**IN THE SUPERIOR COURT OF THE STATE OF DELAWARE**

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

**DEFENDANT MARATHON OIL CORPORATION'S REPLY BRIEF IN FURTHER SUPPORT OF ITS MOTION TO DISMISS**

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## INTRODUCTION

Marathon Oil Corporation's (MRO's) Opening Brief ("OB") in support of its motion to dismiss explained that Plaintiff's Complaint is devoid of well-pleaded allegations against MRO. Plaintiff's response is simply to repeat the same inadequate allegations and to confuse conclusory allegations for allegations of fact and allegations against other defendants with allegations against MRO. The problem is revealed on the very first page of Plaintiff's Answering Brief ("AB"), where Plaintiff boasts (as it does in response to every individual motion) that it "filed a 217-page Complaint with numerous, detailed allegations about corporate misconduct by Marathon Oil Corporation and other defendants." AB 1. But, *as to MRO*, the Complaint does no such thing. Plaintiff bothered to allege only four paragraphs specific to MRO conduct, and none suggests wrongdoing of any kind. What remains are conclusory allegations as to an undifferentiated mass of "Defendants" and, despite the absence of competent allegations of conspiracy, a claim that MRO's membership in a trade association imputed to MRO all of the association's conduct. Neither suffices under Delaware law.

## ARGUMENT

### I. ALLEGATIONS AGAINST OTHER DEFENDANTS STATE NO CLAIM AGAINST MRO.

MRO's Opening Brief explained – and Plaintiff does not dispute – that, despite its presumably reasonable investigation, the four paragraphs in Plaintiff's

prolix, 217 paragraph Complaint that name MRO specifically are innocuous and contain no well-pleaded allegations of wrongdoing. OB 4-9. Rather, Plaintiff relies on general, conclusory allegations against "Defendants" as if that were a Rule 12 elixir that relieves it of any obligation to provide details concerning particular defendants.[1] By way of example, Plaintiff claims as adequate against MRO its generic allegation that "*Defendants* . . . failed to give adequate warnings, and instead waged a sophisticated campaign of deception and disinformation about their products' contribution to climate change, knowing that the intended use of their products would cause the harms they predicted." AB 5 (emphasis added). This allegation and the many like it in the Complaint are inadequate as to MRO.

First, they are conclusory. This allegation and the others like it fail to identify any communications MRO produced or acts it engaged in, the time period in which those communications were supposedly made, where they were broadcast, or their content. That the Complaint purports (wrongly) to make competent allegations specific to other Defendants (*see infra* Section III) does not make the allegations any less conclusory *as to MRO.*

[1] The allegations against "Defendants" are themselves inadequate as to any Defendant, including for reasons explained in the Joint Defense Brief.

Under Rules 8(a) and 9(b),[2] in "evaluat[ing] the legal sufficiency of the facts" alleged in the complaint, courts must "ignore[] wholly conclusory statements." *Baccellieri v. HDM Furniture Industries, Inc*., 2013 WL 1088338, at *3 (Del. Super. Feb. 28, 2013) (Johnston, J.); *see also Senchery v. Middletown Police Dept*., 2020 WL 4464526, at *1 (Del. Super. Aug. 3, 2020) (Johnston, J.) (courts "need not accept as true any conclusory statements"). Conclusory allegations do not earn the deference afforded allegations of fact and Plaintiff's allegations against "Defendants" must thus be "ignored." *Id.*

The absence of competent factual allegations against MRO also implicates the bedrock notice pleading requirements. *See, e.g., Rinaldi v. Iomega Corp*., 1999 WL 1442014, at *8 (Del. Super. Sept. 3, 1999) (in a false advertising case, a plaintiff must do more than "generally allege[] that Defendant made false representations through advertising;" it must "describe with the particularity required what that advertising was, where it was placed and what it actually stated"); *In re Benzene Litig*., 2007 WL 625054, at *7 (Del. Super. Feb. 26, 2007) (plaintiff must describe "the products that are alleged to be defective and some well-directed sense of time, locations, and general circumstances of the exposure"). Plaintiff's decision not to

[2] As explained in Section V of the Joint Defense Brief, Rule 9(b) is applicable to all claims in this case because all are based on a common allegation of fraud. Rule 8(b) is cited herein as applicable to demonstrate that the standard of review is not dispositive.

plead anything about the materials MRO brought into Delaware or the advertisements or communications made purposely deprives MRO of the opportunity to challenge whether Plaintiff can state a claim based on those actions or statements – *e.g.*, are the actions time-barred, are the statements "puffery," are actions entirely outside Delaware? Those are all grounds for dismissal that MRO might have raised under Rule 12 had Plaintiff bothered to plead any actionable misconduct by MRO at all.

Plaintiff responds that MRO has sufficient "notice of what is alleged" because "Marathon Oil … engaged in the same conduct" and is thus properly "charged with the same misconduct as the other Fossil Fuel Defendants." AB 5. But this just begs the question. Wholly apart from their impermissibly conclusory nature, allegations against "Defendants" bootstrapped from allegations regarding *other* Defendants say nothing about MRO. *See, e.g., Hupan v. Alliance One Int'l*, *Inc*., 2015 WL 7776659, at *12 (Del. Super. Nov. 30, 2015) ("Plaintiffs continue to refer to the separate entities as 'Monsanto Defendants,' leaving this remaining Monsanto to guess whether the alleged tortious act refers to them. As a result, it is impossible for Monsanto to evaluate which allegations are actually directed at them. . . . . Plaintiffs must plead with specificity which defendant caused the alleged harm, what products caused the harm, how the harm occurred, and when that harm occurred.").

## II. PLAINTIFF CANNOT EVADE SETTLED DELAWARE LAW BY LUMPING MRO IN WITH OTHER DEFENDANTS.

Plaintiff argues that its obligation to provide comprehensible notice of claims to each defendant is subject to a special exception for multi-defendant cases, where a plaintiff can engraft allegations from one defendant to the next. No such exception is applicable here.

Under Delaware law, "group pleading is generally disfavored." *In re Swervepay Acquisition*, LLC, No. 2021-0447-KSJM, 2022 WL 3701723, at *9 (Del. Ch. Aug. 26, 2022). This Court explained why in *In re Benzene Litig*., 2007 WL 625054, at *1—a case relied upon by this Court in *State ex rel. Jennings v. Purdue Pharma L.P*., 2019 WL 446382, at *9 (Del. Super. Feb. 4, 2019). "The particularity requirement embodied in Rule 9(b) operates to: (1) provide defendants with enough notice to prepare a defense; (2) prevent plaintiffs from using complaints as fishing expeditions to unearth wrongs to which they had no prior knowledge; and (3) preserve a defendant's reputation and goodwill against baseless claims." *In re Benzene Litig*., 2007 WL 625054, at *6. The Court further explained that, in a multi-defendant case, plaintiff must make allegations that allow each defendant "to isolate the wrong they are alleged to have committed, and to distinguish their behavior, if appropriate in the facts, from the behavior of the other defendants." *Id.* at 7. "[D]efendants must [also] be able to evaluate the condition and composition of the products and/or premises at issue at the time of alleged exposure and compare these

conditions to those that have existed at other relevant time frames (such as the time of manufacture or the time control of premises is ceded over to a third party) in order, inter alia, to determine if others may be liable for subsequent alterations to the product or the premises." *Id.*

Plaintiff seeks to evade the holding in *Benzene* and dilute Rule 9(b) by arguing that "toxic tort cases" present "unique difficulties . . . [that] may justify some departure from [typical] pleading standards." AB 7-8. Stricter pleading requirements are necessary for toxic torts, Plaintiff posits, due to the elusiveness of identifying the cause of an injury. *Id*. at 8. But that is precisely the case here. There can perhaps be no more difficult undertaking than assessing how decades of greenhouse gas emissions have traveled through the skies and which producer (if any) is responsible for the behavior of billions of consumers worldwide over decades. Plaintiff suggests otherwise, arguing that "unlike a toxic tort case, where the timing of exposure may differentiate one defendant's product from another's, the Complaint alleges that all greenhouse gas emissions resulting from Defendant's deceptive promotion have contributed to the State's injuries." AB 8. But that focus on emissions, rather than allegedly unlawful conduct, points precisely to Plaintiff's pleading failure. Plaintiff not only fails to differentiate among defendants' respective activities, communications with the public, or duration and geographic scope of operations (all things that a reasonable investigation and the years-long

litigation experience of its outside counsel in such cases should have uncovered), but it makes *zero* attempt to allege any activities or communications of MRO. More so than in the traditional toxic tort context, not less so, the transient nature of the products of fossil fuel combustion and the traceability of allegedly unlawful acts requires holding Plaintiff to its obligation to plead (and put MRO on notice) of some wrongful conduct in which it allegedly engaged.

Plaintiff's pleading defect is particularly clear in its false advertising claims, for which Plaintiff must allege for each defendant "what the false advertising was, where it was located, the contents of the statements and the reliance that ensued from those statements which caused the damage." *Rinaldi v. Iomega Corp.*, 1999 WL 1442014, at *8. A similar rule would apply to all claims based on the alleged "campaign of misinformation." Far from doing so, Plaintiff repeatedly falls back on the contention it is relieved of any such obligation, but no Delaware case law supports that improbable conclusion.

Finally, Plaintiff purports to justify group-pleading among multiple defendants that have a "close-knit relationship." AB 6. Plaintiff contends that is the case for MRO, Marathon Petroleum Corporation ("MPC"), Marathon Petroleum Company LP, and Speedway LLC. *Id.* But no such relationship exists today, even allegedly, as the Complaint acknowledges (at ¶ 26(e)) that for more than a decade

MRO and MPC have been independent public companies. Given the paucity of specific allegations, it is an academic question in any case. *See also* OB 8-9.

## III. GROUP PLEADING IN THIS CASE FAILS THE *PURDUE PHARMA* TEST.

Plaintiff supports its claim to group pleading with citation to this Court's opinion in *State ex rel. Jennings v. Purdue Pharma L.P.*, 2019 WL 446382, at *8. *See* AB 1, 3. But that decision shows why group pleading as to MRO is inappropriate here. This Court acknowledged in *Purdue Pharma* that each "defendant must be apprised" of its own offending conduct. *Id.* (in context of a negligence claim, plaintiff must allege "(1) what duty, if any, was breached; (2) who breached it, (3) what act or failure to act breached the duty, and (4) the party upon whom the act was performed"). In turn, "[a]t the pleading stage, a defendant in a group of similar defendants may attempt to distinguish its behavior from other defendants." *Id.* Here, as MRO observed in its Opening Brief, the State's own allegations demonstrate a meaningful distinction between MRO and "Defendants" as to which particularized facts are purportedly alleged. OB 11-12. The Complaint identifies the conduct Plaintiff considers to be the basis for liability. None of those

key allegations is made against MRO, and that is what "distinguish[es MRO's] behavior from other defendants":

1. *Alleged Failures to Disclose*.

Across thirty-eight paragraphs, Section IV.C of the Complaint purports to describe actions in furtherance of a "sustained and widespread campaign of denial and disinformation about the existence of climate change and their products' contribution to it." *Id.* ¶ 110. Allegations of conduct in support of this claim are purportedly made specifically against three Defendant Groups, comprising seven Defendants. *Id.* ¶¶ 104-141. Plaintiff pleads no campaign or related conduct by MRO.

2. *Advertising/Marketing/Promotion to Delaware Consumers*.

The Complaint purports to allege advertising, marketing, and/or promotional campaigns specifically directed to Delaware residents by four Defendant groups, comprising eleven named Defendants. *See id.* ¶¶ 21(i-j), 23(h), 24(j-m), and 28(g-j). Plaintiff fails to make any specific allegation about MRO's advertising, marketing or promotions, or that any of them ever reached Delaware consumers.

3. *Conduct of Climate Change Research and Access to "Special Knowledge."*

Dozens of paragraphs of the Complaint allege that certain Defendants conducted private research on climate change or actively participated in API-led activities at various times in the past regarding climate change. *See*, *e.g.*, *id.* ¶¶ 62-

103. Five Defendant groups, comprising 13 Defendants, are alleged to have participated. *Id.* Plaintiff fails to plead that MRO specifically engaged in any private research or API-led activities.[3]

4. *Membership in Alleged "Agents and Front Groups" and API.*

An entire Section of the Complaint builds out the allegation of Paragraph 39 that "Fossil Fuel Defendants" "employed and financed" industry associations to "assist[] the deception campaign by implementing public advertising and outreach campaigns." Three such alleged groups are named, and, as to each, some level of participation by three, two, and seven Defendant groups, respectively, comprising a total of sixteen Defendants. *See id*. ¶¶ 38-42. Despite its apparent familiarity with API's organization, Plaintiff pleads no specific actions by MRO other than API membership at some unspecified time which, as discussed in Section IV below, cannot support an imputation of responsibility.

5. *Greenwashing.*

The Complaint alleges that six Defendant groups (excluding MRO from the deceptively named "Marathon Group" as the allegation does not relate to MRO), comprising sixteen Defendants, engaged in alleged "greenwashing" campaigns. *Id*. ¶¶ 161-210. Plaintiff makes no allegation specific to MRO. *See* OB at 8-9.

[3] Plaintiff alleges "Marathon" received one then-four-year-old summary report on API's "environmental research projects" solely because it was an API member. Compl. ¶ 72. This allegation does not support any claim by Plaintiff.

6. *Operation of Gas Stations in Delaware.*

The Complaint alleges that six Defendant groups, comprising eleven named Defendants, operated gas stations and made sales to consumers in Delaware. *See id*. ¶¶ 21(i), 22(j), 24(m), 25(f), 28(j), and 29(f). MRO is not among them.

* * *

Accordingly, MRO's "behavior" is "distinguish[ed] . . . from the behavior of the other defendants" based on the criteria Plaintiff itself established in the Complaint. *In re Benzene Litig*., 2007 WL 625054, at *7.

## IV. PLAINTIFF CANNOT IMPUTE ALLEGATIONS AGAINST API TO MRO

Plaintiff also contends that it has sufficiently alleged a civil conspiracy by MRO with API. AB 14-15. However, "mere membership in a trade association, including attendance at meetings, is not sufficient to give rise to an inference of conspiracy, absent proof of 'knowing participation' in the wrongful conduct." *In re Asbestos Litig.*, 509 A.2d 1116, 1120 (Del. Super. 1986), *aff'd sub nom. Nicolet, Inc. v. Nutt*, 525 A.2d 146 (Del. 1987); *In re Ins. Brokerage Antitrust Litig*., 618 F.3d 300, 349 (3d Cir. 2010). Plaintiff acknowledges the point, conceding membership must be "coupled with other conduct." AB 15. But Plaintiff has not alleged any "other conduct" by MRO anywhere in its Complaint.

As MRO explained in its Opening Brief, unlike those of certain other defendants, the Complaint does not allege that MRO executives served on API's

Executive Committee or as API's Chairman. AB 6-7. Plaintiff responds that MRO "provides no support for the contention that such leadership is required to demonstrate a conspiracy." AB 16. But Plaintiff itself contends that service on API's Executive Committee or as Chairman is the touchstone for imputing actions by API, *see* Compl. ¶¶ 37(d), (e); OB 7, and it should not be heard to disclaim its own argument. The Complaint makes no comparable allegations of MRO employees holding leadership roles at API and, so far as the Complaint is concerned, that is the end of the matter.

Alternatively, Plaintiff posits that API is the agent of MRO (and presumably every other API member). But the allegation, again, is conclusory: creation of agency would require MRO to have consented to API operating on its behalf, and no such fact is alleged. *See Fisher v. Townsends, Inc.*, 695 A.2d 53, 57 (Del. 1997). Instead, Plaintiff again lumps MRO in with other defendants and alleges, in undifferentiated fashion, "Defendants actively supervised, facilitated, consented to, and/or directly participated in the misleading messaging of these front groups." Compl. ¶39, AB 17. This is just a bare conclusory allegation that need not be accepted. *See* Section I above. What remains is the contention that an agency relationship was created simply by virtue of MRO's membership in API. Compl. ¶37(e). But Plaintiff offers no authority to support that proposition and MRO is aware of none. Were the law otherwise, every member of a trade association or trade

group (including, for example, the American Medical Association) would be deemed responsible for all of the association's positions, statements, and actions. Fortunately, that is not the law.

At bottom, Plaintiff's conspiracy contention fails for the same reason the allegations failed in *Purdue*, 2019 WL 446382, at *14. The Court rejected any claim there because the plaintiff "merely stated . . . that Defendants attended the same conferences." *Id.* "There [were] no allegations of a concerted action, an agreement to commit an underlying wrong, awareness of an agreement, or action in accordance with that agreement." *Id.* So too here. Plaintiff has alleged nothing more than that MRO was a member of API. There are no allegations MRO engaged in "concerted action" or had "an agreement to commit an underlying wrong." Accordingly, no action by API may be imputed to MRO.

## CONCLUSION

For the foregoing reasons, the Complaint should be dismissed with prejudice against MRO.

DATED: August 17, 2023

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I hereby certify that on August 17, 2023, my firm served true and correct copies of the foregoing *Defendant Marathon Oil Corporation's Reply Brief in Further Support of its Motion To Dismiss* on the following counsel of record by File & Serve*Xpress*:

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