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Case No. N20C-09-097 MMJ CCLD

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

STATE OF DELAWARE,
Plaintiffs,

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

CITGO PETROLEUM CORPORATION'S AND MURPHY USA INC.'S REPLY IN SUPPORT OF THEIR
<u>MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM</u>

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TABLE OF CONTENTS

INTRODUCTION 1

ARGUMENT 3

I. Plaintiff's Claims, Grounded in Alleged Misrepresentations, Are Inadequately Pleaded as to CITGO and MUSA Because the Complaint Does Not Identify Any False or Misleading Statements Made by or Attributable to Either Defendant 3

A. Group Pleading Is Improper for Misrepresentation Claims 3

B. API's Statements Cannot Be Imputed to CITGO or MUSA 8

C. The Complaint Improperly Groups MUSA with Murphy Oil 12

II. The Complaint Does Not Allege That CITGO or MUSA Had Special Knowledge about Climate Change That Could Give Rise to a Duty to Warn 13

CONCLUSION 14

TABLE OF AUTHORITIES

Page(s)

Cases

Acosta Orellana v. CropLife Int'l,
711 F. Supp. 2d 81 (D.D.C. 2010) 10

Bank of Am., N.A. v. Knight,
725 F.3d 815 (7th Cir. 2013).................... 4, 5, 11

Bell v. Celotex Corp.,
1988 WL 7623 (Del. Super. Jan. 19, 1988)....................11

Browne v. Robb,
583 A.2d 949 (Del. 1990)....................8

Delaware v. BP Am. Inc.,
2022 WL 1170419 (3d Cir. Apr. 14, 2022)....................6

Dunfee v. KGL Holdings Riverfront, LLC,
2019 WL 1975633 (Del. Super. Apr. 30, 2019)....................9

Estate of Eller v. Bartron,
31 A.3d 895 (Del. 2011)....................9

Fisher v. Townsends, Inc.,
695 A.2d 53 (Del. 1997)....................9

Grant v. Turner,
505 F. App'x 107 (3d Cir. 2012).................... 4, 6, 7, 8

Hawk Mountain LLC v. Mirra,
2016 WL 4541032 (D. Del. Aug. 31, 2016) 7, 8

In re Asbestos Litig.,
509 A.2d 1116 (Del. Super. Ct. 1986).................... 11, 12

In re Swervepay Acquisition, LLC,
2022 WL 3701723 (Del. Ch. Aug. 26, 2022).................... 3, 4, 5, 6

In re WeWork Litig.,
2020 WL 7343021 (Del. Ch. Dec. 14, 2020) 4

Ins. Brokerage Antitrust Litig.,
618 F.3d 300 (3d Cir. 2010) 12

Nicolet, Inc. v. Nutt,
525 A.2d 146 (Del. 1987) 12

Prairie Cap. III, L.P. v. Double E Hldg. Corp.,
132 A.3d 35 (Del. Ch. 2015) 6

State ex rel. Jennings v. Purdue Pharma L.P.,
2019 WL 446382 (Del. Super. Feb. 4, 2019) 1, 4, 5, 6

Szczerba v. Am. Cigarette Outlet, Inc.,
2016 WL 1424561 (Del. Super. Apr. 1, 2016) 11

York Linings v. Roach,
1999 WL 608850 (Del. Ch. July 28, 1999) 3

Rules

Superior Court Civil Rule 8(a) 3

Superior Court Civil Rule 9(b) 1, 3, 4, 6, 8

Other Authorities

Restatement (Third) of Agency § 3.16 9

INTRODUCTION

Plaintiff asserts that its Complaint contains "detailed allegations about corporate misconduct" by CITGO Petroleum Corporation ("CITGO") and Murphy U.S.A. Inc. ("MUSA"). Opp.1. But that is false, as Plaintiff later concedes, for the Complaint alleges *nothing* about CITGO or MUSA other than that they produce and/or sell fossil fuels and were members of API at unspecified times. The truth is that the Complaint alleges misconduct by *some* Defendants and improperly attributes their supposed misconduct to *all* Defendants, including CITGO and MUSA. Such group pleading is improper here because, unlike *State ex rel. Jennings v. Purdue Pharma L.P.*, 2019 WL 446382 (Del. Super. Ct. Feb. 4, 2019), Plaintiff's "campaign of deception" theory sounds in fraud and Plaintiff's collective allegations fail to identify the *particular* misrepresentations CITGO and MUSA purportedly made, as required by Rule 9(b). Neither CITGO nor MUSA can prepare a defense to Plaintiff's deception claims without knowing which statements *they* made that were supposedly misleading. And Delaware law does not allow Plaintiff to embark on a costly and time-consuming fishing expedition to try to *find* an actionable misstatement.

Plaintiff's fallback argument—that API's alleged misrepresentations can be imputed to CITGO and MUSA—fares no better. The Complaint does not even allege an actionable misstatement by API. *See* API Reply Br. ISO Mot. to Dismiss. Nor

does the Complaint allege facts suggesting that API was CITGO's or MUSA's agent or that either Defendant conspired with API (or anyone else). The Complaint alleges only that CITGO and MUSA were *members* of API, but mere membership in a trade association is insufficient to establish either agency or conspiracy.

With respect to the negligent failure to warn claim, Plaintiff contends that CITGO and MUSA knew about the climate-related hazards posed by the intended use of their products. Opp.10–11. But the Complaint provides no factual basis for inferring such knowledge—neither Defendant is alleged to have studied climate change or spoken to those who did. Nor is there any factual predicate for Plaintiff's alternative claim that CITGO and MUSA "should have known" about the risks of climate change. Moreover, that capacious theory would allow the State to bring a failure to warn claim against *every* manufacturer whose products arguably contributed to climate change—such as cars, airplanes, lawnmowers, furnaces, gas grills, water heaters, and countless other products. Indeed, the "you should have known" negligence claim would apply equally to Plaintiff itself—and to every member of the public that has ever used products that emit greenhouse gasses—given the widespread availability of information about climate change. Adopting Plaintiff's theory would thus expose countless individuals and businesses that provide useful and lawful products to burdensome discovery and potentially ruinous liability. That result is contrary to Delaware law.

ARGUMENT

I. Plaintiff's Claims, Grounded in Fraud, Are Inadequately Pleaded as to CITGO and MUSA Because the Complaint Does Not Identify Any False or Misleading Statements Made by or Attributable to Either Defendant

Plaintiff contends that Rule 9(b) applies only to its negligent failure to warn claim, Opp.3, but its Opposition confirms that Plaintiff's claims—including its claims for trespass and nuisance—are predicated on Defendants' alleged "fraudulent scheme" and "campaign of deception." Opp.5–7, 9–10. Rule 9(b) therefore applies. *See York Linings v. Roach*, 1999 WL 608850, at *2 (Del. Ch. July 28, 1999); Joint Reply Br. at 42–44. The Complaint does not come close to satisfying that demanding standard as to CITGO or MUSA. Indeed, the Complaint is so devoid of allegations as to either Defendant that it fails even to satisfy Rule 8(a).

A. Group Pleading Is Improper for Misrepresentation Claims

Despite grounding its claims in fraud, Plaintiff's 217-page Complaint does not contain a single non-conclusory allegation identifying CITGO's or MUSA's supposed misconduct. Plaintiff nevertheless contends that it should be allowed to drag both companies through years of litigation because the Complaint's "collective allegations referencing 'Fossil Fuel Defendants'" supposedly provide them with "ample notice" of their alleged misconduct. Opp.5. But group pleading is "generally disfavored" in Delaware, and Plaintiff's attempted justifications for allowing it here are meritless. *In re Swervepay Acquisition, LLC*, 2022 WL 3701723, at *9 (Del. Ch.

Aug. 26, 2022); *In re WeWork Litig.*, 2020 WL 7343021, at *11 (Del. Ch. Dec. 14, 2020).

First, it is simply false that the Complaint's generic allegations put CITGO and MUSA on notice of the "precise misconduct with which they are charged." Opp.5 (quoting *Grant v. Turner*, 505 F. App'x 107, 111 (3d Cir. 2012)). While the Complaint alleges that Defendants, as a group, "waged a sophisticated campaign of deception and disinformation about their products' contribution to climate change," Opp.5, those conclusory group allegations do not identify *which statements* either Defendant must be prepared to defend at trial. *Purdue*, 2019 WL 446382, at *8. Plaintiff's group allegations do little more than alert CITGO and MUSA to the type of statements Plaintiff *hopes* to find through discovery. But as this Court has previously recognized, Rule 9(b) "prevent[s] plaintiffs from using complaints as fishing expeditions to unearth wrongs to which they had no prior knowledge." *Id.* Here, Plaintiff pleads nothing more than a textbook fishing expedition.

Rule 9(b) does not allow Plaintiff to allege misconduct concerning one Defendant and then aver that every other Defendant is liable for the same general type of alleged misconduct. Instead, "[e]ach defendant is entitled to know what he or she did that is asserted to be wrongful." *Bank of Am., N.A. v. Knight*, 725 F.3d 815, 818 (7th Cir. 2013). Plaintiff attempts to distinguish *Knight* on the ground that its Complaint here supposedly contains "far more detailed allegations" than the

complaint there. Opp.10. But the fatal defect in *Knight* was not the lack of detail—on the contrary, the 87-page complaint in that case went "on and on about what defendants collectively did"—rather, it was the failure to "imput[e] concrete acts to specific litigants." *Knight,* 725 F.3d at 819. The same defect dooms Plaintiff's "maddeningly vague" Complaint here. *Id.*

Under Delaware law, it is Plaintiff's burden to show that group "pleading should be permitted." *Swervepay*, 2022 WL 3701723, at *10. Plaintiff contends it is appropriate given the supposed "context of Defendants' coordinated, sophisticated, and decades-long campaigns of deception." Opp.9. But that conclusory allegation about "Defendants'" supposed campaign is insufficient, and the Complaint does not contain a single *non-conclusory* allegation suggesting that CITGO or MUSA ever "coordinated" with any other Defendant. The only alleged connection between CITGO, MUSA, and any other Defendant is membership in API. But API—an organization formed more than a century ago that currently includes more than 600 members, Compl. ¶37(a)—represents the oil and natural gas industry on countless issues unrelated to climate change. *See* API Br.8. The mere allegation that CITGO and MUSA were members of this sprawling trade association does not come close to showing any coordination with other Defendants to deceive anyone about the risks of climate change.

Plaintiff's reliance on this Court's decision in *Purdue* is misplaced because

the claims asserted there against opioid distributors were not based on alleged "misrepresentations," but rather on the theory that the distributors had failed to prevent diversion of opioids despite being required to do so by various statutes and regulations. *Purdue*, 2019 WL 446382, at *4–5. One distributor argued the complaint "improperly lump[ed] all of the Distributors together in group allegations, and that these allegations [we]re conclusory." *Id.* at *8. But because the alleged misconduct was the distributors' failure to comply with their statutory obligation to prevent diversion, this Court held that the complaint gave each distributor "enough notice to prepare a defense." *Id.*

Here, by contrast, Plaintiffs have insisted that their claims are *not* based on Defendants' sale of lawful products, but rather hinge on Defendants' alleged "*campaign of deception* regarding their fossil fuel products' relationship to climate change." *Delaware v. BP Am. Inc.*, 2022 WL 1170419, at *1 (3d Cir. Apr. 14, 2022) (emphasis added). Unlike the claims in *Purdue,* claims based on alleged misrepresentations cannot be pleaded on a collective basis consistent with Rule 9(b) because only "the speaker who makes a false representation is, of course, accountable for it." *Swervepay*, 2022 WL 3701723, at *9 (quoting *Prairie Cap. III, L.P. v. Double E Hldg. Corp.*, 132 A.3d 35, 59 (Del. Ch. 2015)).

The Third Circuit's decision in *Grant* is even less helpful to Plaintiff. That case involved allegations that travel-club companies—with the assistance of two

credit-card companies—fraudulently induced the purchase of memberships but then never delivered the promised benefits. *Grant*, 505 F. App'x at 109. The district court dismissed all claims, and the Third Circuit *affirmed dismissal* of the fraud claims against the credit-card companies under Rule 9(b) because the plaintiffs did "not specifically allege[] how either party played a role in committing the predicate acts of fraud." *Id.* at 112. It reversed only as to the travel-club entities because the complaint "include[d] many other details to 'inject precision or some measure of substantiation into their allegations of fraud.'" *Id.* The court also noted that the travel-club defendants "deliberately concealed the identities of salespeople and agents," preventing the plaintiffs from alleging "who, in particular made the misrepresentation absent discovery." *Id.*

The defect here, by contrast, is not the failure to identify *who* made any alleged misrepresentation—it is the failure to allege *a single misrepresentation* by CITGO or MUSA or to inject any "precision" into the claims against them. Nor does the Complaint allege that CITGO or MUSA concealed any misconduct. CITGO and MUSA are thus more akin to the credit-card companies dismissed in *Grant* than to the travel-club companies.

Plaintiff urges the Court to excuse the particularity requirement because any misrepresentations CITGO or MUSA may have made about climate change are "exclusively within" CITGO or MUSA's possession. Opp.6 (quoting *Hawk*

Mountain LLC v. Mirra, 2016 WL 4541032, at *2 (D. Del. Aug. 31, 2016)). But *Hawk Mountain* did not endorse any such exception to Rule 9(b)'s particularity requirement,[1] and the proposed exception would not even apply here because misrepresentations designed to deceive the public would, by definition, not be in CITGO or MUSA's exclusive possession.

In short, the claims against CITGO and MUSA should be dismissed because the Complaint "totally lacks even a single particular or specific fact to support [Plaintiff's] fraud claim" against either Defendant. *Browne v. Robb*, 583 A.2d 949, 955 (Del. 1990).

B. API's Statements Cannot Be Imputed to CITGO or MUSA

Plaintiff spends much of its brief arguing that API's conduct and knowledge can be imputed to CITGO and MUSA under principles of agency and conspiracy. Opp.11–19. But Plaintiff has not alleged any actionable misrepresentation by API, and the allegations in the Complaint do not support either of Plaintiff's theories. To

[1] The quoted portion of *Hawk Mountain* (Opp.6) is the court's recitation of *the plaintiff's objection* to the Magistrate's order. 2016 WL 4541032, at *2. The district court did not adopt that legal framing but instead quoted *Grant* for the proposition that Rule 9(b) "requires a plaintiff to plead the date, time, and place of the alleged fraud, or otherwise inject precision into the allegations by some alternative means." *Id.* (quoting *Grant*, 505 F. App'x at 111).

the extent Plaintiff's argument relies on group pleading, it fails for the reasons already discussed.

First, "[a]n agency relationship is created when one party consents to have another act on its behalf, with the principal controlling and directing the acts of the agent." *Fisher v. Townsends, Inc.*, 695 A.2d 53, 57 (Del. 1997); Restatement (Third) of Agency § 3.16 (2006). Yet the Complaint does *not* allege that CITGO or MUSA consented to allow API to speak on its behalf about climate change or that API consented to act "subject to [their] control." *Estate of Eller v. Bartron*, 31 A.3d 895, 897–98 (Del. 2011). Instead, the Complaint alleges that "*Defendants* actively supervised, facilitated, consented to, and/or directly participated in the misleading messaging of these front groups." Compl. ¶39 (emphasis added). That bare legal conclusion is insufficient to state a claim based on agency. *See Dunfee v. KGL Holdings Riverfront, LLC*, 2019 WL 1975633, at *8 (Del. Super. Apr. 30, 2019) (dismissing claim based on agency theory where "Plaintiff merely offered the legal conclusion that GRS and SAV were agents of Keybank without factual allegations which may demonstrate what control Keybank had over the manner in which GRS or SAV operated"). And Plaintiff cannot rely on allegations about *other* Defendants

to establish that CITGO or MUSA controlled API and directed its alleged misstatements. *See supra,* Part I.A.

The only alleged connection between CITGO, MUSA, and API is that of membership. Compl. ¶37(e). Plaintiff cites no authority suggesting that a company can be held vicariously liable for the acts of a trade association based solely on membership—and there is none. Plaintiff cites *Acosta Orellana v. CropLife Int'l*, 711 F. Supp. 2d 81 (D.D.C. 2010), but that court *rejected* a claim based on an agency theory because "the plaintiffs fail[ed] to adequately plead the element of control." *Id.* at 111. There, as here, the plaintiffs alleged that the defendants "used" their supposed agent "to initiate a campaign to falsely promote" an allegedly harmful product. *Id.* The "shortcoming" of that theory of "purported control" was "that it [was] completely conclusory and lacking the necessary factual support to survive dismissal under Rule 12(b)(6)." *Id.* at 112 ("[E]ven if [the alleged agent] engaged in a campaign to falsely promote the safety of [the product], that action does not reasonably lead to the conclusion the CropLife Defendants had the right to order such an undertaking, or that [they] actually exercised such a right."). Plaintiff's Complaint here is equally "conclusory" and devoid of any allegations suggesting

that CITGO or MUSA had the right to control, or in fact controlled, API's communications about climate change.

Second, Plaintiff's attempt to attribute API's statements to CITGO and MUSA based on a supposed conspiracy also fails. Before a defendant can be held liable for the acts of its alleged co-conspirators, it is "essential to show that [that] *particular defendant* joined the conspiracy and knew of its scope." *Knight*, 725 F.3d at 818 (emphasis added); *see also Szczerba v. Am. Cigarette Outlet, Inc.*, 2016 WL 1424561, at *2 (Del. Super. Apr. 1, 2016) (conspiracy claims "must, at a minimum, sufficiently allow the Court 'to determine whether or not a valid claim for relief has been stated and to enable the opposing side to prepare an adequate responsive pleading'" (quoting *Bell v. Celotex Corp.*, 1988 WL 7623, at *4 (Del. Super. Jan. 19, 1988)). Yet the Complaint does not allege that CITGO or MUSA took any affirmative steps to join the alleged conspiracy. Indeed, it does not allege that either Defendant even communicated with any other Defendant about climate change, much less affirmatively joined a coordinated effort to deceive the public about it.

Even if Plaintiff had alleged that CITGO and MUSA attended API meetings where the alleged misinformation was discussed (which it does not), dismissal would still be warranted because "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. Ct. 1986), *aff'd sub nom. Nicolet, Inc. v. Nutt*, 525 A.2d 146 (Del. 1987); *see also In re Ins. Brokerage Antitrust Litig.*, 618 F.3d 300, 349 (3d Cir. 2010). As Plaintiff concedes, "membership in a trade association" must be "coupled with other conduct" to "demonstrate a conspiracy." Opp.16. But the Complaint does not allege that CITGO or MUSA engaged in any "other conduct" that even arguably connects them to this supposed conspiracy.

Plaintiff points to paragraphs 27(f) and 29(e), but those boilerplate allegations assume the very facts the Complaint fails to allege—*e.g.*, that CITGO or MUSA made misstatements about climate change. The Complaint thus provides CITGO and MUSA with no notice of the conduct supposedly connecting them to the alleged conspiracy beyond associational membership, making it impossible for them to prepare a defense.

C. The Complaint Improperly Groups MUSA with Murphy Oil

The Complaint acknowledges that MUSA was incorporated in 2013, well after most of the alleged misconduct occurred. Compl. ¶27(d). The Complaint nevertheless groups MUSA with Murphy Oil Corporation in alleging "*Murphy's*" supposed misconduct. As a result, MUSA lacks notice of its particular alleged misconduct. The Complaint also lumps MUSA with Murphy Oil in alleging that "Murphy" was a member of API—even though the Complaint does not allege that

MUSA has been a member at any time since its incorporation in 2013.[2] Accordingly, the allegations are deficient vis-à-vis MUSA.

II. The Complaint Does Not Allege That CITGO or MUSA Had Special Knowledge about Climate Change That Could Give Rise to a Duty to Warn

Plaintiff concedes that there are no allegations showing that either CITGO or MUSA had any special knowledge about the "dangers" of fossil fuels, Opp.10-11, which is necessary to plead a duty to warn. Plaintiff offers two insufficient excuses for not alleging CITGO and MUSA's special knowledge. First, Plaintiff contends that "Defendants" knew about the risks. Opp.11. But such group pleading fails because, as discussed, the claim here is grounded in fraud. Second, Plaintiff notes that knowledge may "be averred generally." Opp.11. But the Complaint does not allege that CITGO or MUSA even had access to the relevant information. And Plaintiff's "you should have known" theory would authorize a failure to warn claim against any company that makes (or made) a product that contributes to climate change without any allegation that the company had information unavailable to the public. Such an expansive theory of liability finds no support in Delaware law.

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[2] Plaintiff's judicial-notice argument misses the mark. MUSA did not raise the membership issue to contradict well-pled facts. MUSA noted it as an example of the impropriety of Plaintiff's attempt to make MUSA liable for API's conduct by grouping it with actual API members. Mot.3.n.1.

CONCLUSION

Plaintiff's claims against CITGO and MUSA should be dismissed with prejudice.

DATED: August 17, 2023

Respectfully submitted,

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