

**UNITED STATES DISTRICT COURT  
DISTRICT OF PUERTO RICO**

**MUNICIPALITY OF BAYAMON et al.,**

*Plaintiffs,*

v.

**EXXON MOBIL CORP. et al.,**

*Defendants.*

**Case No. 3:22-cv-01550-DRD**

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**DEFENDANT BP P.L.C.'S MOTION TO DISMISS THE COMPLAINT FOR FAILURE  
TO STATE A CLAIM**

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## **INTRODUCTION**

This Court should dismiss all of Plaintiffs’ claims against BP p.l.c. (“BP”) for the reasons set forth in Defendants’ Joint Opening Brief (the “Joint Br.”). BP writes separately to provide additional reasons to dismiss certain fraud (counts 1–3), failure-to-warn (count 10), and RICO (counts 4, 7) claims pleaded against it.

Plaintiffs, several Puerto Rico municipalities, seek damages allegedly sustained from hurricanes that happened in 2017. Compl. ¶ 43. The thrust of their theory is that “Defendants,” a select group of energy companies including BP, purportedly engaged in a “campaign of climate change denial” “to convince consumers that their fossil fuel-based products did not—and would not—alter the climate,” and that this supposed “campaign” prevented Plaintiffs from being “[p]repared for” the hurricanes and/or switching to “non-carbon-based energy sources.” *Id.* ¶¶ 2, 6, 10, 43, 626, 770. But, on the face of the Complaint, this theory crumbles as against BP. Not only do Plaintiffs fail to identify a single purported statement by BP that was part of this supposed “campaign,” they concede BP publicly recognized the link between fossil fuels and climate change decades before the hurricanes.

Indeed, Plaintiffs affirmatively plead that in 1997—twenty years before the hurricanes—BP’s then-chief executive publicly stated that “[t]here is now an effective consensus among the world’s leading scientists and serious and well-informed people . . . that there is a discernable human influence on the climate, and a link between the concentration of carbon dioxide and the increase in temperature.” *Id.* ¶ 616. As the Complaint notes, BP’s chief executive emphasized the “need . . . to take action” and warned that “[i]t would be unwise and potentially dangerous to ignore th[is] mounting concern.” *Id.* Then, in 1999—eighteen years before the hurricanes—BP echoed

these sentiments by publicly “discuss[ing] the need to convert our carbon-based energy economy into a hydrogen-based energy economy.” *See id.* ¶ 438.

In short, far from alleging that BP participated in a “campaign of climate change denial” that prevented them from being prepared for hurricanes in 2017 or switching to alternative energy sources, Plaintiffs allege precisely the opposite: that BP publicly acknowledged the risk of climate change and urged the need for alternative energy decades before the hurricanes. As such, claims against BP premised on Plaintiffs’ purported climate change denial theory must be dismissed. Those include Plaintiffs’ fraud (counts 1–3), failure-to-warn (count 10), and RICO (counts 4 & 7) causes of action. BP respectfully requests that the Court dismiss these claims.

### **LEGAL STANDARD**

A court must dismiss a complaint that fails to allege facts supporting a “plausible entitlement to relief.” *Velazquez-Ortiz v. Negron-Fernandez*, 174 F. Supp. 3d 653, 660 (D.P.R. 2016) (quoting *Sanchez v. Pereira-Castillo*, 590 F.3d 31, 41 (1st Cir. 2009)). Plaintiffs must do more than “merely parrot the elements of the cause of action.” *Id.* (quoting *Ocasio-Hernandez v. Fortuno-Burset*, 640 F.3d 1, 12 (1st Cir. 2011)). “A complaint that rests on bald assertions, unsupported conclusions, periphrastic circumlocutions, and the like will likely not survive a motion to dismiss.” *Niagara Bottling, LLC v. CCI Ltd. P’ship.*, 381 F. Supp. 3d 175, 181 (D.P.R. 2019) (internal quotations omitted). Where, as here, a suit makes fraud-based allegations, those allegations must be pleaded with particularity. Fed. R. Civ. P. 9(b); *see also P.R. Medical Emergency Grp. Inc. v. Iglesia Episcopal Puertorriqueña Inc.*, 118 F. Supp. 3d 447, 456 (D.P.R. 2015). This heightened pleading standard requires Plaintiffs to allege facts showing the time, place, and content of any purported false representation by BP. *Mulder v. Kohl’s Dep’t Stores, Inc.*, 865 F.3d 17, 21 (1st Cir. 2017).

## ARGUMENT

### **I. THE FRAUD CLAIMS FAIL BECAUSE PLAINTIFFS DO NOT IDENTIFY A SINGLE MISREPRESENTATION BY BP (Counts 1-3)**

Plaintiffs assert claims against BP for common-law consumer fraud (count 1), violations of Puerto Rico Rule 7 Against Misleading Practices and Advertisement (count 3), and conspiracy to commit common-law consumer fraud and deceptive business practices (count 2). None of these counts states a claim against BP.

*Common-Law Consumer Fraud* (count 1). To state a common-law fraud claim, Plaintiffs must allege facts sufficient to show that (1) BP made a false representation that (2) Plaintiffs reasonably relied on to their detriment. *See Wadsworth, Inc. v. Schwarz-Nin*, 951 F. Supp. 314, 323 (D.P.R. 1996). To survive a pleading challenge, Plaintiffs must allege these elements with particularity. *See, e.g., Mulder*, 865 F.3d at 21; Joint Br. Part IV.<sup>1</sup>

Plaintiffs come nowhere close to stating a claim against BP. Despite their book-length Complaint, Plaintiffs do not identify a single purported misrepresentation by BP—let alone one they relied on to their detriment. To the contrary, Plaintiffs admit that BP publicly recognized the link between fossil fuels and climate change some quarter century ago. Specifically, in 1997, long before the hurricanes giving rise to this action, BP’s then-chief executive publicly stated that “[t]here is now an effective consensus among the world’s leading scientists and serious and well-informed people . . . that there is a discernable human influence on the climate, and a link between the concentration of carbon dioxide and the increase in temperature.” Compl. ¶ 616. He emphasized the “need . . . to take action” and warned that “[i]t would be unwise and potentially dangerous to ignore th[is] mounting concern.” *Id.* Two years later, BP reiterated these sentiments by publicly

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<sup>1</sup> As noted in the Joint Brief, Puerto Rico law does not recognize the kind of consumer fraud action alleged by Plaintiffs. Joint Br. Part IV. But, even if it did, Plaintiffs would need to satisfy the elements of fraud, which they cannot do against BP.

“discuss[ing] the need to convert our carbon-based energy economy into a hydrogen-based energy economy.” *See id.* ¶ 438. In short, there is no dispute here: BP publicly acknowledged the risk of climate change and its link to fossil fuels decades before the 2017 hurricanes, foreclosing Plaintiffs’ common-law consumer fraud claim against BP.

Plaintiffs cannot walk back these dispositive allegations vis-à-vis BP by relying on blunderbuss accusations of fraud against “Defendants” *en masse*. *See Destfino v. Reiswig*, 630 F.3d 952, 958 (9th Cir. 2011) (Rule 9(b) “does not allow a complaint to . . . lump multiple defendants together but require[s] plaintiffs to differentiate their allegations when suing more than one defendant.”). Indeed, such “group” pleading is especially improper here because Plaintiffs, through their own allegations, have recognized BP as a company that publicly acknowledged the risk of climate change no later than 1997.<sup>2</sup>

In all events, the Court should dismiss the common-law consumer fraud claim against BP.

***Puerto Rico Rule 7 Against Misleading Practices and Advertisement*** (count 3). For the same reasons, Plaintiffs’ Rule 7 claim against BP fails. That Rule (renamed under the current iteration at Rule 14) prohibits “[f]alse or misleading ads or practices.” But the Complaint does not identify a single purportedly false or misleading statement by BP. In fact, Plaintiffs do not mention a single BP advertisement anywhere in the Complaint. The only BP statements Plaintiffs identify expressly acknowledge the risk of climate change and its link to fossil fuels. *See* Compl. ¶ 616; *see also id.* ¶ 438. The Court should therefore dismiss this claim too.<sup>3</sup>

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<sup>2</sup> Nor may Plaintiffs rely on alleged statements by *trade associations* to impose liability *on BP*. It is well-settled that a company’s mere membership in a trade association does not render it liable for every act of the association. Far more particularized (and Defendant-specific) allegations are required, including a particularized showing that *each* Defendant “held a specific intent to further” the alleged “illegal aims” of the trade association. *In re Asbestos School Litig.*, 46 F.3d 1284, 1289 (3d Cir. 1994).

<sup>3</sup> Moreover, as noted in the Joint Brief, Plaintiffs have no right of action under this Rule in any event. Joint Br. Part II.

***Conspiracy to Commit Common-Law Fraud and Deceptive Business Practices*** (count 2).

Because Plaintiffs’ underlying fraud claims (counts 1 and 3) fail, the conspiracy count must be dismissed. Conspiracy “is not in and of itself a civil wrong.” *Martinez v. Hernandez*, 330 F. Supp. 856, 858 (D.P.R. 1971), *aff’d*, 456 F.2d 262 (1st Cir. 1972). Absent an underlying fraud claim, the conspiracy count necessarily fails. *See id.*

**II. THE FAILURE-TO-WARN CLAIM FAILS BECAUSE PLAINTIFFS CONCEDE BP PUBLICLY WARNED OF THE RISKS OF CLIMATE CHANGE (Count 10)**

Plaintiffs’ failure-to-warn claim hinges on their generalized assertion that “Defendants” purportedly “refuted the generally accepted scientific knowledge at the time, and advanced pseudo-scientific theories of their own . . . that prevented . . . Puerto Rico . . . from recognizing the risk that fossil fuel products would cause grave climate changes,” Compl. ¶ 790, which in turn allegedly caused Plaintiffs to be “unprepared for” hurricanes in 2017, *id.* ¶ 626. But Plaintiffs’ own allegations lay bare that this theory cannot apply to BP. It is undisputed that BP publicly warned of the risks of climate change—including that “[i]t would be unwise and potentially dangerous to ignore the mounting concern” over “a link between the concentration of carbon dioxide and the increase in temperature”—twenty years before the 2017 hurricanes. *Id.* ¶ 616. It is likewise undisputed that just two years later, in 1999, BP publicly “discuss[ed] the need to convert our carbon-based energy economy into a hydrogen-based energy economy.” *Id.* ¶ 438.

Put simply, Plaintiffs do not allege facts sufficient to show that BP failed to warn them. To the contrary, they concede BP warned of the risks of climate change decades before the 2017 hurricanes. Thus, Plaintiffs fail to plead a viable failure-to-warn claim as to BP. *See, e.g., Prado Alvarez v. R.J. Reynolds Tobacco Co.*, 313 F. Supp. 2d 61, 75–76 (D.P.R. 2004) (“alleged failure to warn” must “proximately cause[] the . . . injuries”), *abrogated on other grounds by Portugues-Santana v. Rekomdiv Int’l*, 657 F.3d 56 (1st Cir. 2011); *see also* Joint Br. Part IV(C)(3) (explaining

Plaintiffs’ failure-to-warn claim fails against all Defendants because the risk of climate change was well known for decades).

### **III. THE RICO CLAIMS FAIL BECAUSE PLAINTIFFS DO NOT ALLEGE FACTS TYING BP TO ANY RICO ENTERPRISE OR CONSPIRACY (Counts 4 & 7)**

*RICO, 18 U.S.C. § 1962(c)* (count 4). Plaintiffs do not allege facts sufficient to show that BP participated in an enterprise “through a pattern of racketeering activity,” as required to state a claim under section 1962(c).

To survive a motion to dismiss, Plaintiffs must allege facts showing that (1) BP “conduct[ed] or participate[d] . . . in the conduct of” a RICO enterprise (2) “through” at least two distinct predicate acts enumerated in section 1961(1). 18 U.S.C. § 1962(c); *see also United States v. Nerone*, 563 F.2d 836, 851–52 (7th Cir. 1977) (dismissing RICO claim for failing to “attach significance to the use of the word ‘through’”). For the “conducted” element, mere membership in an alleged enterprise is not enough; liability is limited to those who exercised a managerial role in, or “directed,” the enterprise. *Reves v. Ernst & Young*, 507 U.S. 170, 177–85 (1993) (defining direction as “participat[ion] in the operation or management of the enterprise itself”). Importantly, “[t]he requirements of § 1962(c) must be established as to each individual defendant,” and “[t]he focus of § 1962(c) is on the individual patterns of racketeering engaged in by a defendant, rather than the collective activities of the members of the enterprise.” *Craig Outdoor Adver., Inc. v. Viacom Outdoor, Inc.*, 528 F.3d 1001, 1027–28 (8th Cir. 2008).

Here, Plaintiffs assert that “Defendants” participated in a single alleged enterprise, the Global Climate Coalition (“GCC”), through acts of mail and wire fraud. *See* Compl. ¶¶ 732, 734. Mail and wire fraud requires the following showing: (1) a plan or scheme to defraud; (2) intent to defraud; (3) reasonable foreseeability that the mail or wires will be used; and (4) actual use of the mail or wires to further the scheme. *Wisdom v. First Midwest Bank of Poplar Bluff*, 167 F.3d 402,

406 (8th Cir. 1999). “The elements of mail and wire fraud must be pled with particularity.” *Williams v. Affinion Grp., LLC*, 889 F.3d 116, 124 (2d Cir. 2018) (citing Fed. R. Civ. P. 9(b)).<sup>4</sup>

Plaintiffs do not identify a single predicate act of mail or wire fraud by BP in connection with GCC, let alone a “pattern” of such activity. Plaintiffs’ threadbare allegations about BP are limited to the following: (1) two BP predecessor entities, ARCO and Amoco, were members of GCC at some unspecified time; (2) BP was not a member of GCC after 1997 but provided funding to third parties that purportedly participated in GCC activities; and (3) BHP, a separately incorporated Defendant from which BP bought assets, was part of GCC’s purported “reorganiz[ation]” in 1992. *See* Compl. ¶¶ 114, 184(g), 367, 436, 439–40, 489, 542; Case Statement ¶ 9. That’s it. Put differently, Plaintiffs assert, in conclusory fashion, attenuated, indirect connections between BP and GCC—none of which constitutes mail or wire fraud, and none of which identifies a single act of purported racketeering by BP. Plaintiffs simply do not allege facts showing that BP had “intent” to defraud, nor that BP used the mail or wires at all. *Wisdom*, 167 F.3d at 402.

Nor do Plaintiffs allege facts showing that BP “directed” GCC’s affairs. *Reves*, 507 U.S. at 177–84. To the contrary, Plaintiffs allege tangential (at best) connections between BP and GCC that fall far short of establishing that BP directed GCC’s affairs. *See* Compl. ¶¶ 114, 184(g), 367; Case Statement ¶ 9. And for good reason: Plaintiffs admit BP withdrew from GCC after BP’s then-chief executive publicly acknowledged the link between fossil fuels and climate change in 1997, well before the majority of GCC’s purported wrongdoing allegedly occurred. *See* Compl. ¶¶ 436, 733(c)–(g).

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<sup>4</sup> While Plaintiffs broadly accuse “Defendants” of common-law and statutory fraud in their RICO statement, *see* Case Statement ¶¶ 2(h)–(k), these generalized assertions cannot form the basis of their RICO claim, especially as against BP. As a matter of law, alleged conduct that amounts to garden-variety state-law crimes, torts, and contract breaches does not constitute “racketeering activity.” *Annulli v. Panikkar*, 200 F.3d 189, 192 (3d Cir. 1999). Moreover, as noted, Plaintiffs do not identify a single purported fraudulent statement by BP in the Complaint.

Finally, Plaintiffs cannot save their RICO claim by pointing to BP's mere membership in the American Petroleum Institute (a trade association), which itself was an alleged member of GCC after 1998. *See id.* ¶¶ 436, 438. BP's membership in one organization, which was itself a member of a second organization, is insufficient to establish that BP "directed" the second organization for RICO purposes. *Reves*, 507 U.S. at 177–84. Moreover, this generalized allegation, like those discussed above, fails to identify any predicate acts of mail or wire fraud by BP because no use of the mail or wires is alleged against BP.

At bottom, Plaintiffs have not alleged facts showing that BP "participated" in the alleged RICO enterprise, foreclosing this claim.

***RICO, 18 U.S.C. § 1962(d)*** (count 7). Because Plaintiffs do not allege facts showing that BP conspired to violate the RICO statute, this claim must be dismissed.

"To establish a violation of section 1962(d), Plaintiffs must allege either an agreement that is a substantive violation of RICO or that the defendants agreed to commit, or participated in, a violation of two predicate offenses." *Howard v. Am. Online Inc.*, 208 F.3d 741, 751 (9th Cir. 2000) (citing 18 U.S.C. § 1962(d)); *see also Unites States v. Velázquez-Fontanez*, 6 F.4th 205, 212 (1st Cir. 2021). Plaintiffs do not allege these elements vis-à-vis BP.

Plaintiffs nowhere allege facts sufficient to show that BP entered into an agreement to commit acts of racketeering. A RICO conspiracy charge "requires the assent of each defendant who is charged," and there must be facts alleged showing "that the individual, by his words or actions, objectively manifested an agreement to participate, directly or indirectly, in the affairs of an enterprise, through the commission of two or more predicate crimes." *Baumer v. Pacht*, 8 F.3d 1341, 1346 (9th Cir. 1993) (citations omitted) (collecting cases). Here, Plaintiffs do not allege facts showing that BP "objectively manifested an agreement" to commit acts of racketeering. To

the contrary, they concede BP publicly acknowledged the link between fossil fuels and climate change decades ago. *See* Compl. ¶¶ 438, 616. Plaintiffs’ conclusory assertion that “Defendants agreed and conspired to violate” the RICO statute, *see id.* ¶ 760, does not aid them. *See Kufner v. Suttell*, No. 13-12864, 2016 WL 3636977, at \*6 (D. Mass. June 30, 2016) (“To state a claim of conspiracy, the complaint must set forth facts that suggest a conspiracy rather than set out conclusory allegations that the defendants made an unlawful agreement.” (citation omitted)).

Finally, because Plaintiffs do not allege facts sufficient to show that BP violated the RICO statute, their conspiracy theory necessarily fails. *See Efron v. Embassy Suites (Puerto Rico), Inc.*, 223 F.3d 12, 21 (1st Cir. 2000) (“[I]f the pleadings do not state a substantive RICO claim upon which relief may be granted, then the conspiracy claim also fails.”). As shown above and in the Joint Brief, Plaintiffs do not state any underlying RICO claim. *See* Joint Br. Part II. In short, count 7 does not state a claim against BP and must be dismissed.

### **CONCLUSION**

The Court should grant this motion and dismiss counts 1–4, 7, and 10 as against BP.

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