

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO**

MUNICIPALITY OF BAYAMON, et al.,

Plaintiffs,

-against-

EXXON MOBIL CORP., et al.,

Defendants.

Case No. 3:22-cv-01550-SCC

**DEFENDANT BHP GROUP LIMITED’S MOTION TO DISMISS FOR FAILURE TO
STATE A CLAIM**

TO THE HONORABLE COURT:

Defendant BHP Group Limited (“BHP”), through the undersigned counsel, and pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, hereby moves to dismiss the Complaint as to BHP for failure to state a claim.

INTRODUCTION

Plaintiffs’ Complaint fails to state a claim against BHP for all the reasons set forth in Defendants’ Joint Motion To Dismiss pursuant to Rule 12(b)(6). BHP writes separately to highlight additional reasons to dismiss the fraud-based and Racketeer Influenced and Corrupt Organizations Act (“RICO”) claims against it specifically. Plaintiffs have not satisfied the heightened pleading standard for fraud claims under Fed. R. Civ. P. 9(b), which requires Plaintiffs to “state with particularity the circumstances constituting fraud.” *First*, the Complaint does not identify a single false or misleading representation or omission ***made by BHP***; in fact it does not allege ***any*** statement made by BHP. *Second*, Plaintiffs’ RICO claims against BHP lack merit because the Complaint fails to allege that BHP conducted or participated in the conduct of a RICO enterprise or that BHP committed a single racketeering act, let alone that BHP joined a conspiracy

to violate the RICO statute. Accordingly, the claims against BHP should be dismissed for failure to state a claim.

FACTUAL BACKGROUND

BHP incorporates by reference the Factual Background section of BHP's Motion To Dismiss The Complaint For Lack of Personal Jurisdiction.

ARGUMENT

I. PLAINTIFFS' FRAUD AND RICO CLAIMS AGAINST BHP FAIL

All of Plaintiffs' claims should be dismissed pursuant to Rule 12(b)(6) for the reasons set forth in Defendants' Joint Motion To Dismiss in which BHP joins. BHP writes separately to highlight that, as to it, Plaintiffs have not satisfied the heightened pleading standard required for fraud claims under Rule 9(b), requiring Plaintiffs to "state with particularity the circumstances constituting fraud," nor have Plaintiffs alleged that BHP committed any racketeering acts or agreed to enter a conspiracy. So as not to burden the Court or Plaintiffs with duplicative briefs, BHP incorporates by reference Section I, Section II(A) of ExxonMobil's Supplemental Memorandum Of Law In Support Of Defendants' Motion To Dismiss For Failure To State A Claim, which sets forth the legal standards for asserting the claims alleged in the Complaint of: common-law consumer fraud, conspiracy to commit consumer fraud, violations of Puerto Rico Rule 7 Against Misleading Practices and Advertisements, Compl. ¶¶ 648–730; RICO claims predicated on mail and wire fraud, *id.* ¶¶ 731–766; and antitrust, nuisance, strict liability, negligence, and unjust-enrichment claims based in part on fraudulent concealment, *id.* ¶¶ 767–837. Because all these claims sound in fraud, Rule 9(b)'s heightened standard applies to all of them.

A. Plaintiffs Fail To Plead With Particularity That BHP Made Any False Or Misleading Representations Or Omissions

The Complaint alleges no facts supporting Plaintiffs’ fraud-based claims asserted against BHP. Indeed, Plaintiffs’ Complaint does not identify a single false or misleading representation made by BHP specifically. Plaintiffs instead rely on generalized allegations that do not specifically attribute any deception to BHP, *see, e.g.*, Compl. ¶ 6 (alleging that “[d]efendants funded a marketing campaign of deception”). This fails to meet the requirement that a complaint allege a defendant’s specific role in any fraud. *In re Fin. Oversight & Mgmt. Bd. for Puerto Rico*, 578 F. Supp. 3d 267, 285 (D.P.R. 2021) (“*FOMB*”), *aff’d*, 54 F.4th 42 (1st Cir. 2022). The very few BHP-specific paragraphs make no mention of any deception or false or misleading statements, and in fact do not allege any statements by BHP *at all*. There is no allegation of BHP making any statements about climate change or its effects, nor are there allegations of BHP marketing or promoting any fossil fuel products. In fact, the Complaint’s allegations about BHP actually relate to a different company, Cerrejón, of which the Complaint alleges BHP is only a 1/3 owner and which itself is not alleged to have made any challenged statements. Compl. ¶ 150. In sum, Plaintiffs have not alleged specific statements “presented to the public” that “were false or misleading at the time they were made,” and that BHP “knew [] were false or misleading,” in violation of Rule 9(b) and thus Plaintiffs’ fraud-based claims must be dismissed. *Suna v. Bailey Corp.*, 107 F.3d 64, 69 (1st Cir. 1997).

Plaintiffs similarly fail to plead any omission or concealment by BHP. Rule 9(b) applies to omissions, and requires a plaintiff to plead: “(1) precisely what was omitted; (2) who should have made a representation; (3) the content of the alleged omission and the manner in which the omission was misleading; and (4) what [the defendant] obtained as a consequence of the alleged fraud.” *Republic Bank & Tr. Co. v. Bear Stearns & Co.*, 683 F.3d 239, 256 (6th Cir. 2012). Again,

the BHP-specific paragraphs make no mention of any statement to any consumer in Puerto Rico, much less any statement in which a material fact or representation was omitted or concealed by BHP. And in any event, BHP had no cognizable duty to the residents of Puerto Rico to disclose information about climate risks. As the Complaint acknowledges, BHP was only a 1/3 owner of the Cerrejón mines, Compl. ¶ 148, and it was Cerrejón that in the past sold coal to consumers in Puerto Rico, not BHP. *Id.* ¶ 150. As an entity that did not sell coal to Puerto Rico, and had only a 1/3 interest in the entity that ultimately did sell coal, BHP could not have had any duty to consumers in Puerto Rico. *See Guevara v. Dorsey Lab’y, Div. of Sandoz, Inc.*, 845 F.2d 364, 366 (1st Cir. 1988) (applying Restatement (Second) Torts § 402A to explain the extent of a *seller’s* duty to warn). Here, BHP was not the seller, and as such, the duty to warn did not rest with BHP. But even if BHP’s indirect interest in Cerrejón was sufficient to give it a duty to Puerto Rican consumers, Plaintiffs are essentially seeking to impose a duty to warn the entire world of the risks of climate change. Compl. ¶ 355 (alleging a duty to warn “consumers, the public, and regulators”). No such duty to warn exists, particularly here where the climate risks of using fossil fuel have been known by the public for decades. *See, e.g., Id.* ¶ 305 n.295 (an American Institute of Physics website discussing “The Discovery of Global Warming” states: “In the early 1970s, the rise of environmentalism raised public doubts about the benefits of any human activity for the planet. Curiosity about climate change turned into anxious concern. A few degrees of warming no longer sounded benign, and as scientists looked into possible impacts they noticed alarming possibilities of rising sea levels and possible damage to agriculture.”); *see also Cruz-Vargas v. R.J. Reynolds Tobacco Co.*, 348 F.3d 271, 275 (1st Cir. 2003) (cannot hold a manufacturer liable for failure to warn of a danger commonly known to the public).

Moreover, any statements allegedly made by entities other than BHP cannot be attributed to BHP. The Complaint’s sole allegation with respect to BHP’s involvement in industry organizations is a general assertion that BHP was a member of the National Mining Association (“NMA”) and the Global Climate Coalition (“GCC”), Compl. ¶ 184 (though later in the Complaint Plaintiffs acknowledge that BHP was not a member of the GCC, Compl. ¶367). But the Complaint does not allege any role played by BHP in the conduct of the NMA, GCC, or other non-party organizations, nor does it allege that BHP participated in the dissemination of false or misleading statements by any industry association. Courts regularly decline to impose liability solely based on the fact that a defendant was a member of industry trade associations, contributed to them, or attended meetings. *See Taylor v. Airco, Inc.*, 503 F. Supp. 2d 432, 446–47 (D. Mass. 2007) (granting summary judgment where plaintiffs did “no more than offer evidence that individual defendant sent representatives to meetings”), *aff’d sub nom. Taylor v. Am. Chemistry Council*, 576 F.3d 16 (1st Cir. 2009); *Payton v. Abbott Labs*, 512 F. Supp. 1031, 1038 (D. Mass. 1981) (“There is nothing inherently wrong with membership in an industry-wide trade association [or] with participating in scientific conferences Indeed, these practices are probably common to most industries.”). Mere membership in certain industry organizations is not enough to state a claim against BHP, because a member of such a group “does not necessarily endorse everything done by that organization or its members.” *In re Asbestos School Litigation*, 46 F.3d 1284, 1290 (3d Cir. 1994); *see also In re Mun. Stormwater Pond*, 429 F. Supp. 3d 647, 655 (D. Minn. 2019) (dismissing complaint because “a trade association is not a ‘walking conspiracy’ of its members”), *appeals pending*, Nos. 21-3292 et al. (8th Cir.). BHP therefore cannot be held liable for the conduct of industry associations, non-parties, or co-defendants, and the Complaint’s bare-bones

allegation that BHP was merely a member of certain organizations, without more, is not enough to adequately plead liability for fraud under Rule 9(b).

B. Plaintiffs Fail To Plead That BHP Committed Racketeering Acts Or Entered Into Any Conspiracy

The Court should also dismiss Plaintiffs' RICO claims as against BHP. As set forth in the Joint Motion to Dismiss, Plaintiffs have not pled any of the essential elements of their RICO claims. BHP writes separately to highlight three of these elements. First, Plaintiffs have not tied BHP to any RICO enterprise. Second, Plaintiffs do not allege that BHP committed a single racketeering act, let alone "a pattern of racketeering activity," as required under 18 U.S.C. § 1962(a), (b), or (c). And finally, Plaintiffs' claim under 18 U.S.C. § 1962(d) must fail because the Complaint does not adequately allege that BHP was part of any conspiracy.

Plaintiffs attempt to plead against BHP RICO predicate offenses of mail fraud under 18 U.S.C. § 1341 and wire fraud under 18 U.S.C. § 1343. RICO Statement ¶ 8(b), (d). To start, Plaintiffs fail to allege facts supporting the inference that BHP "conducted" or "participated" in the conduct of a RICO enterprise. 18 U.S.C. § 1962(c). Mere membership in an alleged enterprise is not sufficient to show that BHP "conducted" or "participated" in the conduct of a RICO enterprise. *Reves v. Ernst & Young*, 507 U.S. 170, 177–85 (1993) (holding that liability under § 1962(c) requires "participat[ion] in the operation or management of the enterprise itself . . ."). Plaintiffs' sole allegation in support of BHP's participation in a RICO enterprise is that BHP was a member of the GCC and NMA. Compl. ¶ 184; RICO Statement ¶ 2(a). But as stated in *supra* Section I(A), the Complaint concedes that BHP was not a member of the GCC, and with respect to the NMA, the only allegation is that the NMA and its members actively funded the GCC. *Id.* ¶ 475. This shows no participation in the operation or management of the NMA or the GCC, and as such, the Complaint has failed to plead facts that BHP exercised control over any enterprise.

Plaintiffs have also not alleged any racketeering activity by BHP. The mail and wire fraud statutes, 18 U.S.C. §§ 1341 and 1343, require an allegation of a *specific* false or misleading statement as part of a scheme to obtain money or property. *See Ahmed v. Rosenblatt*, 118 F.3d 886, 889 (1st Cir. 1997) (holding that Rule 9(b) applies to “RICO pleadings of mail and wire fraud”). Plaintiffs do not allege that BHP made any specific false or misleading statements—let alone any statements at all—nor that they made “use of the mails or interstate wire communications in furtherance of [a] scheme” to defraud. *United States v. Sawyer*, 85 F.3d 713, 723 (1st Cir. 1996). Plaintiffs similarly allege no facts suggesting that BHP obtained any income from a pattern of racketeering activity. The Complaint therefore fails to state a claim under RICO’s substantive provisions.

Finally, Plaintiffs’ inability to allege that BHP committed racketeering predicate acts necessarily causes their RICO conspiracy claim under 18 U.S.C. § 1962(d) to fail as well. Plaintiffs have not pleaded that BHP “knowingly joined the conspiracy, agreeing with one or more coconspirators ‘to further [the] endeavor which, if completed, would satisfy all the elements of a substantive [RICO] offense.’” *United States v. Rodríguez-Torres*, 939 F.3d 16, 23–24 (1st Cir. 2019) (quoting *Salinas v. United States*, 522 U.S. 52, 65 (1997)). Although the Complaint makes conclusory statements regarding GCC, *see, e.g.*, Compl. ¶ 760 (stating generally that defendants formulated, funded and supported the GCC enterprise), this does not attribute any specific alleged conduct to BHP—Plaintiffs plead no facts from which you can even infer that BHP specifically agreed to anything at all with the other defendants.¹ Plaintiffs’ list of “predicate acts and material

¹ For the same reason as their RICO Claims, Plaintiffs’ Sherman Act antitrust claim also fails; namely, the Complaint contains no alleged facts specific to BHP regarding an agreement by BHP to restrict competition in violation of the Act. *See, e.g.*, Compl. ¶¶ 767–774; *see also In re Elevator Antitrust Litig.*, 502 F.3d 47, 50 (2^d Cir. 2007) (affirming dismissal of complaint for failure to allege “any specification of any particular activities by any particular defendant”).

misrepresentations” also does not include any specific alleged conduct by BHP. Compl. ¶ 733. Given that the allegations connecting BHP to GCC at most show an attenuated connection to an industry association that implicates no purported racketeering, let alone an intentional agreement or conspiracy to commit racketeering acts, Plaintiffs’ RICO claims must be dismissed.

II. CONCLUSION

For all the foregoing reasons and for the reasons stated in Defendants’ Joint Motion to Dismiss, Defendant BHP Group Limited respectfully requests that the Court dismiss the claims against BHP for failure to state a claim.

WE HEREBY CERTIFY that on this date, we electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to the case participants appearing in said system.

Dated: October 13, 2023
San Juan, Puerto Rico

Respectfully submitted,

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