint because "a trade association is not a 'walking conspiracy' of its members"), *appeals pending*, Nos. 21-3292 et al. (8th Cir.).

B. Plaintiff Fails To Plead That The Shell Defendants Made Any Statements Actionable Under The CFA

The Court should dismiss the CFA claim against the Shell Defendants for an additional and independent reason: Plaintiff does not allege that the Shell Defendants made any deceptive statement in the consumer marketplace. The CFA "is aimed basically at unlawful sales and advertising practices designed to induce consumers to purchase merchandise." *Daaleman v. Elizabethtown Gas Co*., 77 N.J. 267, 270 (1978). Accordingly, it requires a plaintiff to show deception "in connection with the sale or advertisement of" merchandise. N.J.S.A. § 56:8-2.

Here, none of the specific statements that the Amended Complaint attributes to the Shell Defendants is "in connection with the sale or advertisement of" fossil fuels to consumers. *Id.* The statements at issue either (1) are not alleged to be public; (2) did not involve products for sale in the consumer marketplace; or (3) both. In each case, the statements are beyond the CFA because they cannot possibly "attempt . . . to sell" or attempt "to induce" consumers to buy fossil fuels. *Id*. § 56:8-1(a), (e). As to the second category, the Amended Complaint criticizes three "Shell" advertisements about the type of fuels that could be in the future energy mix as society seeks to limit greenhouse gas emissions. One (at ¶ 199) involves "liquefied natural gas,"

"hydrogen fuel cells," and "airplane[ ] . . . biofuels"—but none of these products is alleged to be available in the marketplace to Hoboken consumers. *See Papergraphics Int'l, Inc. v. Correa*, 389 N.J. Super. 8, 13-14 (App. Div. 2006) ("CFA protections [are] inapplicable to the purchase of non-consumer goods" and "a non-consumer transaction [lies] outside [its] ambit") (collecting cases). The other two materials (at ¶¶ 198, 199) likewise did not occur in connection with the sale or advertisement of merchandise: according to Plaintiff, they involve the Shell Defendants allegedly "hold[ing themselves] out as an environmentally conscious energy company" or suggesting "commit[ment] to a cleaner energy future," without offering to sell any product. *See DepoLink Ct. Reporting & Litig. Support Servs. v. Rochman*, 430 N.J. Super. 325, 339 (App. Div. 2013) (holding CFA does not apply to debt-collection activities because they do not involve "an offer to sell merchandise"); *PNC Bank, Nat'l Ass'n v. Great Gorge Vill. S. Condominium Council, Inc.*, 2017 WL 436389, at *2 (D.N.J. Feb. 1, 2017) (dismissing CFA claim because plaintiff did not allege "fraud in a sale," much less "specifically identify what . . . sale it is referring to and what . . . misrepresentation or omission was made in connection with that sale"). Accordingly, none of these statements is cognizable under the CFA.

C. Plaintiff Fails To Plead A RICO Claim Against The Shell Defendants

Finally, Plaintiff's RICO claim fails for two independent reasons: Plaintiff lacks standing to bring a RICO claim, and Plaintiff fails to plead that the Shell Defendants committed any predicate racketeering acts or agreed to further any such acts as part of a conspiracy.

1. Plaintiff lacks standing to bring a RICO claim

Plaintiff lacks standing to bring a RICO claim against the Shell Defendants. "Any person damaged in his business or property *by reason of* a violation of N.J.S. 2C:41-2 may sue therefor." N.J.S.A. § 2C:41-4(c) (emphasis added). To meet the "by reason of" requirement, Plaintiff must show that its " 'harm was proximately caused by the NJRICO predicate acts

alleged, *i.e*. that there was a direct relationship between plaintiff's injury and defendant's conduct.'" *Southward v. Elizabeth Bd. of Educ.*, 2017 WL 4392038, at *12 (D.N.J. Oct. 2, 2017) (quoting *Interchange State Bank v. Veglia*, 286 N.J. Super. 164, 178 (App. Div. 1995)); *see also Salit Auto Sales, Inc. v. CCC Info. Servs. Inc*., 2020 WL 5758008, at *7 (D.N.J. Sept. 28, 2020) ("[I]n the absence of adequately pled causation . . . , Plaintiff's NJRICO claim fails."). The purpose of this "proximate causation" requirement is to narrow "the universe of actionable harms" and exclude "suits by parties who have been injured only indirectly." *Anza v. Ideal Steel Supply Corp*., 547 U.S. 451, 460 (2006). Accordingly, New Jersey courts take a "narrow interpretation" to "proximate cause in RICO claims." *Interchange*, 286 N.J. Super. at 181. "If a plaintiff is harmed only in an indirect way by the predicate acts, the plaintiff does not have standing to pursue a RICO claim." *Id*.

Plaintiff's RICO claim fails because the Amended Complaint does not—and cannot—plead a causal chain connecting the Shell Defendants' alleged deception in Hoboken to Plaintiff's alleged climate-related injuries. Plaintiff's theory depends on supposed misrepresentations leading to an incremental increase in emissions that exacerbate extreme weather events and Plaintiff's alleged injuries. Under Plaintiff's theory, it must prove an extremely attenuated causal chain that includes at least seven links: (1) there was a predicate racketeering act; (2) which caused an incremental increase in consumer demand for fossil-fuel products; (3) which caused an incremental increase in production and sale of those products; (4) which caused an incremental increase in emissions; (5) which caused an incremental increase in global climate change; (6) which caused an incremental increase in the severity or frequency of extreme weather events; (7) which then caused an incremental increase in the alleged damages to Plaintiff. This causal chain is implausible on its own terms: Plaintiff does not allege, for example, that any economical, lower-carbon alternative to fossil fuels existed during the at-issue

period, such that consumers—absent alleged fraud—would have used it and decreased their emissions in such a way that would have altered global climate change and Plaintiff's alleged injuries. In any case, "[t]he sheer number of links in the chain of causation" between the Shell Defendants' alleged conduct and Plaintiff's alleged injuries is "greater than in any case" in history and too attenuated to support liability. *Steamfitters Loc. Union No. 420 Welfare Fund v. Philip Morris, Inc*., 171 F.3d 912, 930 (3d Cir. 1999).

Because this causal chain is so attenuated, it is also not susceptible to proof—as courts confronting similar climate-related claims with even shorter causal chains have agreed. In *Kivalina*, for example, the plaintiffs similarly alleged that energy companies campaigned "to mislead the public about the science of global warming," *Kivalina* Compl. ¶¶ 189-248, *Native Vill. of Kivalina v. ExxonMobil Corp*., No. 08-CV-01138, Dkt. 1 (N.D. Cal. Feb. 26, 2008) (Tor Cert., Ex. E), and that the defendants "directly contributed to global warming through their emissions of large quantities of greenhouse gases," *id*. ¶¶ 163-164 (emphasis omitted). The court noted the "extremely attenuated causation scenario alleged in Plaintiffs' Complaint" and dismissed the claims because "the pleadings ma[de] clear that there is no realistic possibility of tracing any particular alleged effect of global warming to any particular emissions by any specific person, entity, [or] group at any particular point in time." *Native Vill. of Kivalina v. ExxonMobil Corp*., 663 F. Supp. 2d 863, 880 (N.D. Cal. 2009), *aff'd*, 696 F.3d 849 (9th Cir. 2012). Here, Plaintiff's "deception" theory is even more attenuated: it begins with alleged fraud, not emissions; and it requires attributing to that fraud an *incremental increase* in emissions, climate change, extreme weather events, and damages. A causal chain so attenuated and speculative is not cognizable under RICO. *See Steamfitters*, 171 F.3d at 934 (affirming dismissal of RICO claim for lack of standing).

2. Plaintiff fails to plead that the Shell Defendants committed any predicate acts or entered any conspiracy

The Court also must dismiss Plaintiff's substantive RICO claim because Plaintiff fails to allege any predicate racketeering acts by the Shell Defendants or that they agreed to conspire with anyone. To state a claim under the RICO Act's § 2C:41-2(c), Plaintiff must allege that the Shell Defendants "participate[d]" "in the conduct of the enterprise's affairs through a pattern of racketeering activity." N.J.S.A. § 2C:41-2(c); *see also*, *e.g.*, *Southward*, 2017 WL 4392038, at *13 (dismissing RICO claim because "Plaintiffs simply do not provide sufficient factual content to support a reasonable inference that each defendant joined in and conducted the affairs of an enterprise through the commission of predicate crimes"); *Prospect Med., P.C. v. Horizon Blue Cross Blue Shield of New Jersey, Inc.*, 2011 WL 3629180, at *5 (N.J. Super. Ct. App. Div. Aug. 19, 2011) (affirming dismissal of RICO claim because plaintiff did not "allege that [defendant] engaged in necessary predicate criminal conduct").

Plaintiff fails to allege that the Shell Defendants committed even a single racketeering act, much less "a pattern of racketeering activity." Plaintiff alleges (at ¶¶ 398-399) three types of predicate acts by Defendants: (1) deceptive business practices in violation of N.J.S.A. § 2C:21-7(e); (2) mail fraud under 18 U.S.C. § 1341; and (3) wire fraud under 18 U.S.C. § 1343.

All three alleged types of predicate acts fail as to the Shell Defendants. A deceptive business practice requires that a defendant "[m]ake[ ] a false or misleading statement in any advertisement addressed to the public . . . for the purpose of promoting the purchase or sale of property or services." N.J.S.A. § 2C:21-7(e). But Plaintiff does not allege that the Shell Defendants made any specific false or misleading statement, *see supra* Part IV.A—and, even if they did, that statement would not be for the purpose of promoting the sale of fossil fuels to consumers, *see supra* Part IV.B. Mail and wire fraud likewise require a specific false or

misleading statement, *see Bonavitacola Elec. Contractor, Inc. v. Boro Devs., Inc*., 87 F. App'x 227, 231-32 (3d Cir. 2003) (mail and wire fraud RICO predicates must be pleaded with particularity), made as part of a scheme to obtain money or property, *see* 18 U.S.C §§ 1341, 1343. But again, Plaintiff does not allege that the Shell Defendants made any specific misstatement—or even made "use of the mail or interstate wires for purposes of carrying out any scheme or artifice to defraud," as is required by the mail and wire fraud statutes. *Lum*, 361 F.3d at 223.[8]

Nor has Plaintiff stated a claim under RICO's conspiracy provision, Section 2C:41-2(d). To state a claim under that section, 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." *State v. Ball*, 141 N.J. 142, 180 (1995). 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*. A RICO conspiracy claim must be dismissed in the absence of fact-based allegations that defendants agreed to violate RICO. *See Ottilio v. Valley National Bancorp*, 2019 WL 1496188, at *5 (N.J. Super. Ct. App. Div. Apr. 3, 2019) (affirming dismissal of 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' ") (quoting *Ball*, 141 N.J. at 180).

[8] To the extent Plaintiff alleges (at ¶ 405) a scheme "to promote the sale or purchase of fossil fuels" at market prices, that is not a cognizable deprivation of money or property. Courts have "reject[ed] application of the mail and wire fraud statute where the purported victim received the full economic benefit of its bargain." *United States v. Kelerchian*, 937 F.3d 895, 913 (7th Cir. 2019).

Plaintiff has not adequately alleged any agreement between the Shell Defendants and others to violate RICO. Plaintiff's list (at ¶ 401) of "conduct committed by the Fossil Fuel Company Defendants" with respect to "the API Enterprise" does not include any specific alleged conduct by the Shell Defendants. Nor does the Amended Complaint make factual allegations as to whether (if at all) the Shell Defendants indirectly: (a) "form[ed] Task Forces and Committees housed within API"; (b) "creat[ed]" and funded a "Global Climate Science Communications Team"; (c) "[h]ir[ed]" "people involved in Big Tobacco's disinformation campaign"; (d) funded "advocacy groups and think tanks" "[t]hrough the 1990s and 2000s"; or (e) and (f) "launch[ed]" "fraudulent[ ]" or "greenwashing" campaigns. *See supra* Part IV.A.3.

Similarly, the list (at ¶ 402) of "conduct committed by all Defendants" that Plaintiff alleges shows the Shell Defendants' participation in "the GCC Enterprise" has no factual support. Nowhere does the Amended Complaint plead facts showing that the Shell Defendants, either independently or through their membership in GCC: (a) claimed that climate change "was the result of natural variation"; (b) spent money on advertisements about "settled climate science"; (c) "[i]nfiltrat[ed]" the IPCC "scientific review process"; or (d) distributed publications "falsely denying" any connection between fossil fuels and catastrophic weather events.

The sum total of factual allegations in the Amended Complaint connecting the Shell Defendants to API and GCC is threadbare and implicates none of these above-listed actions, let alone an intentional agreement to commit or advance racketeering acts. At most, Plaintiff has alleged that "Shell" or the Shell Defendants: are members of API and its various task forces or committees; had executives or scientists serving on API's task forces or board of directors; and paid membership dues. *See* Am. Compl. ¶¶ 24(a), 24(e), 24(f), 88, 99. As to GCC, Plaintiff alleges only that "Shell" was a "founding member[ ]." *Id.* ¶ 127. The Amended Complaint does

not allege that the Shell Defendants agreed to pursue unlawful activity. And again, liability cannot hinge only on membership in industry associations. *See supra* Part IV.A.3.

Plaintiff does not allege that the Shell Defendants committed any cognizable predicate acts or entered any conspiracy, so its RICO claim should be dismissed.

CONCLUSION

The Court should dismiss Plaintiff's Amended Complaint against the Shell Defendants with prejudice.

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Respectfully submitted,

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