UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

MUNICIPALITY OF BAYAMON, et al.

Plaintiffs,

v.

EXXON MOBIL CORP., et al.

Defendants.

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

EXXONMOBIL'S SUPPLEMENTAL MEMORANDUM OF LAW IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM

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Defendant Exxon Mobil Corporation ("ExxonMobil") submits this supplemental memorandum of law in further support of Defendants' motion to dismiss for failure to state a claim under Federal Rules of Civil Procedure 12(b)(6) and 9(b).[1]

PRELIMINARY STATEMENT

Plaintiffs' claims against ExxonMobil should be dismissed because they sound in fraud, but are not pleaded with the particularity that Federal Rule of Civil Procedure 9(b) requires.

Rule 9(b) imposes a heightened pleading standard for claims sounding in fraud. To satisfy Rule 9(b), a plaintiff must plead with particularity—for *each* alleged misrepresentation by *each* defendant—who made the misrepresentation, to whom it was made, when it was made, and its specific contents. Rule 9(b) also requires that a plaintiff allege with particularity its detrimental reliance on each purportedly misleading statement.

Plaintiffs' claims do not remotely satisfy this standard. Plaintiffs have cobbled together purportedly fraudulent statements that they attribute to ExxonMobil, but all of them were made far beyond Puerto Rico's borders and long ago. Among other fatal deficiencies, Plaintiffs have not alleged that a single allegedly fraudulent statement by ExxonMobil was made in Puerto Rico, directed at Puerto Rico, or even seen by Plaintiffs in Puerto Rico. Indeed, none of the allegedly deceptive statements that Plaintiffs identify have *any* nexus to Puerto Rico. It is therefore unsurprising that Plaintiffs have also failed to allege detrimental reliance on those statements.

To the extent Plaintiffs seek to hold ExxonMobil liable for statements allegedly made by others, they cannot do so consistent with Rule 9(b). Plaintiffs allege that "Defendants" are responsible for certain purportedly fraudulent conduct, but make no effort to differentiate between

[1] ExxonMobil has joined in Defendants' Joint Memorandum of Law in Support of Their Motion to Dismiss for Failure to State a Claim, and incorporates those arguments herein. In filing this brief, ExxonMobil does not waive, and expressly preserves, any right, defense, affirmative defense, or objection, including, without limitation, lack of personal jurisdiction.

Defendants. That plainly violates Rule 9(b)'s mandate that pleadings identify *each* alleged misrepresentation by *each* defendant. Further, Plaintiffs cannot impute statements by non-party "industry associations" to ExxonMobil because Plaintiffs have not pleaded the requisite connection between those statements and ExxonMobil.

Because Plaintiffs have failed to allege their claims against ExxonMobil with the particularity required by Rule 9(b), these claims must be dismissed.

I. LEGAL STANDARD

Federal Rule of Civil Procedure 9(b) provides that, "[i]n alleging fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake." Fed. R. Civ. P. 9(b). "Plaintiffs must comply with Rule 9(b) even if they do not explicitly claim fraud, but their allegations nonetheless sound like fraud." *Gonzalez-Camacho* v. *Banco Popular de P.R.*, 318 F. Supp. 3d 461, 481 (D.P.R. 2018); *see Mulder* v. *Kohl's Dep't Stores, Inc.*, 865 F.3d 17, 22 (1st Cir. 2017); *Garcia* v. *Carrión*, 2010 WL 3662593, at *7 (D.P.R. Aug. 11, 2010) (holding that Rule 9(b) applies if a claim either "explicitly alleges fraud" or "sounds in fraud").

Rule 9(b) imposes a "higher pleading standard" than Rule 8(a)'s notice-pleading standard. *Surén-Millán* v. *United States*, 38 F. Supp. 3d 208, 217 (D.P.R. 2013). To plead fraud with "particularity," as Rule 9(b) requires, a plaintiff "usually is expected to specify the who, what, where, and when of the allegedly false or fraudulent representation." *Alternative Sys. Concepts, Inc.* v. *Synopsys, Inc.*, 374 F.3d 23, 29 (1st Cir. 2004). Furthermore, where a plaintiff alleges multiple acts of fraud, multiple schemes, and/or multiple defendants, the complaint must detail with particularity *each* act of fraud, *each* scheme, and the role of *each* defendant therein. *See Emery* v. *Am. Gen. Fin.*, 71 F.3d 1343, 1348 (7th Cir. 1995); *In re Fin. Oversight & Mgmt. Bd. for P.R.*, 578 F. Supp. 3d 267, 285 (D.P.R. 2021); *Vázquez Lazo* v. *Emeterio Walker*, 2016 WL 8711710, at *2 (D.P.R. Sept. 30, 2016). "[M]ere allegations of fraud, corruption, or conspiracy, averments to conditions of mind, or

referrals to plans and schemes are too conclusional to satisfy the particularity requirement, no matter how many times those accusations are repeated." *Generadora de Electricidad del Caribe, Inc.* v. *Foster Wheeler Corp.*, 92 F. Supp. 2d 8, 18 (D.P.R. 2000).

Rule 9(b) "requires a complaint in an action based on fraud . . . to allege all the substantive elements of fraud." Wright & Miller, 5A Fed. Prac. & Proc. Civ. § 1297. That includes detrimental reliance, which "by definition, is one of the necessary elements of *any* fraud claim." *Cooperativa da Ahorro y Credito Aguada* v. *Kidder, Peabody & Co.*, 758 F. Supp. 64, 73 (D.P.R. 1991); *see Generadora de Electricidad*, 92 F. Supp. 2d at 20 (holding that "the concept of fraud which is present in Rule 9(b)" requires that plaintiff plead "detrimental reliance upon the representation by the person claiming to have been deceived"); *see, e.g.*, *Woods* v. *Wells Fargo Bank, N.A.*, 733 F.3d 349, 358 (1st Cir. 2013); *Juárez* v. *Select Portfolio Servicing, Inc.*, 708 F.3d 269, 280 (1st Cir. 2013).

II. ARGUMENT

A. Rule 9(b) Applies to Plaintiffs' Claims Against ExxonMobil.

All of Plaintiffs' claims must satisfy Rule 9(b)'s heightened pleading standard, because all "explicitly allege fraud" or "sound in fraud." *See Garcia*, 2010 WL 3662593, at *7. Plaintiffs' theory of liability rests almost entirely on allegations of fraud. Indeed, Plaintiffs use the word "fraud" in the Complaint nearly 60 times, and they announce on the very first page of the Complaint that they "seek to impose liability on Defendants *who misrepresented* the dangers of carbon-based products." Compl. ¶ 2 (emphasis added). In particular, Plaintiffs allege that, "[d]ecades ago," Defendants "obtained scientific information establishing that products they marketed and sold in Puerto Rico accelerated climate change," *id.*, and that Defendants "collude[d] by investing billions into a *fraudulent marketing scheme* to convince consumers that their fossil fuel-based products did not—and would not—alter the climate." *Id.* ¶ 6 (emphasis added); *see id.*

¶ 7(e) (accusing Defendants of "carefully crafted corporate subterfuge"). Plaintiffs further allege that Defendants implemented this fraudulent scheme through "front groups, dark money funding, and fringe scientists for hire." *Id.* ¶¶ 6, 7(c).

All of Plaintiffs' claims are based on this flawed theory of fraud. Plaintiffs' first three causes of action are for "common law consumer fraud"; "conspiracy to commit common law consumer fraud and deceptive business practices"; and "violations of Rule 7 of the Puerto Rico Rules Against Misleading Practices and Advertisements." *Id.* ¶¶ 648–730. Plaintiffs' claims under the Racketeer Influenced and Corrupt Organizations ("RICO") Act are premised on mail fraud and wire fraud. *See id.* ¶ 734. In fact, Plaintiffs rely on averments of fraud in pleading the elements of every cause of action in their Complaint. *See id.* ¶¶ 733, 743, 757 (RICO); ¶¶ 779, 825 (public and private nuisance); ¶ 773 (Sherman Act § 1); ¶ 793 (failure to warn); ¶¶ 804, 820 (design defect); ¶ 833 ("Restitution-Unjust Enrichment").

Courts routinely recognize that claims like Plaintiffs, which are premised on allegedly fraudulent conduct, are subject to Rule 9(b) without regard to whether plaintiff asserts standalone fraud claims. In *Garcia*, for example, plaintiffs asserted shareholder derivative claims against corporate board members, including for breach of the fiduciary duties of loyalty and care. 2010 WL 3662593, at *2. While breach of fiduciary duty is not an "explicit fraud claim," it rested on allegations that the board publicly offered stock pursuant to a false and misleading registration statement. *Id.* at *2, *7. Therefore, the court held, plaintiff's claims "sound[ed] in fraud," warranting Rule 9(b)'s application. *Id.* at *7. So, too, here. Some of Plaintiffs' claims *are* "explicit fraud claim[s]," *id.*: "Common Law Consumer Fraud," "Conspiracy to Commit Common Law Consumer Fraud and Deceptive Business Practices," and "Rule 7 of Puerto Rico Rules Against Misleading Practices and Advertisements." *Id.* ¶¶ 648–730; *see, e.g.*, *Rodríguez-Ortega*

v. *Philip Morris, Inc.*, 2005 WL 8168625, at *5 (D.P.R. Mar. 23, 2005) (applying Rule 9(b) to claims of "fraud, misrepresentation and/or deceit, concealment by omission"). But *all* of Plaintiffs' claims "sound in fraud," such that Rule 9(b) must apply. Each claim rests on Plaintiffs' allegation that ExxonMobil allegedly "deceived" Puerto Rico consumers about "the role of fossil fuel products in causing" climate change. Compl. ¶ 610; *see Ins. Brokerage Antitrust Litig.*, 618 F.3d 300, 347–48 (3d Cir. 2010) (Rule 9(b) pleading applies to Sherman Act claims sounding in fraud); *Feinstein* v. *RTC*, 942 F.2d 34, 42 (1st Cir. 1991) (Rule 9(b) applies to RICO claims that plead predicate acts of mail and wire fraud).

B. Plaintiffs' Allegations Against ExxonMobil Fail to Satisfy Rule 9(b).

Plaintiffs' allegations against ExxonMobil fail to meet Rule 9(b)'s stringent pleading requirements because the Complaint fails to identify *each* alleged misrepresentation by ExxonMobil, or who purportedly saw or relied on each statement to their detriment.

1. Plaintiffs Fail to Plead Any Alleged Misrepresentations Attributable to ExxonMobil with Particularity.

The Complaint identifies only the following purportedly misleading statements allegedly attributable to ExxonMobil, its predecessors, or affiliates:

- advertorials published in the *New York Times* by Mobil prior to 2000, and Exxon from 2000 to 2004, Compl. ¶¶ 402-03; RICO Case Statement Ex. M, N;[2]
- a 1996 corporate publication, published by Exxon in Texas, *id.* ¶¶ 397-400;
- a 1997 speech by Exxon's then-CEO in Beijing, China, *id.* ¶ 405;
- three advertisements by Mobil in *The New York Times* in 1997, *id.* ¶¶ 404, 409-10;
- a 1998 article by the CEO of Imperial Oil—a "smaller subsidiar[y]" of ExxonMobil, *id.* ¶ 72—published in the Imperial Oil Review, a publication for Imperial Oil's shareholders and employees, *id.* ¶ 425; and

[2] Exxon and Mobil merged in 1999.

- a 2007 Corporate Citizenship Report, published by ExxonMobil in Texas, *id.* ¶ 465.

Plaintiffs fail to plead these statements with the requisite particularity.

(a) Plaintiffs Fail to Allege Who Was Deceived by Any Statement.

Plaintiffs fail to allege with particularity who supposedly was deceived by *any* of the identified statements. Plaintiffs do not so much as identify anyone—in Puerto Rico or among Plaintiffs themselves—who saw, heard about, or were exposed to any of these statements, let alone were deceived by them. Rather, Plaintiffs only identify statements published in Texas, made in a single speech in China, circulated in national publications based in New York, and sent to investors and employees of a Canadian company. None are alleged to have been crafted for or directed at Puerto Rico. That alone requires dismissal of Plaintiffs' claims against ExxonMobil. *See Alternative Sys. Concepts*, 374 F.3d at 30 (explaining that Rule 9(b) requires plaintiff to allege "the who" of the allegedly false or fraudulent representation, and dismissing plaintiff's claims for failing to identify "to whom" the allegedly "misleading statements . . . were made"); *In re Fin. Oversight & Mgmt. Bd. for P.R.*, 578 F. Supp. 3d at 286 (dismissing fraud claims under Rule 9(b) where plaintiff alleged "that fraud occurred at unspecified meetings attended by unspecified individuals").

(b) Plaintiffs Fail to Allege Detrimental Reliance on Any Statement.

Because Plaintiffs fail to allege who in particular was deceived by any of the allegedly misleading statements, they similarly fail to allege who in particular detrimentally relied on any of those statements, one of the "necessary elements for *any* fraud claim." *Cooperativa da Ahorro y Credito Aguada*, 758 F. Supp. at 73. Under Plaintiffs' theory of liability, unspecified consumers in Puerto Rico, including Plaintiffs, used fossil fuels at levels beyond what they would have, absent Defendants' alleged deceptive statements. *See, e.g.*, Compl. ¶ 688 (alleging that Defendants

"promote[d] climate change denial and undermine[d] scientific consensus as a deceptive means to manipulate the Municipalities and their citizens into continuing to purchase their products and avoid the energy source alternative"). But Plaintiffs utterly fail to allege with any specificity who in particular supposedly relied to their detriment on the alleged misrepresentations. In fact, despite alleging, in conclusory fashion, that Defendants "marketed their campaign of deception in Puerto Rico" and that Plaintiffs "reasonably and justifiably relied on the Defendants' representations," *id.* ¶¶ 13, 666, the Complaint conspicuously fails to identify a single alleged misrepresentation that was prepared for or directed at Puerto Rico, or to plausibly allege that Plaintiffs actually saw or relied on any of the identified statements to their detriment. This deficiency also requires dismissal of Plaintiffs' claims against ExxonMobil. *See Woods*, 773 F.3d at 358 (affirming dismissal of a claim under Rule 9(b) where the complaint was "wholly silent on the issue of [plaintiff's] actual reliance"); *Juárez*, 708 F.3d at 280 (affirming dismissal of a claim of fraud based on wrongful foreclosure under Rule 9(b) for failure to specifically plead facts showing detrimental reliance). This deficiency is especially significant with respect to Plaintiffs' claims purportedly pleaded under Puerto Rico law, which necessarily applies only to conduct in Puerto Rico. *See Rodriguez-Navarro* v. *Am. Airlines, Inc.*, 2016 WL 4179884, at *3 n.7 (D.P.R. Aug. 4, 2016) ("Puerto Rico law does not apply extraterritorially."); *Goya de P.R., Inc.* v. *Rowland Coffee,* 206 F. Supp. 2d 211, 215 n.4 (D.P.R. 2002) ("It is well settled that Puerto Rico's laws cannot be interpreted to have an extraterritorial effect.").

At bottom, although Plaintiffs purport to assert claims against ExxonMobil in court in Puerto Rico, partially under Puerto Rico law, the only specific statements that the Complaint attributes to ExxonMobil were alleged to have been made long ago, far beyond Puerto Rico's shores.

2. Plaintiffs Impermissibly Allege Unattributed Statements to Defendants Collectively and Fail to Attribute Individually to ExxonMobil with the Required Particularity.

The Complaint's remaining allegations of fraudulent conduct fail because they are improperly attributed to "Defendants" collectively, or to third-party organizations. Such generalized allegations cannot be attributed to ExxonMobil consistent with Rule 9(b).

(a) Plaintiffs Rely on Impermissible Group Pleading.

The Complaint repeatedly refers to allegedly fraudulent conduct committed by "Defendants" collectively, without specifying, as Rule 9(b) requires, which of the nine remaining Defendants in particular is alleged to have engaged in the conduct, or differentiating between each Defendant's alleged role. For example, the Complaint alleges: "*Defendants* proclaimed that climate change was not a real, imminent threat." Compl. ¶ 7(a) (emphasis added); the "*Oil Defendants* embarked on a public relations campaign . . . to deceive the public about the science connecting global climate change to fossil fuel products and greenhouse gas emissions." *Id.* ¶ 372 (emphasis added). Which Defendants? Which statements? Plaintiffs nowhere "specify the who, what, where, and when of the allegedly false or fraudulent representation." *Alternative Sys. Concepts*, 374 F.3d at 29. These and similar allegations throughout the Complaint do not comport with Rule 9(b). "Where multiple defendants are asked to respond to allegations of fraud, the complaint must particularize *each defendant's* alleged participation in the fraud." *Vázquez Lazo*, 2016 WL 8711710, at *2 n.5 (emphasis added). Where, as here, Plaintiffs "group all of the Individual Defendants together generally without specifically referring to each one of them[,]" Rule 9(b) is unsatisfied. *Blue* v. *Doral Fin. Corp.*, 123 F. Supp. 3d 236, 271 (D.P.R. 2015). One of the primary purposes of Rule 9(b)'s particularity requirement is "to place defendants on notice and enable them to prepare meaningful responses[.]" *Cruz* v. *Caribbean Univ., Inc.*, 698 F. Supp. 2d 254, 260 (D.P.R. 2009). For ExxonMobil to prepare an effective defense to Plaintiffs' expansive and

amorphous claims of fraud and deception, it is entitled to—and must—know each supposedly deceptive act that Plaintiffs allege *it* has taken, and who is alleged to have been deceived by each act. *See Emery*, 71 F.3d at 1348.

(b) Plaintiffs Cannot Attribute the Statements of Third Parties to ExxonMobil.

Plaintiffs seek to hold Defendants, including ExxonMobil, responsible for statements made by various "fossil fuel industry associations" and other third parties, none of which Plaintiffs have named as parties. *See, e.g.*, Compl. ¶¶ 426–30, 453. But not "every action by a trade association is . . . concerted action by the association's members," *N. Am. Soccer League, LLC* v. *U.S. Soccer Fed'n, Inc.*, 883 F.3d 32, 40 (2d Cir. 2018), and "concerted action does not exist every time a trade association member speaks or acts[.]" *Alvord-Polk, Inc.* v. *F. Schumacher & Co.*, 37 F.3d 996, 1007 (3d Cir. 1994). Therefore, it is Plaintiffs' obligation, under Rule 9(b), to plead with particularly the connection between a defendant and the statement it seeks to impute to that defendant. *Southland Sec. Corp.* v. *INSpire Ins. Sols., Inc.*, 365 F.3d 353, 365 (5th Cir. 2004).

Plaintiffs have fallen far short of fulfilling that obligation. For example, Plaintiffs allege that ExxonMobil made contributions to various third parties, without plausibly pleading the timing, amount, and/or purpose of those contributions. *See, e.g.*, Compl. ¶ 426. They aver that ExxonMobil was a "member" of various organizations, without explaining what that "membership" consisted of. *See, e.g.*, *id.* ¶ 445(b). And they assert that ExxonMobil employees served for unspecified periods of time, in unspecified roles, on the boards of organizations, and "contributed" in unspecified ways to "the development" of the organizations' activities. *See, e.g.*, *id.* ¶¶ 417, 557. But none of that is enough to impute the alleged statements of these third parties to ExxonMobil. *See, e.g.*, *In re Asbestos Sch. Litig.*, 46 F.3d 1284, 1290 (3d Cir. 1994) (Alito, J.) (rejecting arguments that a defendant's donations to a third party and attendance at meetings held

by the third party were sufficient to establish a conspiracy); *In re Processed Egg Prods. Antitrust Litig.*, 821 F. Supp. 2d 709, 753 (E.D. Pa. 2011) (that the Egg Association, Egg Producers, and Egg Merchants "have overlapping members," and that Egg Association members may have attended Egg Producers and Egg Merchants meetings, or vice versa, "are not sufficient alone to plausibly suggest that" the Egg Association "participated in the conspiracy"); *Taylor* v. *Airco, Inc.*, 503 F. Supp. 2d 432, 446 (D. Mass. 2007) (refusing to impute organization's statements to members, even where members sent representatives and participated in drafting the allegedly misleading statements, where "no evidence of record indicate[d] to what extent each Defendant controlled the contents" of the organization's publication), *aff'd sub nom.*, 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."); *see also N.A.A.C.P.* v. *Claiborne Hardware Co.*, 458 U.S. 886, 890, 902, 919–920 (1982) (holding that the First Amendment barred Mississippi's imposition of tort liability on NAACP Field Secretary, Charles Evers, in connection with an NAACP boycott because "[c]ivil liability may not be imposed merely because an individual belonged to a group, some members of which committed acts of violence[; f]or liability to be imposed by reason of association alone, it is necessary to establish that the group itself possessed unlawful goals and that the individual held a specific intent to further those illegal aims").

CONCLUSION

Rule 9(b) requires Plaintiffs to plead their claims against ExxonMobil, all of which are premised on an alleged campaign of deception, with particularity. Among other things, Plaintiffs must specify *each* allegedly deceptive statement made by ExxonMobil, to whom those deceptive statements were made, and how anyone deceived by any such statements relied on them to their

detriment. Because Plaintiffs have failed to do so, their claims against ExxonMobil should be dismissed.

DATED: October 13, 2023

IT IS HEREBY CERTIFIED that on this same date, the undersigned counsel electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to all attorneys of record.

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