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

DEFENDANTS BP P.L.C. AND BP AMERICA INC.'S REPLY IN SUPPORT OF MOTION TO DISMISS THE COMPLAINT FOR FAILURE TO STATE A CLAIM

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Regulations

Other Authorities

INTRODUCTION

Plaintiff's opposition confirms it has failed to plead a Delaware Consumer Fraud Act ("DCFA") claim against BP. *First*, Plaintiff concedes the Complaint does not identify *any* misrepresentation by BP pertaining to the purported "multidecadal campaigns to discredit climate science." In fact, the only climate-related BP statements the Complaint identifies lay bare that BP publicly acknowledged the risk of climate change and its link to fossil fuels decades ago, foreclosing Plaintiff's "climate denial" theory vis-à-vis BP. *Second*, Plaintiff's "greenwashing" theory fails against BP because the cherry-picked statements on which Plaintiff relies express BP's aspirations and goals—such as "we're working to make energy that's cleaner and better"—classic examples of non-actionable puffery. *Third*, Plaintiff concedes the selectively quoted phrases it targets about Invigorate and BP Diesel say nothing about climate change or the environment, and the complete statements make clear their focus is engine health. Plaintiff's DCFA claim against BP should be dismissed. *See Light Years Ahead, Inc. v. Valve Acquisition, LLC*, 2021 WL 6068215, at *3 (Del. Super. Ct. Dec. 22, 2021) ("Each . . . claim [must] be reviewed . . . under Rule 12(b)(6).").

I. PLAINTIFF DOES NOT ALLEGE A SINGLE "CLIMATE-DENIAL" STATEMENT MADE BY BP

Plaintiff concedes "the Complaint alleges specific climate denial misrepresentations by certain Defendants, *but not BP*." Answering Br. 5 (emphasis added); *see*

also id. at 3, 5 (similar concessions). That concession is remarkable. Despite asserting a "multidecadal campaign[]" (*id.* at 3) of "public statements" that purportedly "den[ied] the scientific consensus that use of fossil fuel products directly causes climate change," Compl. ¶¶ 277–78, Plaintiff does not identify *even one* contribution to that purported "campaign" by BP. The reason why is simple: Plaintiff's own allegations foreclose its "climate-denial" theory as against BP.

The Complaint acknowledges that in 1991—more than thirty years ago—BP publicly "released a short film" stating that "dependence on carbon-based fuels is . . . a cause for concern"; that burning "coal, oil or gas . . . release[s] carbon dioxide and other reactive gases"; that "[a]n overall increase in temperature of even a few degrees could disrupt our climate with devastating consequences"; and that "climatic change is now one of our most urgent concerns." *Id.* ¶ 99. The Complaint further acknowledges that in 1997—more than twenty-five years ago—BP's then-chief executive publicly recognized "an effective consensus among the world's leading scientists and serious and well informed people . . . that there is a discernible human influence on the climate, and a link between the concentration of carbon dioxide and the increase in temperature," and warned that "[i]t would be unwise and potentially dangerous to ignore the mounting concern." *Id.* ¶ 151.[1] In short, far from alleging

[1] Plaintiff erroneously cites BP's statements acknowledging climate change as evidence that BP somehow "*knowingly* made false and misleading statements about the link between its products and climate change after 1991." Answering Br. 8. But, as

that BP "den[ied] the scientific consensus that use of fossil fuel products directly causes climate change," *id.* ¶¶ 277–78, Plaintiff affirmatively pleads facts showing precisely the opposite: that BP publicly acknowledged the risk of climate change and its link to fossil fuels decades ago.

Plaintiff's assertion that its climate denial theory against BP is viable because the Complaint "group[s] [D]efendants together for purposes of some allegations" is without merit. Answering Br. 2. According to Plaintiff, *see id.*, its "group" pleadings against BP are permitted under *State ex rel. Jennings v. Purdue Pharma L.P.*, 2019 WL 446382 (Del. Super. Ct. Feb. 4, 2019). But *Purdue* is inapposite for two fundamental reasons.

First, *Purdue* does not address a misrepresentation-based DCFA claim like Plaintiff's. In *Purdue*, the State brought civil claims against opioid distributors, manufacturers, and pharmacies, including a DCFA claim. But, unlike here, the State proceeded against distributors not based on alleged misrepresentations they made but, instead, for breaching a duty "to actively prevent opioid diversion." *Id.* at *1. Specifically, the DCFA claim against the distributors alleged that they "failed to report suspicious orders of controlled substances," "failed to maintain necessary records of opioid transactions," and "failed to implement effective business practices to

---

Plaintiff concedes, the Complaint does not identify even one such statement by BP. The only BP statements identified in the Complaint concerning climate change expressly acknowledge the scientific consensus and the urgency of the problem.

guard against diversion of highly-addictive opioid products." *See* Complaint ¶ 263, *State ex rel. Jennings v. Purdue Pharma L.P.*, No. N18C-01-223 MMJ CCLD (Del. Super. Ct. filed Jan. 19, 2018) (attached hereto as Exhibit A). To the extent the State alleged misrepresentations by certain distributors, but not by distributor Anda, those misrepresentations were not alleged to be independently actionable but, rather, were evidence that the "distributors ha[d] themselves recognized the magnitude of the problem and, at least rhetorically, their legal responsibilities to prevent diversion." *Id.* ¶ 141; *see id.* ¶¶ 132–44. In those circumstances—where misrepresentations were *not* the basis of the claims against distributors—this Court declined to dismiss claims against Anda simply because the complaint did not allege Anda-specific misrepresentations. *Purdue*, 2019 WL 446382, at *8.

Second, even setting aside the distinct nature of the DCFA claim against Anda, Anda's argument was fundamentally different than BP's here. Anda focused exclusively on the *absence* of Anda-specific misrepresentations. *See id.* (arguing "there were no allegations of specific misrepresentations" by Anda and that "the State only referenced Anda specifically a few times in its Complaint"). In ruling on Anda's motion, this Court emphasized that, "[a]t the pleading stage, a defendant in a group of similar defendants may attempt to distinguish its behavior from other defendants." *Id.* But there—where Anda relied solely on the absence of Anda-specific misrepresentations even though the claims were not based on alleged misrepresentations—

the Court concluded "that there [wa]s no meaningful or substantive distinction between Anda and other Distributor defendants," and allowed claims against Anda to proceed. *Id.*

Those are not the circumstances here. BP is *not* moving to dismiss based solely on the *absence* of climate denial allegations against it (though the absence of such allegations is undisputed and dispositive). Here, Plaintiff *affirmatively pleads* that BP publicly acknowledged the risk of climate change—and its link to fossil fuels—decades ago. *See* Compl. ¶¶ 99, 151. In other words, Plaintiff affirmatively pleads that BP publicly acknowledged the very thing the purported denialist "campaign" was meant to conceal. That further distinguishes this Complaint from *Purdue* and warrants dismissal under any pleading standard, especially the heightened standard under Rule 9(b) that applies here. *See* Defs.' Joint Mot., Argument § V, Dkt. 260. Indeed, "[u]nder Rule 9(b), oblique references to false statements allegedly made by 'each defendant' will not serve to attribute misrepresentations to all the defendants in an action." *Metro Commc'n Corp. BVI v. Advanced Mobilcomm Techs. Inc.*, 854 A.2d 121, 146 n.48 (Del. Ch. 2004).[2]

[2] The other cases Plaintiff cites are even further afield. In *Grant v. Turner*, the plaintiffs identified "several examples" of specific fraudulent statements they received in the mail from the defendants; the only issue was that they could not identify "who, specifically, made misrepresentations to whom in all cases." 505 F. App'x 107, 109, 112 (3d Cir. 2012) (unpub.). The Third Circuit found it a "close[] call" but ultimately gave the plaintiffs the benefit of the doubt because the defendants "did not file a brief in response to [the plaintiffs'] appeal." *Id.* at 112.

Nor may Plaintiff justify its improper group pleadings on grounds that Defendants allegedly "concealed facts regarding their misconduct" or that "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." Answering Br. 5–6. The very premise of Plaintiff's DCFA claim is that BP made "climate-denial" misrepresentations to "*consumers and the public*." *Id.* at 5 (emphasis added). By their very nature, such misrepresentations are *not* "concealed" and *not* "exclusively within the possession of" BP.[3]

Swartz v. KPMG LLP is similarly inapposite. It holds only that every member of a conspiracy need not individually make false statements to be held liable for conspiracy. 476 F.3d 756, 765 (9th Cir. 2007). Plaintiff here does not assert conspiracy claims.

The plaintiffs in *River Valley Ingredients, LLC v. American Proteins, Inc.* did identify specific misrepresentations (made in a contract) and specific facts demonstrating that *each* defendant knew those misrepresentations were false. 2021 WL 598539, at *3 (Del. Super. Ct. Feb. 4, 2021). Plaintiff's Complaint, in contrast, does neither.

[3] Plaintiff incorporates by reference its argument from Plaintiff's Answering Brief in Opposition to Citgo Petroleum Corporation and Murphy USA Inc.'s Motion to Dismiss for Failure to State a Claim that BP can be held liable for API's conduct. *See* Answering Br. 8–9. As stated fully in Defendants' Joint Opening Brief and Reply, that argument fails because the Complaint does not make a particularized showing that *each* Defendant "held a specific intent to further" the alleged "illegal aims" of the trade association. *See In re Asbestos School Litig.*, 46 F.3d 1284, 1289 (3d Cir. 1994); *see also* BP Mot. 6 n.1.

II. THE "GREENWASHING" ALLEGATIONS AGAINST BP TARGET NON-ACTIONABLE ASPIRATIONAL STATEMENTS, OPINIONS, AND PUFFERY

Plaintiff categorically asserts that "whether a statement is opinion, puffery, or aspirational are factual questions improper for resolution on the pleadings." Answering Br. 10. But no such categorical rule exists. Delaware courts routinely dismiss claims targeting puffing or aspirational statements at the pleading stage. *See, e.g.*, *Winner Acceptance Corp. v. Return on Cap. Corp.*, 2008 WL 5352063, at *8 (Del. Ch. Dec. 23, 2008); *Trenwick Am. Litig. Tr. v. Ernst & Young, L.L.P.*, 906 A.2d 168, 209–10 (Del. Ch. 2006), *aff'd sub nom. Trenwick Am. Litig. Tr. v. Billett*, 931 A.2d 438 (Del. 2007); *Wal-Mart Stores, Inc. v. AIG Life Ins. Co.*, 2005 WL 5757653, at *12 (Del. Ch. July 27, 2005); *Solow v. Aspect Res., LLC*, 2004 WL 2694916, at *3 (Del. Ch. Oct. 19, 2004); *Great Lakes Chem. Corp. v. Pharmacia Corp.*, 788 A.2d 544, 554 (Del. Ch. 2001); *Schaefer v. Byler*, 1997 WL 33471239, at *2 (Del. Com. Pl. Mar. 13, 1997). This Court should do likewise.

On their face, the two supposed BP "greenwashing" advertisements Plaintiff targets amount to nothing more than non-actionable aspiration, opinion, or puffing. The first—titled "Better fuels to power your busy life"—communicated BP's goals and aspirations to deliver cleaner energy and to contribute to the energy transition, including statements like "[w]e want—and need—energy to be kinder to the planet"

and "we're working to make energy that's cleaner and better." *See* BP Mot. 7. Plaintiff responds that this language must be "[r]ead in context with the other statements in that advertisement" to understand how it is misleading—but then omits most of the text. Answering Br. 12. The full text—which broadly discusses future "challenges" the world faces, like population growth, and contains numerous aspirational statements like "we . . . want – and need," "we're working," "we're leaving no stone unturned," "we're . . . finding new ways," and "[w]e see possibilities everywhere"—makes clear that this advertisement communicates BP's desires and goals. *See* Ex. B.[4]

Plaintiff takes issue with the advertisement's use of the words "[b]etter fuels." Answering Br. 13. But whether one fuel is "better" than another is an opinion and classic puffery. BP Mot. 6–7. Plaintiff also objects to the phrase "cleaner burning *natural gas*," asserting that, "[a]s alleged, natural gas is n[ot] '*clean*.'" Answering Br. 13 (second emphasis added). But BP never said natural gas is unqualifiedly "clean," only that it is *cleaner burning* (*see* Compl. ¶ 185)—which is both undis-

[4] The full text of the advertisement is attached as Exhibit B hereto, which is taken from the hyperlink in the Complaint. *See* Compl. ¶ 185 n.177. The Court may consider this text on a motion to dismiss because it is "integral to plaintiff's claim and it is incorporated into the complaint." *Willis v. City of Rehoboth Beach*, 2004 WL 2419143, at *1 n.1 (Del. Super. Ct. Oct. 14, 2004).

puted and indisputable. Both the state and federal governments recognize that natural gas is cleaner burning than alternatives, and natural gas has been a cornerstone of Delaware's efforts to reduce greenhouse gas emissions.[5]

Plaintiff faults BP for saying it is "bringing solar and wind energy to homes from the US to India"—the truth of which Plaintiff does not dispute—because the statement supposedly gives "a false impression." Answering Br. 13–14. But Plaintiff does not explain what that false impression might be. The statement says nothing about the relative balance of BP's energy portfolio (alternative energy vs. fossil fuels). Rather, it simply describes residential solar and wind as one way, among others, that BP is attempting to meet its goal of "finding new ways to produce and deliver [energy] with fewer emissions." Compl. ¶ 185; *see Trenwick*, 906 A.2d at 209 ("[S]tatements of expectation or opinion about the future of the company and the hoped for results of business strategies" are "the softest of information.").

---

[5] *See, e.g.*, ICF, *Delaware Climate Action Plan Supporting Technical Greenhouse Gas Mitigation Analysis Report* 3 (2020), https://documents.dnrec.delaware.gov/energy/Documents/Climate/Plan/DNREC%20Technical%20Report.pdf ("The trend of decreasing state GHG [greenhouse gas] emissions through 2025 results from current state policies and past and anticipated regional energy trends, primarily due to a shift from coal to natural gas-powered electricity."); *id.* at 13 ("Natural gas emits about 40% less GHGs than coal when used as a fuel for generating power (IEA 2020)."); U.S. Energy Info. Admin., *Natural Gas Explained: Natural Gas and the Environment*, https://www.eia.gov/energyexplained/natural-gas/natural-gas-and-the-environment.php ("Natural gas is a relatively clean burning fossil fuel"; "Burning natural gas for energy results in fewer emissions of nearly all types of air pollutants and carbon dioxide (CO_2) than burning coal or petroleum products to produce an equal amount of energy.").

The same goes for BP's "Blade Runners" advertisement, which states that BP is "*one of* the major wind energy businesses in the US." Compl. ¶ 186 (emphasis added). According to Plaintiff, this statement is false because "BP's installed wind capacity is a mere 1% of the [U.S.] market." Answering Br. 14–15 (quoting Compl. ¶ 186). But whether a company is "one of the major wind energy businesses"—and whether "major" should even be measured by market share—is an opinion; the statement makes no factual claims about the relative proportion of wind energy BP produces compared to other wind producers (or compared to other forms of energy BP produces). It is precisely the sort of "vague statement boosting the appeal of a service or product that" Delaware courts have long held to be non-actionable "puffery." *Airborne Health, Inc. v. Squid Soap, LP*, 2010 WL 2836391, at *8 (Del. Ch. July 20, 2010) (citations omitted).

Plaintiff's reliance on the FTC's "Guides for the Use of Environmental Marketing Claims," codified at 16 C.F.R. § 260.1 *et seq.* ("Green Guides"), is misplaced. Plaintiff has not identified any "[u]nqualified general environmental benefit claims" made by BP that would run afoul of the Green Guides. Answering Br. 11 (quoting 16 C.F.R. § 260.4(b)). "Unqualified general environmental benefit claims" are blanket statements—like "environmentally safe" or "green product"—that lack any clarifying context and, thus, misleadingly convey the item either has "'specific and far-reaching environmental *benefits*'" or "'*no negative* environmental impact.'" *White*

v. Kroger Co., 2022 WL 888657, at *2 (N.D. Cal. Mar. 25, 2022) (emphasis added) (quoting 16 C.F.R. §260.4(b)). The BP statements Plaintiff cites do not make any unqualified claims of environmental benefits, like "BP gasoline is an environmentally friendly green product." Nor do they give the impression that fossil fuels have no negative environmental impact. In fact, the "Better fuels to power your busy life" advertisement recognizes that burning fossil fuels *does* generate emissions and describes ways BP is "working" towards its goal of "finding new ways to produce and deliver [energy] with *fewer* emissions." Compl. ¶ 185 (emphasis added).

Nor does Plaintiff explain how these purported "greenwashing" statements address "merchandise" within the meaning of the DCFA, as required to state a claim. *See* BP Mot. 9–10. According to Plaintiff, statements wholly unrelated to BP gasoline and lubricants—the only BP merchandise alleged to be available to Delaware consumers, *see* Compl. ¶ 21(i)—are actionable because they might indirectly induce consumers to purchase more BP gasoline and lubricants. Answering Br. 16. In Plaintiff's strained telling, BP statements about "wind and solar energy" "paint a misleading picture" that "tends to deceive consumers into believing BP is more sustainable than reality reflects"—whatever that means—which, "in turn, persuades Delaware consumers to buy more of BP's fossil fuel products . . . than consumers otherwise would." *Id.* (emphasis omitted). But Plaintiff cites no case permitting a DCFA claim to proceed based on such tenuous reasoning. And for good reason:

Plaintiff's theory would eviscerate the merchandise requirement. If statements that do not address "merchandise" are deemed to address "merchandise" simply because a consumer who hears them might then purchase "merchandise," then practically *any* corporate statement could be construed to address "merchandise"—from statements about investment strategies to hiring and diversity practices to charitable donations. Nothing in the DCFA authorizes such sweeping and pervasive regulation of speech.

III. ALLEGED STATEMENTS ABOUT INVIGORATE GASOLINE AND BP DIESEL DO NOT SUPPORT A CLAIM

Plaintiff insists that statements about Invigorate gasoline and BP Diesel misrepresent that these products are "more environmentally beneficial" than they actually are. Answering Br. 18. But Plaintiff does not contest that neither statement says anything about the environment at all, much less any environmental benefits. BP's statement that Invigorate gasoline "gives you more miles per tank" by "defend[ing] your engine against dirt" (BP Mot., Ex. A) is about mileage and engine dirt. And the statement about BP Diesel—that it is "made with the perfect mix of low sulfur and additives to help reduce emissions and protect your engine" (BP Mot., Ex. A)—likewise addresses engine health.

Plaintiff takes issue with the statement that BP Diesel's "low sulfur and additives . . . help reduce emissions." But, read in context, the statement is *not* an un-

qualified claim of environmental benefits, like "eco-friendly"; rather, it includes specific qualifications explaining under what circumstances BP Diesel improves engine performance and helps reduce emissions. The statement clarifies that it is "[c]ompar[ing] diesel engine performance vs. a gasoline engine with similar displacement," and "[r]efer[ring] to modern technology incorporating newer diesel engines, advanced emissions after-treatment systems, and the ultra-low sulfur diesel that enables them to help lower harmful emissions." *Id.* This narrow, qualified statement about engine performance and emissions—the accuracy of which Plaintiff does not dispute—does not misleadingly imply the product is "more environmentally beneficial than it is." Answering Br. 18.

More fundamentally, Plaintiff does not dispute that its theory would render *any* statement about mileage, engine performance, or emissions "misleading" absent an express warning that BP's products allegedly cause "catastrophic" climate change—a sweeping outcome that cannot be what the DCFA requires. BP Mot. 12. Nor should it; as Plaintiff concedes, the potential link between fossil fuels and climate change has been well understood and widely known for at least half a century. *See, e.g.*, Compl. ¶¶ 4, 66, 98–99, 106(a), 106(c)–(e), 151.

Finally, Plaintiff argues that, "[e]ven if these statements [about Invigorate and BP Diesel] were nonactionable, the Complaint alleges far more misrepresentations

by BP." Answering Br. 19 (citing Compl. ¶¶ 182–87). But the only "misrepresentations" in the paragraphs Plaintiff cites are two alleged "greenwashing" advertisements, which are non-actionable for the reasons discussed above (*supra* Section II).

CONCLUSION

The Court should grant this motion and dismiss the DCFA claim against BP with prejudice.

Of Counsel:

ARNOLD & PORTER KAYE SCHOLER LLP
Nancy G. Milburn, *pro hac vice*
Diana E. Reiter, *pro hac vice*
250 West 55th Street
New York, NY 10019-9710
Tel: (212) 836-8000
Fax: (212) 836-8689
nancy.milburn@arnoldporter.com
diana.reiter@arnoldporter.com

Jonathan W. Hughes, *pro hac vice*
3 Embarcadero Center, 10th Floor
San Francisco, CA 94111-4024
Tel: (415) 471-3100
Fax: (415) 471-3400
jonathan.hughes@arnoldporter.com

John D. Lombardo, *pro hac vice*
777 South Figueroa Street, 44th Floor
Los Angeles, CA 90017-5844
Tel: (213) 243-4000
Fax: (213) 243-4199
john.lombardo@arnoldporter.com

ASHBY & GEDDES

/s/ Catherine A. Gaul

Catherine A. Gaul (#4310)
500 Delaware Avenue, 8th Floor
P.O. Box 1150
Wilmington, DE 19899
(302) 654-1888
cgaul@ashbygeddes.com

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

Dated: August 17, 2023