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Case No. N20C-09-097 MMJ CCLD

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

STATE OF DELAWARE, *ex rel.* KATHLEEN JENNINGS, Attorney General of the State of Delaware, Plaintiff, v. BP AMERICA INC., BP P.L.C., CHEVRON CORPORATION, CHEVRON U.S.A. INC., CONOCOPHILLIPS, CONOCOPHILLIPS COMPANY, PHILLIPS 66, PHILLIPS 66 COMPANY, EXXON MOBIL CORPORATION, EXXONMOBIL OIL CORPORATION, XTO ENERGY INC., HESS CORPORATION, MARATHON OIL CORPORATION, MARATHON OIL COMPANY, MARATHON PETROLEUM CORPORATION, MARATHON PETROLEUM COMPANY LP, SPEEDWAY LLC, MURPHY OIL CORPORATION, MURPHY USA INC., ROYAL DUTCH SHELL PLC, SHELL OIL COMPANY, CITGO PETROLEUM CORPORATION, TOTAL S.A., TOTAL SPECIALTIES USA INC., OCCIDENTAL PETROLEUM CORPORATION, DEVON ENERGY CORPORATION, APACHE CORPORATION, CNX RESOURCES CORPORATION, CONSOL ENERGY INC., OVINTIV, INC., and AMERICAN PETROLEUM INSTITUTE, Defendants.	C.A. No. N20C-09-097-MMJ CCLD

REPLY MEMORANDUM OF LAW OF DEFENDANTS MARATHON PETROLEUM CORPORATION, MARATHON PETROLEUM COMPANY LP, AND SPEEDWAY LLC IN FURTHER SUPPORT OF THEIR MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM

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INTRODUCTION

The Court should dismiss Marathon Petroleum Corporation ("MPC"), Marathon Petroleum Company LP ("MPCLP"), and Speedway LLC ("Speedway") and reject Plaintiff's opposition for three reasons. First, Plaintiff has made clear that it premises its *entire* Complaint on a theory of fraud. Accordingly, Rule 9(b) applies to *all* of Plaintiff's claims, and not only its negligent failure to warn claim, as Plaintiff concedes. Second, Plaintiff's reliance on group pleading does not lessen the requirement that it state, with particularity, the alleged actions by MPC, MPCLP, and Speedway constituting fraud and deceit. Third, Plaintiff's claims of agent-principal liability and conspiracy liability—fully formed for the first time in its opposition brief—are unavailing. Plaintiff's Complaint fails to allege facts sufficient to show an agent-principal relationship or a conspiratorial agreement involving MPC, MPCLP, or Speedway.

ARGUMENT

I. The Allegations Against MPC, MPCLP, And Speedway Fail To Meet Rule 9(b)'s Heightened Pleading Standard.

Plaintiff concedes that Rule 9(b) applies to its negligent failure to warn claim. *See* Opp. at 3. The particularity requirement of Rule 9(b) is not confined to that claim, however, insofar as the gravamen of the other claims Plaintiff asserts is fraud, misrepresentations, or omissions, as Plaintiff has repeatedly stated. *See, e.g.*, Compl. ¶ 220 ("Defendants' tortious misconduct, in the form of misrepresentations,

omissions, and deceit, began decades ago . . ."); Plaintiff's Resp. Opp. to Pet. at 1, *BP America Inc., et al. v. State of Delaware*, No. 22-821 (S. Ct. 2023) (Plaintiff stating that its action is premised on the theory that Defendants' "misled consumers and the public about their products"). Plaintiff asserts in its opposition that its entire Complaint is based on an alleged "fraudulent scheme" or "deceptive conduct." *See* Opp. at 5, 9. Accordingly, all of Plaintiff's claims are subject to Rule 9(b)'s heightened pleading standard. *See Toner v. Allstate Ins. Co.*, 821 F. Supp. 276, 283 (D. Del. 1993) (applying Rule 9(b) to breach of implied covenant of good faith and fair dealing and unjust enrichment claims: "the requirements of the rule apply to all cases where the gravamen of the claim is fraud even though the theory supporting the claim is not technically termed fraud") (citing *In re Healthco Int'l, Inc. Sec. Litig.*, 777 F. Supp. 109, 113 (D. Mass. 1991) (finding Rule 9(b) applicable to "all claims where 'fraud lies at the core of the action'"); *York Lingings v. Roach*, No. 16622-NC, 1999 WL 608850, at *2 (Del. Ch. July 28, 1999) (applying Rule 9(b) to breach of fiduciary duty claim); *Mosiman v. Madison Cos., LLC*, No. CV 17-1517-CFC, 2019 WL 203126, at *3 (D. Del. Jan. 15, 2019) (applying Rule 9(b) to

claims of intentional misrepresentation, negligent misrepresentation, and false promises because they sound in fraud or mistake).[1]

Here, the Complaint fails to identify a single false or deceptive statement that MPC, MPCLP, or Speedway allegedly made to the public that resulted in Plaintiff's alleged injuries. Plaintiff's scant, largely generic, statement as to MPC, MPCLP, and Speedway falls far short of the mark: "To plead fraud or negligence with the particularity required by Rule 9(b), a party must include the 'time, place, contents of the alleged fraud or negligence, as well as the individual accused of committing the fraud' or negligence." *Flowshare, LLC v. GeoResults, Inc.*, No. N17C-07-227 EMD CCLD, 2018 WL 3599810, at *3 (Del. Super. Ct. July 25, 2018) (citations omitted). Further, although "actual reliance" is not an element of a Consumer Fraud Act ("CFA") claim, Plaintiff still must allege with particularity facts showing "the false advertising *cause*[*d*] the plaintiff's injury." *Teamsters Loc. 237 Welfare Fund v. AstraZeneca Pharms. LP*, 136 A.3d 688, 694 (Del. 2016) (emphasis added).

[1] *State v. Publisher's Clearing House*, 787 A.2d 111 (Del. Ch. 2001) is a non-issue. *Publisher's* addressed statutory fraud claims under Delaware's CFA and UDTPA. Here, Plaintiff's claims are not limited to a statutory fraud claim. Rule 9(b) applies to all of Plaintiff's claims because the gravamen of those claims is misrepresentation and fraudulent conduct. Moreover, the Superior Court has repeatedly applied Rule 9(b) to CFA claims. *See Rinaldi v. Iomega Corp.*, No. 98C-09-064-RRC, 1999 WL 1442014, at *7–8 (Del. Super. Ct. Sept. 3, 1999) (holding Rule 9(b) applies to CFA and failure to warn claims); *RHA Constr., Inc. v. Scott Eng'g, Inc.*, No. C.A. N11C–03–013 JRJ CCLD, 2013 WL 3884937, at *3 (Del. Super. Ct. July 24, 2013) (applying Rule 9(b) to CFA claims).

Logically, Plaintiff cannot suffer an injury "as a result of" an alleged fraudulent advertisement if Plaintiff fails to even identify an advertisement or other actionable statement of the defendant. *See id.* at 692, 694.

Instead of providing specific supporting factual allegations against MPC, MPCLP, and Speedway, Plaintiff merely recites the same conclusory, boilerplate, legal assertions it relies on as to several other Defendants, namely that "*Marathon* wrongfully distributed, marketed, advertised, and promoted its products in Delaware, with knowledge that those products would cause climate crisis-related injuries in Delaware, including Plaintiff's injuries." Compl. ¶ 26(k) (emphasis added); *see also* Br. at 3 n.3. Plaintiff's Complaint is devoid of allegations as to the time, place, and content of the alleged fraud or negligence by MPC, MPCLP, or Speedway. Plaintiff's claims are woefully insufficient under Rule 9(b).

City & Cnty. of Honolulu v. Sunoco LP, No. 20-380, Dkt. 618 (Haw. Cir. Ct. Mar. 29, 2022) and *Massachusetts v. Exxon Mobil Corp.*, 2021 WL 3493456, at *13 (Mass. Super. Ct. June 22, 2021) are distinguishable and inapposite. In *Massachusetts*, the claim under Massachusetts's consumer protection law was not challenged under Rule 9(b). And the *Honolulu* court's analysis focused almost exclusively on the federal preemption arguments. It contained only a cursory discussion of Hawaii Rule of Civil Procedure 9(b)—which it appeared to apply to *all* of the plaintiffs' claims—and found Rule 9(b) satisfied on the ground that

"Hawai'i is a notice pleading jurisdiction and Plaintiffs are not required to cite every bad act in their operative complaint." *Honolulu*, Dkt. 618 at 10. The court failed to analyze each claim separately—or even state the elements of these claims—on the ground they "share[d] the same basic structure of requiring that a defendant engage in tortious conduct that causes injury to a plaintiff." *Id.* at 3 n.1. The persuasive value of these two cases is thus negligible.

II. Plaintiff's Group Pleading Allegations Are Not Enough.

Plaintiff's reliance on group pleading cannot fulfill the requirement that the circumstances of its claims against MPC, MPCLP, and Speedway be stated with particularity. Group pleading is "generally disfavored" under Delaware law and may be cause for dismissal. *In re Swervepay Acquisition, LLC*, No. 2021-0447-KSJM, 2022 WL 3701723, at *9 (Del. Ch. Aug. 26, 2022); *see also Hupan v. All. One Int'l, Inc.*, No. CV N12C-02-171-VLM, 2015 WL 7776659, at *12 (Del. Super. Ct. Nov. 30, 2015), *aff'd sub nom. Aranda v. Philip Morris USA Inc.*, 183 A.3d 1245 (Del. 2018) (granting motion to dismiss when plaintiffs engaged in group pleading)[2]; *Raj & Sonal Abhyanker Fam. Tr. ex rel. UpCounsel, Inc. v. Blake*, No. CV 2020-0521-KSJM, 2021 WL 2477025, at *4 (Del. Ch. June 17, 2021) (dismissing claim

[2] Plaintiff's attempt to distinguish *Hupan* as a "toxic tort" case (Opp. at 8–10) is unavailing. Plaintiff pleads claims arising from fraud and negligence, which are subject to Rule 9(b). This requirement is not cabined to "toxic tort" cases, as Plaintiff concedes that Rule 9(b) applies to one of its claims. *See* Opp. at 3.

where plaintiff's allegations encompassed the defendant only by reference to "Defendants," which constituted impermissible group pleading); *Senisch v. BCC Inv. Props. LLC*, No. CV N21C-11-197 FWW, 2022 WL 178506, at *2 (Del. Super. Ct. Jan. 20, 2022) (dismissing claims where plaintiff joined two defendants together as a unit and failed to allege facts supporting one of the defendant's individual liability).

Plaintiff concedes that group allegations are not permitted if they fail to put "individual defendants . . . on notice of the claim against them." *See* Opp. at 5 (quoting *River Valley Ingredients, LLC v. Am. Proteins, Inc.*, 2021 WL 598539, at *3 (Del. Super. Feb. 4, 2021)).[3] Although Plaintiff cites several Complaint paragraphs as providing "ample notice" to MPC, MPCLP, and Speedway, Opp. at 5–6, 9, those paragraphs do not constitute "ample notice" because they state bald legal conclusions, relate only to specific Defendants to the exclusion of others, or otherwise are unsupported.

Moreover, Plaintiff's cases do not support its group pleading argument. The court in *Grant v. Turner*, 505 F. App'x 107 (3d Cir. 2012) *affirmed the dismissal* of

[3] *River Valley* is distinguishable because there, the complaint alleged sufficient facts to put the defendants (three companies and their executives) on notice of the fraud claims against them. 2021 WL 598539, at *4. This was based, in part, on a finding that "*specific allegations of each* [*executives'*] *alleged wrongful actions*" were "sufficiently particularized to put the [executives] on notice of [the plaintiff's] claims against them." *Id.* (emphasis added).

a RICO claim against two defendants because—as here—the plaintiffs "ha[d] not specifically alleged facts reflecting either party's role in committing the predicate acts of fraud." 505 F. App'x at 112. The court vacated the dismissal against other defendants, finding that the complaint included many details to "inject precision or some measure of substantiation" into the fraud allegations, putting those defendants "on notice of the *precise misconduct* with which [they] were charged." *Id.* (emphasis added) (citation omitted). The court permitted the claim to proceed against those defendants in part due to "the closeness of th[e] question" and those defendants' failure to respond to the appeal. *Id.* *Grant* is distinguishable from Plaintiff's case, where factual detail against MPC, MPCLP, and Speedway is grossly lacking.

Similarly, *State ex rel. Jennings v. Purdue Pharma L.P.*, 2019 WL 446382 (Del. Super. Feb. 4, 2019) does not stand for the proposition Plaintiff asserts. *See* Opp. at 4. First, *Purdue* makes clear that, at the pleading stage, a defendant can attempt to distinguish itself from other defendants. *Purdue*, 2019 WL 446382, at *8.

Second, unlike Plaintiff's claims here, the State's claims against the distributor defendants in *Purdue* were not based in misrepresentation. *Id.* at *1. In *Purdue*, the State's claims against the distributors were based in "common law, statutory, and regulatory duties to prevent opioid diversion." *Id.* at *4. At bottom, the State alleged that the distributors had negligently breached a duty "to actively prevent opioid diversion." *Id.*

Third, in that context, the court rejected the argument of one distributor (Anda) that the State had improperly grouped it with other distributors, specifically finding that there was "no meaningful or substantive distinction between Anda and other Distributor defendants at this stage of the proceedings." *Id.* at *8 (identifying "specific statutory and common law duties" and "actions or inactions . . . allegedly committed"). Here, MPC, MPCLP, and Speedway can, and do, distinguish themselves from other Defendants by the fact that not a single allegation in the 218-page, 280-paragraph Complaint points to an alleged misrepresentation or deceptive statement made to the public or to the Plaintiff by MPC, MPCLP, or Speedway.[4] *Purdue* does not absolve Plaintiff of its Rule 9(b) obligation.

Nor is *Swartz v. KPMB LLP*, 476 F.3d 756, 764 (9th Cir. 2007) as broad as Plaintiff suggests. Opp. at 4–5. *Swartz* held that where there was *no claim* of false statements by two of the several defendants, the plaintiff did not need to "identify false statements by each and every defendant." 476 F.3d at 764 (emphasis omitted). Here, Plaintiff alleges that MPC, MPCLP, and Speedway (along with a large group of other Defendants) have all "misrepresented material facts." Compl. ¶ 265. And notably, *Swartz* held that Rule 9(b) "requires plaintiffs to . . . inform each defendant

[4] As noted in these Defendants' opening brief, Plaintiff's Complaint contains only a ***single*** factual allegation against "Marathon Petroleum" about its expenditures in energy efficiency and emissions reductions from its own operations. *See* Br. at 4–5 ("The Complaint set forth no facts supporting how the 2018 statement about MPC's investments constitutes a misrepresentation.").

separately of the allegations surrounding [its] alleged participation." *Id.* (citation omitted).

Finally, Plaintiff's reliance on *Hawk Mountain LLC*, Opp. at 6, is misplaced. There, the district court overruled the plaintiffs' objections to the magistrate judge's recommendation that the plaintiffs' action be dismissed with prejudice. *Hawk Mountain LLC v. Mirra*, No. CV 13-2083-SLR/SRF, 2016 WL 4541032 (D. Del. Aug. 31, 2016). In doing so, the district court *repeated*—but did *not agree with*—plaintiffs' objection that "'Group Pleading' is permissible 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." *Id*. at *2. The district judge held that the "case law cited by plaintiffs is *not* inconsistent" with the case law cited by the magistrate judge requiring plaintiffs to meet Rule9(b). *Id.* (emphasis added). The district judge *agreed* with the magistrate judge, *id.*, who held that plaintiffs' complaint constituted "improper group pleading pursuant to Rule 9(b)" because it was "unclear" which defendants were precisely charged with the forgeries and "who transmitted the forged documents in each instance," *Hawk Mountain LLC v. Mirra*, No. CV 13-2083, 2016 WL 3182778, at *16 (D. Del. June 3, 2016).

In this case, Plaintiff cannot credibly argue that MPC's, MPCLP's, or Speedway's alleged *public* misrepresentations are "exclusively within" these

Defendants' possession. Opp. at 6. To the contrary, the thrust of Plaintiff's Complaint is that Defendants led "public deception campaigns" and developed "public relations materials" that were widely disseminated. *See, e.g.*, Compl. ¶¶ 4, 9, 12, 26(k), 128, 164, 196, 226, 239, 270, 277.

III. Plaintiff Has Stated No Facts Establishing An Agent-Principal Relationship Or A Conspiratorial Agreement.

Unable to point to facts averred with particularity in the Complaint against MPC, MPCLP, and Speedway directly, Plaintiff argues that alleged actions by API can be imputed to MPC, MPCLP, and Speedway under an agent/conspirator theory. Opp. at 13–18. Plaintiff is wrong.

"Delaware law requires plaintiffs seeking to hold a purported principal liable for wrongful acts of the agent to plead control over that specific wrongful act." *Otto Candies, LLC v. KPMG, LLP*, 2020 WL 4917596, at *12 (Del. Ch. Aug. 21, 2020). The Complaint paragraphs cited by Plaintiff to support its agency theory amount to pure legal conclusions that "Fossil Fuel Defendants" exercised control over API, Compl. ¶ 39, or statements about API's alleged actions without any facts that would, if true, indicate that MPC, MPCLP, or Speedway exercised control over API generally or as to the specific allegedly wrongful acts. *Id.* ¶¶ 37, 62–64, 69–72, 78–80, 92, 122–28, 152, 198–201.

None of the cases Plaintiff cites to support its agency theory resemble the situation here—where Plaintiff does not plead facts demonstrating that MPC,

MPCLP, or Speedway exercised control over API when it undertook any of its alleged acts. *See* Opp. at 14. Plaintiff tries to sidestep this issue by arguing that whether an agent-principal relationship exists "is a question of fact that is premature for resolution at the pleading stage." Opp. at 15–16. But the cases Plaintiff cites do not absolve Plaintiff's failure to allege facts showing control by MPC, MPCLP, and Speedway over API's alleged wrongful acts. *Otto Candies,* 2020 WL 4917596, at *12. Nor do Plaintiff's cases stand for the proposition that conclusory allegations of an agency relationship are sufficient to satisfy Plaintiff's pleading standard.

In a last ditch effort to salvage its claims, Plaintiff attempts to import a civil conspiracy claim into its opposition brief—but Plaintiff "cannot amend its defective pleading in its briefs in opposition to a motion to dismiss." *Ocimum Biosolutions (India) Ltd. v. LG Corp.*, No. CV 19-2227 (MN), 2021 WL 931094, at *6 n.6 (D. Del. Mar. 11, 2021). The *Complaint* simply does not adequately plead a civil conspiracy, as a conspiratorial agreement must be alleged. *See Atamian v. Nemours Health Clinic*, No. C.A. 01C-07-038 HDR, 2001 WL 1474819, at *1 (Del. Super. Ct. Nov. 14, 2001) (dismissing civil conspiracy claim). Plaintiff's *brief argues* that MPC, MPCLP, and Speedway conspired with API, asserting—without further explanation—that "Marathon" was a "core API member" at times relevant to the Complaint. Compl. ¶ 37(e). But Plaintiff fails to provide any facts to show when or which of the five "Marathon" entities were even members of API. And Plaintiff

alleges no facts showing a conspiratorial agreement. While Plaintiff claims that "[e]xecutives from ConocoPhillips, Hess, Marathon, Citgo, Total, and Occidental also served as members of API's Board of Directors at various times," the Complaint fails to state to whom from MPC, MPCLP, or Speedway Plaintiff even refers. Compl. ¶ 37(e).

Plaintiff fails to cite a case where such bare allegations were found sufficient to state a claim, for pleading purposes, that a defendant engaged in a conspiracy. *In re Asbestos Litig.*, 509 A.2d 1116, 1121 (Del. Super. Ct. 1986) is misplaced. In that case, at issue was whether a jury could find that a defendant, who denied membership in a trade association, had knowingly engaged in a conspiracy with the trade association. *Id.* at 1120. Importantly, the court held that "mere membership in a trade association, including attendance at meetings, is *not* sufficient to give rise to an inference of conspiracy." *Id.* (emphasis added). Many key factual allegations also were not in dispute—in particular, that the defendant's subsidiary was a member of the trade association from 1948 to 1968, and that the trade association intentionally suppressed information. *Id.* at 1120. That is not the case here. Plaintiff alleges only that some unknown executive, at some unspecified "Marathon" company, served on API's Board of Directors at some unknown time. This fails under the Rule 9(b) pleading standard and must be rejected.

CONCLUSION

For the reasons set forth above, and in MPC, MPCLP, and Speedway's Memorandum of Law in Support of the Motion to Dismiss, Plaintiff's claims should be dismissed as to MPC, MPCLP, and Speedway.

Dated: August 17, 2023

Respectfully submitted,

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