MAYOR AND CITY COUNCIL OF BALTIMORE, *Plaintiff,*	*	IN THE CIRCUIT COURT
v.	*	FOR
BP P.L.C., *et al.,*	*	BALTIMORE CITY
Defendants.	*	Case No. 24-C-18-004219

* * * * * * * * * * * * *

DEFENDANT CITGO PETROLEUM CORPORATION'S MEMORANDUM OF LAW IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED

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Defendant CITGO Petroleum Corporation ("CITGO") submits this Supplemental Brief in support of Defendants' Motion to Dismiss and incorporates by reference the statement of the case, statement of issues, and arguments set forth in Defendants' Joint Memorandum in Support of Motion to Dismiss for Failure to State a Claim Upon Which Relief Can Be Granted ("Joint Brief").

INTRODUCTION

Plaintiff's alleged injuries are the result of worldwide greenhouse-gas emissions by billions of third parties over the past century. But Plaintiff's Complaint does not target greenhouse-gas emitters. Instead, it seeks to hold a small handful of companies in the fossil-fuel chain of production liable for the impacts of global climate change. As the Joint Brief explains, Plaintiff's claims are hopelessly flawed because state law cannot regulate out-of-state emissions, the claims present non-justiciable political questions, and Plaintiff has failed to allege the essential elements of its claims. Indeed, it would be both hypocritical and unjust to hold oil and gas companies responsible for alleged downstream environmental impacts caused by the cumulative, worldwide use of lawful products that power the necessities and conveniences of modern life.

Plaintiff's theory as to why Maryland law should apply and why *these Defendants* should be held singularly responsible for the alleged consequences of global climate change is that Defendants allegedly engaged in "campaigns" to mislead the public. Compl. ¶ 6. For more than four years, Plaintiff has argued at every level of the federal courts that it does *not* seek to hold Defendants liable for their production and sale of fossil-fuel products or the emissions resulting from their use, but rather seeks to hold Defendants liable for their alleged *misrepresentations* about climate change and for *concealing* the risks of fossil-fuel use. In other words, Plaintiff contends that this case is fundamentally about what Defendants said and/or did not say.

Plaintiff's decision to base its various tort claims on this novel speech-based theory dooms

the Complaint as to CITGO because the Complaint does not allege that CITGO said *anything* about its products' connection to global climate change, much less that it made any *misrepresentations* that misled consumers. Nor has Plaintiff adequately alleged a factual basis for holding CITGO responsible for any alleged misstatement made by any other Defendant. Indeed, the Complaint is so devoid of facts as to CITGO that it fails not only to satisfy the particularity requirement for claims sounding in fraud but fails even to satisfy Maryland Rule 2-305's traditional pleading requirement.

The Complaint also falls well short of stating a claim against CITGO for failing to warn consumers about the alleged risks of global climate change. As the Joint Brief explains, Plaintiff's "failure to warn" theory is untenable because the risks of global climate change have been widely known and publicized for many decades. And beyond that, the Complaint does not allege that CITGO ever possessed special information about the risks of climate change that was unavailable to the public. In the absence of special knowledge, CITGO had no duty to warn the world about the potential environmental harms that could result from the use of its products.

Thus, even under Plaintiff's flawed speech-based theory of liability, the Complaint utterly fails to state a claim against CITGO.

BACKGROUND

Plaintiff's Complaint alleges that CITGO and twenty-five other Defendants have caused climate-change-related harms in Baltimore. The asserted theory of Plaintiff's case is that Defendants "have known for nearly a half century that unrestricted production and use of their fossil fuel products" would cause climate change but they:

> "nevertheless engaged in a coordinated, multi-front effort to conceal and deny their own knowledge of those threats, discredit the growing body of publicly available scientific evidence, and persistently create doubt in the minds of customers, consumers, regulators, the media, journalists, teachers, and the public about the reality and consequences of the

impacts of their fossil fuel pollution."

Compl. ¶ 1. The Complaint alleges that Defendants engaged in public campaigns to "deceive" the public about the danger of their products, *id.* ¶¶ 141–70. Each of Plaintiff's eight causes of action likewise accuses Defendants of misleading the public and concealing information about the risks of climate change. *See, e.g.*, *id.* ¶¶ 221(c), 233(e), 242, 254, 264(d), 275, 284, 295.

Yet, while the Complaint includes nearly 300 paragraphs of allegations, CITGO is individually mentioned in only *three* paragraphs. *Id.* ¶¶ 25, 31, 111. The bulk of those allegations appear in Paragraph 25, which identifies CITGO's ownership and states that it is incorporated in Delaware and headquartered in Houston, Texas. *Id.* ¶ 25(a). Subparts (b) and (c) allege that CITGO "controlled companywide decisions" "about the quantity and extent of fossil fuel production and sales" and decisions "related to . . . climate change and greenhouse gas emissions from its fossil fuel products." *Id.* ¶ 25(b)–(c). The Complaint is silent, however, about any decisions CITGO supposedly made related to those topics. Subpart (d) alleges that CITGO engages in the "refining, marketing, and transportation of petroleum products." *Id.* ¶ 25(d). Finally, subpart (e) alleges that a "substantial portion" of CITGO's fossil fuel products is "transported, traded, distributed, promoted, marketed, manufactured, sold, and/or consumed in Maryland." *Id.* ¶ 25(e).

Paragraph 31 alleges that CITGO was, at unspecified times, a member of the American Fuel and Petrochemical Manufacturers (AFPM) and the U.S. Oil & Gas Association (USOGA). *Id.* ¶ 31(c)–(d). Finally, Paragraph 111 alleges that CITGO's "predecessor[] in interest," "Cities Service," received a status report in 1972 regarding environmental research projects funded by the American Petroleum Institute, which "describ[ed] the impact of fossil fuel products . . . on the environment, including global warming and attendant consequences." *Id.* ¶ 111.

Defendants removed this case to federal court in 2018, arguing that Plaintiff's claims arise

under federal law because the Complaint asserts that Plaintiff's alleged injuries resulted from global climate change, which is allegedly caused by worldwide greenhouse-gas emissions. *See* Defs. Notice of Removal, *Mayor and City Council of Balt. v. BP P.L.C., et al.*, No. 1:18-cv-02357 (D. Md. July 31, 2018) (hereinafter, "D. Md. Action"), ECF No. 1. Notwithstanding these allegations—and many more that discuss the role of interstate emissions in causing Plaintiff's alleged injuries, *see, e.g.*, Compl. ¶¶ 36–58, 60–66, 69–73, 75, 78, 84–85—Plaintiff argued that its claims should be remanded because they are *not* based on Defendants' contribution to interstate emissions but rather are based on Defendants' alleged *misrepresentations* and *concealment*. For example, Plaintiff's remand motion argued that its injuries stem from "deliberate campaigns of misinformation that undermined public understanding of" the risks of climate change allegedly resulting from the use of Defendants' fossil-fuel products. D. Md. Action, ECF No. 111-1, at 15.

In the Fourth Circuit, Plaintiff again insisted that its "actual theory is that [Defendants] are liable for climate change-related harms caused by their *deliberate misrepresentation* of the climatic dangers of fossil fuels and their *misleading marketing* of those products." Pltf.-Appellee's Suppl. Br., *Mayor and City Council of Balt. v. BP P.L.C., et al.*, No. 19-1644, 2021 WL 4108598, at *8 (4th Cir. Sept. 7, 2021) (hereinafter, "Fourth Cir. Action") (emphasis added). That argument convinced the Fourth Circuit, which concluded that the "Complaint clearly seeks to challenge the promotion and sale of fossil-fuel products without warning and abetted by a sophisticated *disinformation campaign*." Fourth Cir. Action, 31 F.4th 178, 233–34 (4th Cir. 2022) (emphasis added). According to the Fourth Circuit, "fossil-fuel production . . . is not the source of tort liability." *Id.* Instead, "it is the *concealment and misrepresentation* of the products' known dangers—and the simultaneous promotion of their unrestrained use—that allegedly drove consumption, and thus greenhouse gas pollution, and thus climate change." *Id.* (emphasis added).

Most recently, in resisting Defendants' petition for certiorari, Plaintiff told the Supreme Court that "Baltimore's claims hinge on petitioners' *alleged misrepresentations* to consumers and the public." Br. for Respondent Mayor & City Council of Balt., *BP P.L.C., et al. v. Mayor and City Council of Balt.*, No. 22-361, 2022 WL 17852486, at *29 (S. Ct. Dec. 19, 2022) (emphasis added).

ARGUMENT

Because Plaintiff's alleged injuries are based on Defendants' purported contribution to worldwide greenhouse-gas emissions, Plaintiff's claims fail for the reasons set forth in the Joint Brief. But the Complaint would have to be dismissed as to CITGO even under Plaintiff's misrepresentation theory because it does not allege (i) that CITGO is responsible for *any* misrepresentations about the connection between oil and gas products and global climate change, or (ii) that CITGO had special knowledge that use of its products would likely contribute to climate change.

I. The Complaint Does Not Allege Any Actionable Misrepresentations About Climate Change Made By, or Attributable To, CITGO

Maryland courts have "long required parties to plead fraud with particularity," regardless of the specific cause of action asserted in the complaint. *McCormick v. Medtronic, Inc.*, 219 Md. App. 485, 527 (2014) (action under Consumer Protection Act predicated on misrepresentation must "allege fraud with particularity"); *Hosmane v. Univ. of Md.*, No. 354, 2019 WL 4567575, at *7 (Md. Ct. Spec. App. Sept. 20, 2019) (claim for intentional misrepresentation must meet the heightened pleading standard for fraud).

The particularity standard requires the plaintiff to identify "who made what false statement, when, and in what manner (i.e., orally, in writing, etc.); why the statement is false; and why a finder of fact would have reason to conclude that the defendant acted with scienter . . . and with the intention to persuade others to rely on the false statement." *Buckingham v. Fisher*, 223 Md.

App. 82, 91 (2015).

A. CITGO is not alleged to have said *anything* about its products' alleged connection to global climate change.

Nowhere in the three paragraphs that contain the word "CITGO" does Plaintiff allege that CITGO made any representations about its products or climate change, let alone misrepresentations. *See* Compl. ¶¶ 25, 31, 111. The absence of any such allegation alone warrants dismissal. *See Alleco Inc. v. Harry & Jeanette Weinberg Found., Inc.*, 340 Md. 176, 197–98 (1995) (affirming dismissal because "[n]owhere in the plaintiff's complaint is it alleged that [the defendant] made an actual misrepresentation to the plaintiffs."). Instead of specifically alleging what *CITGO* supposedly did wrong, the complaint vaguely alleges that "*Defendants* wrongfully and falsely promoted, campaigned against regulation of, and concealed the hazards of use of their fossil fuel products." Compl. ¶ 190 (emphasis added). But such conclusory allegations would be insufficient to state a misrepresentation claim even if they had been directed at CITGO. *See Antigua Condo. Ass'n v. Melba Invs. Atlantic, Inc.*, 307 Md. 700, 735 (1986) ("General or conclusory allegations of fraud are insufficient. A plaintiff must allege facts which indicate fraud or from which fraud is necessarily implied"); *RRC Ne., LLC v. BAA Maryland, Inc.*, 413 Md. 638, 644 (2010) ("The well-pleaded facts setting forth the cause of action must be pleaded with sufficient specificity; bald assertions and conclusory statements by the pleader will not suffice."). The purpose of the particularity requirement is to "give fair notice to a defendant of the substance of the charges," and simply slapping the adverbs "wrongfully" and "falsely" before a description of otherwise lawful conduct—promoting fossil-fuel products—does not put any Defendant on notice as to what it supposedly did wrong. 71 C.J.S. Pleading § 72 (footnotes omitted).

Moreover, Plaintiff cannot state a claim by lumping all "Defendants" together when alleging the "misleading" or "deceptive" conduct. *See, e.g.*, Compl. ¶¶ 102, 170, 295–97. On the

contrary, "[w]hen a complaint alleges fraud against multiple defendants, [the heightened pleading requirement] requires that the plaintiff identify *each defendant's* participation in the alleged fraud." *Haley v. Corcoran*, 659 F. Supp. 2d 714, 721 (D. Md. 2009) (emphasis added). Group pleading does not satisfy Maryland's particularity requirement because it "do[es] not inform each defendant of its role in the fraud." *Id.* (citation omitted). Because "the defendants are not fungible," the court "must examine what each is charged with doing or failing to do." *Wells v. State*, 100 Md. App. 693, 703 (1994). Such examination should result in dismissal here because the Complaint "never set forth any acts or omissions committed by" CITGO and instead "dumps" all defendants "into the same pot." *Heritage Harbour, LLC v. John J. Reynolds, Inc.*, 143 Md. App. 698, 711 (2002); *see also Edison Realty Co. v. Bauernschub*, 191 Md. 451, 461 (1948) (dismissing complaint that failed to allege any specific acts of fraud on the part of the individual defendant); *Adams v. NVR Homes, Inc.*, 193 F.R.D. 243, 250 (D. Md. 2000) ("A complaint fails to meet the particularity requirements [for fraud] when a plaintiff asserts merely conclusory allegations of fraud against multiple defendants without identifying each individual defendant's participation in the alleged fraud"); *Samuels v. Tschechtelin*, 135 Md. App. 483, 528–29 (2000).[1]

Given the dearth of allegations that CITGO made *any* statements about its products' connection to global climate change—much less any *misrepresentations*—the Complaint falls well short of the heightened pleading requirement that Maryland courts impose on complaints that sound in fraud. *See McCormick*, 219 Md. App. at 528. Indeed, the Complaint fails even to satisfy

[1] *Accord, e.g., Bank of Am., N.A. v. Knight*, 725 F.3d 815, 818 (7th Cir. 2013) (because "[e]ach defendant is entitled to know what he or she did that is asserted to be wrongful," a "complaint based on a theory of collective responsibility must be dismissed"); *In re Crude Oil Commodity Litig.*, No. 06 Civ. 6677(NRB), 2007 WL 1946553, at *6 (S.D.N.Y. June 28, 2007) ("In situations where multiple defendants are alleged to have committed fraud, the complaint must specifically allege the fraud perpetrated by each defendant, and 'lumping' all defendants together fails to satisfy the particularity requirement.").

the basic pleading requirements of Maryland Rule 2-305 because it lacks "a clear statement of the facts"—as opposed to unadorned conclusions—describing CITGO's allegedly wrongful conduct. *Margolis v. Sandy Spring Bank*, 221 Md. App. 703, 721–22 (2015) (construing Md. Rule 2-305).

B. The complaint does not allege any basis for attributing any statements made by other Defendants to CITGO.

The Complaint purports to allege misrepresentations about climate change by other Defendants, but those statements are not actionable—*see* Joint Br. at 49–53—and even if they were, Plaintiff does not allege any basis for attributing them to CITGO.

Although the Complaint alleges that CITGO was a member of AFPM and USOGA at unspecified times, Compl. ¶ 31(c)–(d), the Complaint does not allege that either of those trade associations made *any* representations (or misrepresentations). And in all events, it is well established that mere membership in a trade association is insufficient to give rise to an inference of a conspiracy. *See, e.g.*, *Maple Flooring Mfrs. Ass'n v. United States*, 268 U.S. 563, 584 (1925) ("We do not conceive that the members of trade associations become such conspirators merely because they gather and disseminate information"); *Rojas v. Delta Airlines, Inc.*, 425 F. Supp. 3d 524, 543 (D. Md. 2019) ("Defendants' membership in [a trade association] does not raise an inference of conspiracy on its own"); *accord Silkworth v. Cedar Hill Cemetery, Inc.*, 95 Md. App. 726 (1993) (per curiam) (affirming dismissal of conspiracy claims because the "complaint [was] devoid of factual allegations pointing to an actual agreement among appellees. Instead, appellant infers such an agreement from the similarity of business practices engaged in by all appellees and their common membership in a statewide trade association.").

Finally, the Complaint alleges that each Defendant was "the agent . . . of the remaining Defendants herein." Compl. ¶ 32. No facts support this conclusory allegation. Under Maryland law, a principal-agent relationship exists only if the principal has the "right to control the agent,"

Green v. H & R Block, Inc., 355 Md. 488, 503 (1999), and the Complaint does not allege that CITGO had the right to control the conduct of any trade association or Defendant. Nor does it allege that AFPM, USOGA, or any other Defendant agreed to act as an agent for CITGO.

In all events, even if the handful of statements by other Defendants and third parties identified in the Complaint could be attributed to CITGO, Plaintiff's claims are barred by Maryland's anti-SLAPP statute and the First Amendment because the statements involve speech on matters of public concern. *See generally* Chevron Anti-SLAPP Mot.

II. The Complaint Does Not Allege That CITGO Had Any Special Knowledge About Climate Change That Could Give Rise to a Duty to Warn

Plaintiff also purports to base its claims on the theory that Defendants had superior knowledge about the risks of climate change but willfully concealed this information from the public. As the Joint Brief explains, this claim fails because information about the risks of climate change have been publicly available for nearly half a century. Joint Br. at 45–46; *see also Figgie Int'l, Inc., Snorkel-Econ. Div. v. Tognocchi*, 96 Md. App. 228, 240 (1993) ("[I]n Maryland there is no duty to warn someone of an obvious danger or of a danger of which he is already aware"); *accord, e.g., Katz v. Arundel-Brooks Concrete Corp.*, 220 Md. 200, 204 (1959) (general public knowledge of the caustic qualities of cement meant that there was no special duty on the part of the seller to warn of such dangers). And Plaintiff's failure-to-warn theory is doubly deficient as to CITGO because the Complaint does not allege that CITGO had *any* knowledge about the potential dangers of climate change before such information was widely available to the public.

A supplier's duty to warn hinges on whether it "knows or has reason to know that the chattel is or is likely to be dangerous for the use for which it is supplied" and "has no reason to believe that those for whose use the chattel is supplied will realize its dangerous condition." *Eagle-Picher, Indus., Inc. v. Balbos*, 326 Md. 179, 198 n.9 (1992) (quoting Restatement (Second) of

Torts § 388 (1965)). Accordingly, when the supplier lacks actual or constructive knowledge of the potential harm, it has no duty to warn. Restatement (Second) of Torts § 388(a); *accord id.* § 394 (manufacturer of chattel has no duty to warn if it lacks knowledge or reason for knowledge of dangers). Here, the Complaint alleges no facts suggesting *that CITGO* had actual or constructive knowledge about the dangers of climate change or the role its products played in contributing to climate change before such knowledge became readily available to the public. The Complaint alleges that the dangers of climate change were publicly "confirmed" by at least 1988, and publicly known decades earlier. Compl. ¶ 143; *see also id.* ¶¶ 103–05, 129. But CITGO is not alleged to have conducted any research into climate change before that time (or ever).

And the blanket allegation that "Defendants knew or should have known" that fossil-fuel products cause climate change "based on information passed to them from their internal research divisions and affiliates and/or from the international scientific community," *see id.* ¶¶ 226, 239, 240, 262, 272, 273, is plainly insufficient because the Complaint does not allege any specific facts to support such allegations against CITGO. It does not allege that CITGO received any non-public information from the "international scientific community" (or anyone else) or allege any facts suggesting that CITGO had knowledge of the risks of climate change before 1988. To the extent CITGO learned about the risks of climate change from publicly available reports, it had access to no more information than Plaintiff about the possible consequences of fossil-fuel usage.

In short, the Complaint does not allege that CITGO had actual or constructive knowledge about the alleged connection between its products and climate change before such information was widely available. Accordingly, Plaintiff has not adequately alleged that CITGO had a duty to warn about the alleged risks of global climate change resulting from the use of its products.

CONCLUSION

For these reasons, Plaintiff's claims against CITGO should be dismissed with prejudice.

DATED: October 16, 2023

Respectfully submitted,

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I HEREBY CERTIFY that on this 16th day of October 2023, a copy of the foregoing Defendant CITGO Petroleum Corporation's Memorandum of Law in Support of Its Motion to Dismiss for Failure to State a Claim Upon Which Relief Can Be Granted, was served via email on the following:

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