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JERSEY; NEW JERSEY DEPARTMENT OF
ENVIRONMENTAL PROTECTION; AND
CARI FAIS, ACTING DIRECTOR OF THE
NEW JERSEY DIVISION OF CONSUMER
AFFAIRS,

Plaintiffs,

v.

EXXON MOBIL CORP., EXXONMOBIL
OIL CORP., ROYAL DUTCH SHELL PLC,
SHELL OIL COMPANY, BP P.L.C., BP
AMERICA INC., CHEVRON CORP.,
CHEVRON U.S.A. INC.,
CONOCOPHILLIPS, CONOCOPHILLIPS
COMPANY, PHILLIPS 66, PHILLIPS 66
COMPANY, and AMERICAN PETROLEUM
INSTITUTE,

Defendants.

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION: MERCER COUNTY

Docket No. MER-L-1797-22

CIVIL ACTION
CBLP ACTION

**BRIEF IN SUPPORT OF DEFENDANTS BP P.L.C. AND
BP AMERICA INC.'S MOTION TO DISMISS
PURSUANT TO RULES 4:6-2(E) AND 4:5-8(A)**

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INTRODUCTION

The Court should dismiss all of Plaintiffs' claims against BP p.l.c. and BP America Inc. (collectively, "BP") for the reasons in Defendants' Joint Opening Brief.¹ In addition, because Plaintiffs have failed to allege a single statement by BP denying the reality of climate change or the risks of fossil fuels—and instead concede that BP publicly acknowledged those risks more than 25 years ago—BP writes separately to request dismissal of Plaintiffs' claims against BP under the New Jersey Consumer Fraud Act ("CFA"), as well as all of Plaintiffs' other claims which are premised on BP's purported deception.

First, Plaintiffs' "climate denial" theory fails because Plaintiffs have not alleged *any* statements by BP denying the reality of climate change. To the contrary, Plaintiffs concede that BP publicly acknowledged the risks of climate change more than a quarter-century ago in 1997, when BP's former chief executive recognized the "effective consensus" that "there is a discernible human influence on the climate, and a link between the concentration of carbon dioxide and the increase in temperature." Compl. ¶ 152 (**Fishman Cert., Ex. 1**).

Second, none of the purported "greenwashing" statements that Plaintiffs attribute to BP are actionable statements of fact under New Jersey law. Rather, BP's alleged statements, including that BP is "working to make energy that's cleaner and better," *id.* ¶ 180, merely convey the company's goals and aspirations. Nor did BP make any such statements "in connection with the sale or advertisement of any merchandise," as is required to state a CFA claim. N.J. Stat. § 56:8-2.

¹ BP incorporates by reference herein the factual background set forth in Defendants' Joint Opening Brief.

Third, BP’s alleged statements regarding its Invigorate gasoline additive and BP Diesel fuel, which Plaintiffs allege “falsely convey to New Jersey consumers that the use of these products benefits the environment,” do not give rise to liability under the CFA or otherwise. Plaintiffs misrepresent BP’s statements as unqualified environmental benefit claims by selectively quoting only portions of them. Read in their entirety, however, BP’s statements are narrow, qualified descriptions of the products’ specific benefits—namely, that they improve engine health—the accuracy of which Plaintiffs do not dispute. Moreover, while Plaintiffs claim the statements are misleading because they do not mention the link between fossil fuels and climate change, Plaintiffs concede that the public has been aware of that link for more than three decades. Thus, Plaintiffs have failed to allege that BP omitted material facts in violation of the CFA or any other law.

LEGAL STANDARD

In reviewing a motion to dismiss for failure to state a claim pursuant to Rule 4:6-2(e), a court must evaluate the “legal sufficiency of the facts alleged on the face of the Complaint.” *Printing-Mart Morristown v. Sharp Elecs. Corp.*, 116 N.J. 739, 746 (1989). For a claim to survive, a plaintiff must allege the essential facts supporting the cause of action and may not rely on “conclusory allegations.” *Scheidt v. DRS Techns., Inc.*, 424 N.J. Super. 188, 193 (App. Div. 2012). A court “must dismiss the plaintiff’s complaint if it has failed to articulate a legal basis entitling plaintiff to relief.” *Sickles v. Cabot Corp.*, 379 N.J. Super. 100, 106 (App. Div. 2005).

Because “a claim under the CFA is essentially a fraud claim,” it must comply with the heightened pleading standard of Rule 4:5-8(a), which requires that “any complaint alleging fraud set forth the ‘particulars of the wrong, with dates and items if necessary, . . . insofar as practicable.’” *Hoffman v. Hampshire Labs, Inc.*, 405 N.J. Super. 105, 112 (App. Div. 2009) (quoting N.J. Ct. R. 4:5-8(a)); see also *Delaney v. First Hope Bank, N.A.*, No. A-4272-19, 2022

WL 38850, at *4 (N.J. Super. Ct. App. Div. Jan. 5, 2022) (**Fishman Cert., Ex. 3**). Failure to plead a CFA claim with the requisite particularity warrants dismissal. *Hoffman*, 405 N.J. Super. at 114.

ARGUMENT

I. Plaintiffs Have Not Alleged a Single “Climate Denial” Statement by BP

Plaintiffs allege that Defendants deceived the public by denying the reality of climate change. Yet the Complaint does not plead a single “climate denial” statement by BP. To the contrary, Plaintiffs specifically allege the opposite: that BP publicly acknowledged the risks of climate change more than three decades ago. For example, the Complaint concedes that BP warned the public of the potential hazards of climate change as far back as 1991, when it released a short film, “The Earth – What Makes Weather?” Compl. ¶ 92. That film disclosed that “dependence on carbon-based fuels is now a cause for concern” and that “climatic change is now one of our most urgent concerns.” *Id.* The Complaint also quotes a 1997 speech at Stanford University by BP’s then-chief executive recognizing that “there is now an effective consensus among the world’s leading scientists and serious and well informed people outside the scientific community 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.* ¶ 152. The speech further warned that “it would be unwise and potentially dangerous to ignore the mounting concern.” *Id.* In other words, far from denying the reality of climate change, BP publicly *acknowledged* climate change and its connection to fossil fuels decades ago. Accordingly, Plaintiffs have “failed to allege sufficient facts to state a claim” against BP based on a climate denial theory. *Hoffman*, 405 N.J. Super. at 114.

Plaintiffs cannot save their climate denial theory as to BP with generalized allegations that “Defendants” as an undifferentiated bloc engaged in a “sustained and widespread campaign of

denial and disinformation about the existence of climate change and their products' contribution to it." Compl. ¶ 103. Indeed, as the Appellate Division has held, that type of general allegation does not satisfy the particularity requirements of Rule 4:5-8(a). *See Mar Acquisition Grp., LLC v. Oparaji*, No. A-2160-21, 2023 WL 3032156, at *2–3 (N.J. Super. Ct. App. Div. Apr. 21, 2023) (affirming dismissal of fraud claims under Rule 4:5-8(a) because the plaintiff's "allegations combined several parties without explaining which party did what") (**Fishman Cert., Ex. 2**).² Nor can Plaintiffs' generalized allegations regarding all Defendants be squared with BP's statements recognizing climate change, which are quoted in the Complaint. *See* Compl. ¶ 152.

II. BP's Alleged "Greenwashing" Statements Are Not Actionable Statements of Fact

A. BP's At-Issue Statements Are Nonactionable Statements of Aspiration, Opinion, and Vague Optimism

Plaintiffs contend that Defendants engaged in "greenwashing" by "employing false and misleading advertising campaigns promoting themselves as sustainable energy companies committed to finding solutions to climate change." Compl. ¶ 159. This theory of liability, which undergirds each of Plaintiffs' claims, fails as to BP because the few statements Plaintiffs target are nonactionable statements of aspiration, opinion, or vague generality.

As the New Jersey Supreme Court has emphasized, "[n]ot just 'any erroneous statement' will constitute a misrepresentation prohibited by [the CFA]." *Gennari v. Weichert Co. Realtors*, 148 N.J. 582, 607 (1997). Rather, the misrepresentation must be "material to the transaction and...a statement of fact, found to be false, made to induce the buyer to make the purchase." *Id.*

² Plaintiffs' allegations regarding statements made by trade associations, *see, e.g.*, Compl. ¶¶ 119–30, fail to state a claim against BP because it is well settled that a company's mere membership does not render it liable for all statements made by such an association. The law requires far more particularized (and Defendant-specific) allegations, including that *each* Defendant "held a specific intent to further" the trade association's alleged "illegal aims." *See In re Asbestos Sch. Litig.*, 46 F.3d 1284, 1289 (3d Cir. 1994).

In applying that standard, New Jersey courts “recognize[] a distinction between misrepresentations of fact actionable under the CFA” and “mere puffery” that “will not support relief.” *Dabush v. Mercedes-Benz USA, LLC*, 378 N.J. Super. 105, 115 (App. Div. 2005). The Supreme Court and Appellate Division have made clear that CFA claims based on “nothing more than puffery” cannot withstand a motion to dismiss. *Rodio v. Smith*, 123 N.J. 345, 352 (1991); *New Jersey Citizen Action v. Schering-Plough Corp.*, 367 N.J. Super. 8, 13–14 (App. Div. 2003); *see also In re Toshiba Am. HD DVD Mktg. & Sales Pracs. Litig.*, Civ. No. 08-939 (DRD), 2009 WL 2940081, at *10 (D.N.J. Sept. 11, 2009) (granting motion to dismiss NJ CFA claim based on statements that are “too general, vague, or exaggerated to be anything more than puffery”) (**Fishman Cert., Ex. 4**); *Lieberson v. Johnson & Johnson Consumer Cos., Inc.*, 865 F. Supp. 2d 529, 540 (D.N.J. 2011) (“The distinguishing characteristics of puffery are vague, highly subjective claims as opposed to specific, detailed factual assertions.” (citations omitted)). Nor can a subjective statement on a “matter of opinion” support a CFA claim. *Toshiba*, 2009 WL 2940081, at *9.

Ignoring that caselaw entirely, Plaintiffs first allege that BP’s use of two taglines—“Beyond Petroleum” and “Possibilities Everywhere”—constituted “greenwashing” because they “falsely portrayed the company as heavily engaged in low-carbon energy sources.” Compl. ¶¶ 178–79. But those taglines are not “specific, detailed factual assertions” regarding the extent of BP’s financial investment in alternative energy. *Lieberson*, 865 F. Supp. 2d at 540. Rather, they are quintessential examples of nonactionable puffery, just like the tagline “You’re in good hands with Allstate” that the Supreme Court considered when affirming dismissal under the CFA in *Rodio*, 123 N.J. at 352. *See also Toshiba*, 2009 WL 2940081, at *9–10 (dismissing CFA claim because the tagline “For Today, Tomorrow and Beyond” was nonactionable puffery); *Schering-*

Plough, 367 N.J. Super. at 13–14 (affirming dismissal of CFA claim; “you . . . can lead a normal nearly symptom-free life again” was nonactionable puffery).

Second, Plaintiffs target three advertisements from BP’s “Possibilities Everywhere” campaign. The first advertisement, titled “[b]etter fuels to power your busy life,” consisted of several plainly nonactionable statements regarding (i) BP’s *opinion* that the world needs cleaner energy (“We want—and need—[] energy to be kinder to the planet”); (ii) BP’s *goals* and *aspirations* to deliver cleaner energy and lead the energy transition (“we’re working to make our energy cleaner and better”); and (iii) the existence of BP’s wind and solar businesses (“We’re bringing solar and wind energy to homes from the US to India”). *Id.* ¶ 180. Plaintiffs nevertheless contend that these statements were “materially false and misleading” because they amounted to a “claim that non-fossil energy systems constitute a substantial portion of BP’s business.” *Id.* ¶ 181. But the advertisement said absolutely nothing about the relative size of BP’s alternative energy and fossil fuel businesses, and it certainly did not make the “specific, detailed factual assertions” that New Jersey law requires. *Liebersohn*, 865 F. Supp. 2d at 540. Rather, BP’s statements were classic examples of “vague and general statements of optimism” that are not actionable. *City of Edinburgh*, 754 F.3d at 172; *see also Rodio*, 123 N.J. at 352; *Schering-Plough*, 367 N.J. Super. at 13–14; *Toshiba*, 2009 WL 2940081, at *10.

The second advertisement, titled “[b]lade runners,” stated that BP was “one of the major wind energy businesses in the US.” Compl. ¶ 181. Plaintiffs argue that this statement was false and misleading because “BP owns only approximately 1.7 gigawatts (‘GW’) of wind capacity,” which is “a mere 1% of the market.” *Id.* However, Plaintiffs’ allegation that BP controls 1% of the country’s wind capacity is consistent with the statement that BP was “*one* of the major wind energy businesses in the US.” *Id.* (emphasis added). BP did not claim to be the “largest” wind

energy business in the country, nor did it make any “specific, detailed factual assertions” regarding how many gigawatts of wind capacity it owned. *Lieberson*, 865 F. Supp. 2d at 540. BP’s statement that it was a “major” wind energy business is another clear example of nonactionable puffery. *See Rodio*, 123 N.J. at 352; *Schering-Plough*, 367 N.J. Super. at 13–14; *Toshiba*, 2009 WL 2940081, at *10.

The third advertisement Plaintiffs target, titled “Rise and Shine,” unremarkably described BP’s partnership with Lightsource—a solar power company—and highlighted two solar power projects in the United Kingdom. Compl. ¶ 183. The advertisement stated that “[p]rojects like these are advancing the possibilities of solar,” and “even rainy days can’t dampen the excitement for this fast-growing energy source” because “whatever the weather, our cleaner-burning natural gas can play a supporting role to still keep your kettle ready for action.” *Id.* Critically, Plaintiffs do not dispute the factual accuracy of those statements. Instead, they argue that the advertisement created the “overall impression” that “BP is substantially invested in solar energy, with its natural gas used only for backup,” when in reality “BP’s investments in natural gas outstrip its solar investments by a factor of approximately 100 or more, and only a small fraction of its natural gas products, an estimated 5% of less, are used to backup renewables.” *Id.* ¶ 184.

But the advertisement contained no claim that BP was “substantially invested in solar energy.” *Id.* ¶ 183. Nor did it contain any “specific, detailed factual assertions” regarding the relative size of BP’s solar and natural gas businesses or the extent to which BP’s natural gas products were used to back up renewable energy sources or for other purposes. *Lieberson*, 865 F. Supp. 2d at 540. Instead, BP’s statement that it was “advancing the possibilities of solar” is precisely the kind of “vague and general statement[] of optimism” that “constitute[s] no more than puffery.” *City of Edinburgh*, 754 F.3d at 172.

B. BP's Alleged Greenwashing Statements Were Not Made in Connection with the Sale or Advertisement of Any Merchandise

Plaintiffs' "greenwashing" theory against BP also fails for the independent reason that none of BP's alleged statements were made "in connection with the sale or advertisement of any merchandise," as the CFA requires. N.J. Stat. § 56:8-2. In fact, to state a claim under the CFA, "a plaintiff must allege the commission of a deception, fraud, misrepresentation, etc., 'in connection with' the sale of merchandise or services." *Castro v. NYT Television*, 370 N.J. Super. 282, 294 (App. Div. 2004); *see also Joe Hand Promotions, Inc. v. Mills*, 567 F. Supp. 2d 719, 723–24 (D.N.J. 2008).

Here, Plaintiffs have not alleged any such connection, nor could they. Aspirational statements about BP's efforts to contribute to the energy transition are not statements about "merchandise." And statements about BP's efforts to develop wind or solar energy do not address "merchandise" that Plaintiffs allege was offered for sale to the New Jersey public. Indeed, according to Plaintiffs, the only BP "merchandise" available in New Jersey are retail gasoline, engine lubricant, and motor oils. Compl. ¶ 25(i). Yet none of BP's purported "greenwashing" statements relate to the sale or advertisement of—or even mention—gasoline, lubricants, or motor oils, and none of the statements appeared on a product label or gas pump; nor were the statements otherwise made at the point of sale where consumers purchase those BP products. Because none of BP's alleged "greenwashing" statements were made "in connection with the sale or advertisement of any merchandise," Plaintiffs' CFA claim based on this theory fails against BP. *See Castro*, 370 N.J. Super. at 294–95; *Joe Hand*, 567 F. Supp. 2d at 723–24.

III. BP’s Alleged Statements Regarding Invigorate and BP Diesel Fail to Support a Claim

Plaintiffs erroneously allege that BP’s “promotional materials” for its Invigorate gasoline additive and BP Diesel fuel “falsely convey to New Jersey consumers that the use of these products benefits the environment.” Compl. ¶ 208. Plaintiffs fundamentally misrepresent the BP statements at issue through selective quotation. When BP’s statements are read in full (as shown in the chart below), it is apparent that they are not unqualified environmental benefit claims like “eco-friendly” or “green.” Indeed, none of the statements mention the environment or climate change *at all*. Rather, they are narrow, qualified statements regarding specific benefits of BP’s products—namely, that (i) Invigorate protects engines from dirt, which improves fuel economy, and (ii) BP Diesel contains a mix of low sulfur and additives that helps protect engines and results in reduced emissions.

Plaintiffs’ Allegation	Complete BP Statement ³
<p>“BP markets its Invigorate gasoline as a ‘cleaning agent that helps . . . give you more miles per tank,’ and ‘help[s] cars become clean, mean, driving machines.’”</p> <p>Compl. ¶ 208 (alteration in original).</p>	<p>“All grades of bp gasoline have Invigorate®—a <u>cleaning agent that helps defend your engine against dirt to give you more miles per tank.</u>”</p> <p>“<u>Helping cars become clean, mean, driving machines.</u> All grades of bp gasoline with Invigorate help: Get more miles per tank*; Provide instant engine protection*; Begin instant clean-up*; Begin to restore engine performance with the first tank.*”</p> <p>*Footnote: “Compared to minimum detergent gasoline. Requires continuous use over 5000 miles. Based on fleet testing representative of the U.S. car population. Fuel economy can be affected by many factors. Benefits may be more significant in older-model vehicles.”</p>

³ In reviewing a motion to dismiss, “a court may consider documents specifically referenced in the complaint,” even where “the complaint does not describe those documents in detail, [but] its provisions . . . reference them.” *Myska v. New Jersey Mfrs. Ins. Co.*, 440 N.J. Super. 458, 482 (App. Div. 2015) (citations omitted). Fishman Exhibits 5 and 6 are true and correct copies of BP’s *Fuels* webpage (archived May 18, 2022) and BP’s *FAQ* webpage (archived Oct. 7, 2022), each of which contains the language cited in the Complaint at ¶ 208.

Plaintiffs' Allegation	Complete BP Statement ³
	<p><i>*Footnote:</i> “Based on ASTM D6201 engine testing. Results begin with your first tank fill up.</p> <p><i>*Footnote:</i> “Driving performance resulting from engine cleanliness.”</p> <p>(BP <i>Fuels</i> webpage, archived May 18, 2022) (Fishman Cert., Ex. 5).</p>
<p>“BP describes [Invigorate] on its website as better than ‘ordinary fuels’ that have problems like ‘increased emissions.’”</p> <p>Compl. ¶ 216(a).</p>	<p>“A new and improved version of bp gasoline with Invigorate® was introduced in April 2016, and we’re proud to say this version is our best fuel ever—with versatility for both conventional port fuel injector engine technology, and emerging direct injection engine technology. It has 10 times <u>better</u> protection against intake valve deposits than <u>ordinary</u>, minimum-detergency <u>fuels</u>. Keeping intake valves clean is important because dirty deposits from ordinary fuels that form in engines can lead to a variety of <u>problems</u>—hesitation, rough starts, loss in fuel economy, and <u>increased emissions</u> to name a few. bp gasoline with Invigorate® not only helps prevent deposits from forming in the first place but can even help clean deposits left by minimum detergency fuels—giving drivers more miles with every tank.*”</p> <p><i>*Footnote:</i> “Ordinary Fuel refers to minimum detergency gasoline. Dirt refers to deposits on critical engine parts. Requires continuous use over 5000 miles. Restores an average of 3 - 5 miles per tank that had been lost due to deposits. Based on fleet testing representative of the U.S. car population. Fuel economy can be affected by many factors. Benefits may be more significant in older model vehicles.”</p> <p>(BP’s <i>FAQ</i> webpage, archived Oct. 7, 2022) (Fishman Cert., Ex. 6).</p>
<p>“BP markets . . . its BP Diesel as ‘a powerful, reliable, and efficient fuel made . . . to help reduce emissions.’”</p> <p>Compl. ¶ 208 (second alteration in original).</p>	<p>“bp Diesel® is a <u>powerful, reliable, and efficient fuel made with the perfect mix of low sulfur and additives to help reduce emissions and protect your engine.</u>”</p> <p><i>*Footnote:</i> “Compares diesel engine performance vs. a gasoline engine with similar displacement, and the higher torque and efficiency typical of a diesel engine. Refers to meeting the appropriate ASTM specifications for this fuel. Refers to modern technology incorporating newer diesel engines, advanced emissions after-treatment systems, and the ultra-low sulfur diesel that enables them to help lower harmful emissions.”</p> <p>(BP <i>Fuels</i> webpage, archived May 18, 2022) (Fishman Cert., Ex. 5).</p>

Importantly, Plaintiffs do not contend that any of these statements was false.⁴ Instead, Plaintiffs allege that BP’s statements “were misleading because they emphasize the fuels’ supposedly environmentally beneficial qualities without disclosing the key role fossil fuels play in causing climate change.” Compl. ¶ 209. However, Plaintiffs affirmatively plead that the link between fossil fuels and climate change has been public knowledge for decades:

- Compl. ¶ 58 (“By 1965, concern over the potential for fossil fuel products to cause disastrous global warming reached the highest levels of the United States’ scientific community”);
- Compl. ¶ 99(a) (“In 1988, [NASA] scientists confirmed that human activities were actually contributing to global warming,” and “presentation of this information to Congress engendered significant news coverage and publicity for the announcement, including coverage on the front page of The New York Times”);
- Compl. ¶ 99(d) (“In 1990, the IPCC published its First Assessment Report on anthropogenic climate change, which concluded that ... emissions from human activities are substantially increasing the atmospheric concentrations of the greenhouse gases”);
- Compl. ¶ 152 (describing a 1997 speech in which BP’s then-chief executive discussed the link between fossil fuels and climate change and acknowledged the “effective consensus” that there is “a discernible human influence on the climate”).

See also Defs.’ Joint Opening Br. at Section III.E.2. Because Plaintiffs’ own allegations make clear the allegedly omitted information was “well known,” Plaintiffs have failed to plead any actionable omission of “material fact.” N.J. Stat. § 56:8-2; *see Toshiba*, 2009 WL 2940081, at *12–13 (granting motion to dismiss NJ CFA claim as “def[ying] logic” where “Plaintiffs have failed to plead that the [allegedly omitted facts] were material facts because they were so well known”).

⁴ Similarly, Plaintiffs do not dispute the accuracy of a statement on BP’s website that the company’s fuel selection includes “a growing number of lower-carbon and carbon-neutral products,” Compl. ¶ 216(b), which is too general to support a CFA claim in any event.

CONCLUSION

Plaintiffs' claims against BP under the CFA, as well as all of Plaintiffs' other claims, are based on a theory that BP deceived consumers about the reality of climate change and the risks of fossil fuels. But Plaintiffs have not identified a single such deceptive statement by BP. Instead, Plaintiffs admit that BP publicly acknowledged the risks of climate change more than a quarter-century ago in 1997. The few other BP statements identified in the Complaint were true, statements of aspiration and opinion, and/or taken out of context by Plaintiffs. Therefore, all of Plaintiffs' claims against BP should be dismissed.

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