EFiled: Aug 17 2023 04:23PM EDT
Transaction ID 70662863
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

APACHE CORPORATION'S REPLY BRIEF IN FURTHER SUPPORT OF ITS MOTION TO DISMISS PLAINTIFF'S COMPLAINT FOR FAILURE TO STATE A CLAIM

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I.
PRELIMINARY STATEMENT

Seeking to avoid dismissal on preemption grounds, Plaintiff repeatedly asserts that its "case is about Defendants' [allegedly] deceptive promotion of products in Delaware," and not their "fossil fuel production." JAB.1.[1] But Apache cannot be liable in a deceptive promotion case because the Complaint fails to allege that Apache engaged in any "deceptive" conduct or promoted any products in Delaware at all. Attempting to salvage its claims, Plaintiff points only to its broad allegation that "Apache Corporation controls and has controlled companywide decisions … related to marketing, advertising, climate change and greenhouse gas emissions from its fossil fuel products, and communications strategies concerning climate change and the link between fossil fuel use and climate-related impacts on the environment and communities." AB.9[2] (*citing* ¶33(c)[3]). This vague and conclusory statement does not refer to any marketing to consumers in Delaware. Indeed, Plaintiff's

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[1] "JAB" refers to Plaintiff's Answering Brief in Opposition to Defendants' Joint Motion to Dismiss for Failure to State a Claim. Apache Corporation ("Apache") incorporates by reference the arguments in Defendants' Joint Reply Brief in Support of Motion to Dismiss Plaintiff's Complaint for Failure to State a Claim.

[2] "AB" refers to Plaintiff's Answering Brief in Opposition to Defendant Apache Corporation's Motion to Dismiss for Failure to State a Claim.

[3] References to ¶ are references to the Complaint.

omission of Apache from its Delaware Consumer Fraud Act claim implicitly concedes that Apache did not do so.

The Court should reject Plaintiff's two attempts to overcome the complete absence of allegations specifically against Apache. First, Plaintiff seeks to lump Apache into a group of "Fossil Fuel Defendants" allegedly engaged in deceptive promotion, and to hold Apache liable for the conduct of any such defendant. But Plaintiff has not established that Apache is properly included in that group. Courts routinely reject such "group pleading" where, as here, the complaint fails to allege how a particular defendant participated in the alleged misconduct. Second, Plaintiff claims that its allegations against API can be imputed to Apache. That is wrong. Plaintiff pleads only that Apache was one of API's 600 members at some unspecified time, but fails to plead that API was authorized to act or did act on Apache's behalf, or that Apache had any ability to control API. Plaintiff has likewise failed to allege that Apache took any action in concert with API, and Plaintiff's omission of Apache from enumerated lists of actors contradicts claims of Apache's involvement in such conduct.

Plaintiff's nuisance and trespass claims fail, notwithstanding the recent *Monsanto* decision, because Plaintiff has not pleaded that Apache "participated to a substantial extent" in any deceptive marketing, which Plaintiff acknowledges is the

basis of its claims (JAB.1). *See State ex rel. Jennings v. Monsanto Co., Solutia, Inc.*, -- A.3d --, 2023 WL 4139127, at *2 (Del. 2023).

Likewise, Plaintiff's failure-to-warn claim fails because Plaintiff does not establish that Apache had any duty to warn consumers to whom it was not marketing products or that Apache had knowledge of the alleged dangers.

The claims against Apache should therefore be dismissed.

II.
ARGUMENT

A. The Complaint—Devoid of Allegations Specific to Apache—Does Not Put Apache on Notice of the Claims Against It.

There are no "detailed allegations about corporate misconduct by Apache" (AB.1) in Plaintiff's 217-page complaint, much less "short and plain" allegations that give Apache "fair notice of what the claim[s] [are] and the facts upon which [they] rest[]." *See Alston v. Admin. Off. of the Courts*, 2018 WL 1080606, at *1 (Del. Feb. 23, 2018). Although the Complaint attempts to link conduct and statements to other individual defendants, Plaintiff makes no attempt to do so for Apache. *See, e.g.*, ¶¶98, 111, 113, 116-121, 124, 171-201. The Complaint only states that Apache "is an oil and gas exploration and production company" and was, at some unidentified time, one of "more than 600 members" of API. ¶¶33(a), 37. Critically, despite Plaintiff's claim that its "case is about Defendants' [allegedly]

deceptive promotion of products in Delaware" (JAB.1), the Complaint does not allege that Apache made any statements to consumers at all.

Because Plaintiff fails to include any specific allegations about Apache, the Complaint does not satisfy Delaware Superior Court Civil Rules 8 or 9(b). *See* JOB.64-67; SB.8-12.[4]

B. Plaintiff's Attempted "Group Pleading" Fails as to Apache.

Plaintiff cannot cure its failure to make specific allegations against Apache by lumping it in with a group of "Fossil Fuel Defendants," because Plaintiff has not alleged that Apache participated in the alleged conduct of the "Fossil Fuel Defendants." *See infra* pp. 6-8; SB.5-6. For example, Plaintiff does not plead that Apache was among certain defendants that allegedly researched the effects of fossil fuels from the 1950s through 1990s. *See* ¶¶62-77, 81-90, 94-95. Nor does Plaintiff plead that Apache was involved in any alleged attempts to deny or deemphasize contemporary climate science. *See e.g.*, ¶¶111, 113, 117-120, 124. Lastly, Plaintiff does not plead that Apache was among the defendants that allegedly made any statements to consumers regarding fossil fuels. *E.g.*, ¶¶98, 116-17, 121, 171-201.

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[4] "JOB" refers to Defendants' Joint Opening Brief in Support of the Motion to Dismiss for Failure to State a Claim. "SB" refers to Defendant Apache Corporation's Supplemental Brief in Support of the Motion to Dismiss for Failure to State a Claim.

Plaintiff's silence regarding Apache stands in sharp contrast to its allegations specifically naming other defendants.

Delaware courts routinely dismiss claims resting on assertions that defendants acted as part of a group, where, as here, the complaint lacks allegations specifying defendants' involvement in the conduct underlying the claims. SB.8-12 (collecting authorities). Plaintiff's attempts to discount and distinguish these authorities are unpersuasive. For example, in *Pattern Energy*, the court dismissed claims where the plaintiff attempted to rely on group pleading and failed to allege what particular officers did to breach their fiduciary duties. *In re Pattern Energy Group Stockholder Litig.*, 2021 WL 1812674, at *69-70 (Del. Ch. May 6, 2021).[5] Contrary to Plaintiff's claims that breach of fiduciary duty claims involve "a heightened pleading standard" (AB.7), *Pattern Energy* dismissed under Rule 8's "reasonable conceivability" standard. 2021 WL 1812674, at *29. These cases are not an exception, but rather reflect that group pleading is "generally disfavored" in Delaware. *In re Swervepay*

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[5] The pleading standards applied in *Benzene Litig.* and *Hupan* were not, as Plaintiff maintains, limited to toxic tort cases and were instead based on Rule 8. *See In re Benzene Litig.*, 2007 WL 625054, at *8 (Del. Super. Ct. Feb. 26, 2007); *Hupan v. All. One Int'l Inc.*, 2015 WL 7776659, at *12 (Del. Super. Nov. 30, 2015). Moreover, even if courts reject group pleading in toxic tort cases because "harm may manifest years after the initial exposure, increasing the difficulty in determining which products or manufacturers caused the injury," those same "unique difficulties" are present here. AB.6. Plaintiff seeks to hold Apache liable for alleged conduct spanning many decades, and for harms that have still not fully materialized.

Acquisition, LLC, 2022 WL 3701723, at *9 (Del. Ch. Aug. 26, 2022) (dismissing group-pleaded allegations because "only the speaker who makes a false representation is, of course, accountable for it").

The cases Plaintiff relies on confirm the deficiency of its "group pleading" here. Plaintiff cites *Grant v. Turner*, 505 F. App'x 107, 112 (3d Cir. 2012) and *Swartz v. KPMG LLP*, 476 F.3d 756, 764 (9th Cir. 2007) for the proposition that a complaint need not always identify false statements made by each defendant. JAB.62-63; AB.3, 5-6. But those cases explain that, absent such identification, a plaintiff must "otherwise inject precision into the allegations by some alternative means" and notify defendants of the "precise misconduct with which they are charged." *Grant*, 505 F. App'x at 111; *Swartz*, 476 F.3d at 764-65 (noting a plaintiff cannot "merely lump multiple defendants together but [must] differentiate their allegations … and inform each defendant separately of the allegations surrounding his alleged participation") (internal quotation omitted). Both *Grant* and *Swartz* affirmed the dismissal of certain defendants because "plaintiffs have not specifically alleged how [those defendants] played a role in committing the predicate acts" attributed to the group. *Grant*, 505 F. App'x at 112; *Swartz* 476 F.3d at 765 (explaining "conclusory allegations … without any stated factual basis" that certain defendants acted with other defendants to whom "specific misconduct" was attributed failed to comply with Rule 9(b)). Plaintiff's pleading is similarly deficient

in this case—it does not specify what misconduct Apache allegedly engaged in to justify its inclusion in the group of "Fossil Fuel Defendants." This dearth of factual allegations does not meet even the "minimal threshold" of Rule 8(a), let alone Rule (9)(b). SB.8-12.

Plaintiff's reliance on *Purdue* is also misplaced. There, the State brought opioid-related claims against distributors, alleging that each distributor "distributed substantial amounts of prescription opioids" within Delaware and "failed to comply with its legal obligations concerning opioid diversion." *State ex rel. Jennings v. Purdue Pharma L.P.*, 2019 WL 446382, at *1 (Del. Super. Feb. 4, 2019); Complaint at ¶¶26-31, *Purdue*, No. N18C-01-223, 2019 WL 446382 (Dkt No. 7). Because the claims against the distributors did not turn on misrepresentations, the court rejected one distributor's argument that it was "improperly lump[ed]" together with other distributors as the complaint lacked allegations of specific misrepresentations or regulatory enforcements against that defendant, in contrast to others. *Purdue*, 2019 WL 446382, at *8. Though, "[a]t the pleading stage, a defendant in a group of similar defendants may attempt to distinguish its behavior from other defendants," the court found that the moving defendant failed to do so. *Id.*

Unlike in *Purdue*, Plaintiff does not provide any basis for Apache's inclusion in the group of "Fossil Fuel Defendants" that allegedly engaged in deceptive promotion. Whereas all distributors in *Purdue* were alleged to have engaged in the

underlying misconduct (*i.e.*, distribution and failure to comply with diversion obligations), Plaintiff does not satisfy the foundational pleading requirement of alleging that Apache engaged in the underlying misconduct. Further, the absence of allegations as to conduct of Apache specifically stands in stark contrast to the statements and conduct alleged as to other defendants.[6] Thus, there is a "meaningful and substantive distinction" between Apache and other "Fossil Fuel Defendants" that was absent in *Purdue*.[7] *See* 2019 WL 446382, at *8.

The Court should also reject the argument that Plaintiff is excused from pleading specific allegations against Apache because the Fossil Fuel Defendants' alleged concealment supposedly leaves Plaintiff unable to plead with specificity. AB.4-5. The Complaint contains numerous assertions that other defendants (although, again, not Apache) were involved in certain organizations' alleged misinformation campaigns. *E.g.*, ¶¶111, 122, 124, 135, 136. And Delaware courts "resist invitations to avoid early scrutiny of pleadings amidst promises that discovery will put flesh on the bare bones of a complaint" because "[p]rotracted discovery and

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[6] *See supra* pp. 3, 4.

[7] *River Valley v. American Protein* is also inapposite. *See* 2021 WL 598539 (Del. Super. Ct. Feb. 4, 2021). There, the claims provided defendants sufficient notice because the complaint contained "factual allegations of particular acts" and supported inferences that the defendants each engaged in wrongful conduct. *Id.* at *4-5.

extensive motion practice to ferret out those defendants who are not implicated in a given [controversy] are not acceptable substitutes for proper pleading." *In re Benzene Litig.*, 2007 WL 625054, at *8. Thus, Plaintiff cannot rely on speculation as to future discovery to cure its deficient pleading.

Given the complete absence of factual allegations about Apache's participation in the underlying alleged conduct, Plaintiff's claims against Apache should be dismissed.

C. The Complaint Contains No Allegations to Support Plaintiff's Attempt to Impute API's Conduct on to Apache.

In another effort to overcome its wholesale failure to allege that Apache engaged in any wrongful conduct, Plaintiff asserts that its allegations as to API can be imputed to Apache. Plaintiff is wrong. The only reference in the Complaint connecting Apache to API is the allegation that Apache (at some unspecified time) was one of more than 600 members of API. ¶37(e). Yet Plaintiff acknowledges as "unremarkable" the proposition that mere membership in a trade organization will not support liability for the organization's acts. *See* AB.18; SB.13-14. Because Plaintiff does not plead that Apache had any role with API beyond mere membership, Plaintiff's theory of liability fails.

i. Plaintiff has not alleged an agency relationship between API and Apache.

Plaintiff argues that API acted as an agent of Apache but fails to plead any facts supporting an agency relationship. Though Plaintiff suggests the question of agency is fact intensive, (AB.16), Delaware courts routinely dismiss agency-based claims at the pleading stage where, as here, plaintiffs fail to plead facts to support the necessary elements. *E.g.*, *Baccellieri v. HDM Furniture Indus., Inc.*, 2013 WL 1088338, at *3 (Del. Super. Ct. Feb. 28, 2013), *aff'd*, 74 A.3d 653 (Del. 2013) (dismissing agency claim where complaint was "devoid of any factual allegations" supporting agency relationship); *Albert v. Alex. Brown Mgmt. Servs., Inc.*, 2005 WL 2130607, at *10 (Del. Ch. Aug. 26, 2005); *IronRock Energy Corp. v. Pointe LNG, LLC*, 2021 WL 3503807, at *7 (Del. Super. Ct. July 19, 2021) (dismissing agency-based claim where plaintiff failed to plead facts supporting inference of control); *Tygon Peak Cap. Mgmt., LLC v. Mobile Invest. Investco, LLC*, 2022 WL 34688, at *14 (Del. Ch. Jan. 4, 2022) (same).

First, as Plaintiff admits, (AB.18), mere membership in API does not create an inference that Apache authorized API to act on its behalf. *See Albert*, 2005 WL 2130607, at *9-10. The Complaint does not otherwise state that Apache authorized API to act on its behalf, and so Plaintiff's claims fail to plead facts establishing authority. *See id.* at *10.

Second, Plaintiff does not allege that API ever acted "at the behest of" Apache. *See IronRock*, 2021 WL 3503807, at *7. The purportedly "wide range of examples of conduct API undertook on behalf of Fossil Fuel Defendants," (AB.15), does not allege any conduct undertaken on behalf of Apache specifically. Without such allegations, Plaintiff's "conclusory allegation is insufficient to withstand a motion to dismiss." *Baccellieri*, 2013 WL 1088338, at *4.

Third, Plaintiff does not allege that Apache at any time had the right to control API's conduct. Allegations that Defendants, including Apache, "employed and financed" API, (¶39), are insufficient to allege control. *See, e.g.*, *Neurvana Med., LLC v. Balt USA, LLC*, 2019 WL 4464268, at *8 (Del. Ch. Sept. 18, 2019) (financing an organization insufficient to establish control). Moreover, the Complaint describes how API was governed by certain Defendants (but not Apache). ¶37(e) (describing service by certain Defendants' officers on API's Board and/or Executive Committee).

Fourth, Plaintiff does not allege a relationship between Apache and API at the time API allegedly engaged in the complained-of conduct. SB.12-13. Each time Plaintiff lists defendants that were allegedly acting with API, Apache is conspicuously omitted. *E.g.*, ¶¶41-42, 63, 72, 78, 80, 90, 111, 117, 122, 124, 129-30. Moreover, contrary to Plaintiff's protests (AB.19), it is Plaintiff's burden to

plead that Apache was a member at the time an act occurred, and it has failed to do so.

ii. Plaintiff has not alleged that Apache acted in conspiracy with API.

The Complaint likewise does not plead facts supporting a civil conspiracy between Apache and API. SB.13-15. A claim of conspiracy to engage in negligent misrepresentations must be pleaded with particularity under Rule 9(b), and "where a pleading of fraud has at its core the charge that the defendant knew something, there must, at least, be sufficient well-pleaded facts from which it can reasonably be inferred that this 'something' was knowable and that the defendant was in a position to know it." *Trenwick Am. Litig. Tr. v. Ernst & Young, L.L.P.*, 906 A.2d 168, 207-08 (Del. Ch. 2006), *aff'd sub nom. Trenwick Am. Litig. Tr. v. Billett*, 931 A.2d 438 (Del. 2007). Again, the only specific allegation against Apache is its membership in API, which Plaintiff concedes is insufficient. AB.18.

D. The Complaint Fails to State Nuisance and Trespass Claims Against Apache.

Even under the recent *Monsanto* decision, Plaintiff still fails to plead sufficient allegations to state a nuisance or trespass claim against Apache. In *Monsanto*, the Court held that, "[f]or environmental public nuisance and trespass claims, the question is whether the defendant participated to a substantial extent in carrying out the activity that created the public nuisance or caused the trespass."

Monsanto, -- A.3d --, 2023 WL 4139127, at *2. The Court found this test satisfied by allegations that "for over forty years, ***Monsanto was the only U.S. manufacturer of … 'PCBs.'***" *Id.* at *1 (emphasis added); *see also id.* at *12. But here, Plaintiff does not plead that Apache participated in ***any*** deceptive marketing—let alone to "a substantial extent."

E. The Complaint Fails to State a Failure-to-Warn Claim Against Apache.

Apache cannot be liable for failure to warn because Apache is an exploration and production company that is not alleged to have marketed its products to consumers in Delaware or elsewhere. SB.17-18. Plaintiff's Answering Briefs are silent as to this glaring flaw in its Complaint. Indeed, Plaintiff has not cited any law that establishes a duty to warn in the absence of allegations that there was any marketing directly to consumers.

Additionally, Plaintiff does not deny that its Complaint fails to allege any specific knowledge of Apache's that would give rise to a duty to warn. In fact, Plaintiff acknowledges that there is no concurrent duty to warn where a purchaser has "equal knowledge" of the products' dangers. *See* JAB.42 (*citing Ramsey v. Ga. S. Univ. Advanced Dev. Ctr.*, 189 A.3d 1255, 1281 (Del. 2018)). As the Delaware Supreme Court explained in *Ramsey*, it would be "impractical, inefficient, and unfair" to impose a broad duty to warn on manufacturers where the purchaser has knowledge of the danger. 189 A.3d at 1281. Without allegations that Apache had

superior or non-public knowledge of the harms, Plaintiff cannot sustain a failure-to-warn claim against Apache. SB.18-19.

III.
CONCLUSION

Plaintiff's claims against Apache should be dismissed with prejudice.

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Dated: August 17, 2023

CERTIFICATE OF SERVICE

I hereby certify that on August 17, 2023, true and correct copies of *Apache Corporation's Reply Brief in Further Support of its Motion to Dismiss Plaintiff's Complaint for Failure to State a Claim* were served via File & Serve*Xpress* upon all counsel of record.

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