IN THE CIRCUIT COURT FOR BALTIMORE CITY

MAYOR AND CITY COUNCIL OF BALTIMORE, *Plaintiff*, vs. BP P.L.C., *et al.*, *Defendants*.	Civil Action No. 24-C-18-004219

SHELL PLC AND SHELL USA, INC.'S REPLY IN SUPPORT OF INDIVIDUAL MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM

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Plaintiff bases its claims on an alleged "massive campaign[]" to "promote the ever-increasing use of [fossil-fuel] products" and "conceal[] the dangers." Compl. ¶ 6. Yet the Opposition still does not identify any misleading statement or omission by Shell. Instead, Plaintiff resorts to group pleading and tries to hold Shell liable for membership in a trade association. This alone requires dismissal. But Plaintiff's claims also fail for lack of causation. Plaintiff's alleged causal chain—which attempts to connect mere speech to "localized climate change-related conditions" and "cascading social and economic impacts," *id.* ¶ 17—is among the most attenuated in the history of tort law. Such harms are not the foreseeable result of the alleged tortious conduct. Plaintiff does not and cannot adequately allege that Shell's *words* are a cause in fact or legal cause of its alleged injuries, so the Court should dismiss all the claims against Shell with prejudice.

A. Plaintiff Identifies No Deceptive Statement Or Omission By Shell

For many of the alleged Shell statements in the Complaint, Plaintiff has declined to argue why they are false or misleading. As for the 1994 report, Plaintiff ignores (at 2) its failure to allege three things necessary to allege it was false or misleading: (1) the report was public, (2) scientific uncertainty did not exist, and (3) countermeasures lack potential economic effects. *See* Mot. 3. Instead Plaintiff quotes (at 2) the statement that "[o]ther natural phenomena have been put forward as possible explanations." Plaintiff does not—and cannot—allege that selective quote is false.[1]

Plaintiff also has not alleged an actionable omission. Plaintiff's argument (at 3) that any duty to warn extends only to "foreseeable victims" of climate change would still create an

[1] As for the alleged misleading "public relations campaign" around the energy transition, Plaintiff does not identify (at 2) any specific statements or explain how they were misleading. Indeed, the only specific statement Plaintiff identifies is Shell's *public disclosure* that it did not have immediate plans to transition to net zero emissions. Plaintiff argues (at 2 n.5) that Shell must show "Maryland consumers were aware of" this disclosure. But the reasonable inference from Plaintiff's allegation that Shell made a public disclosure is that consumers were aware of that public disclosure. *See Green v. H&R Block, Inc.*, 355 Md. 488, 524 (1999) (dismissal is appropriate when the allegations "do not allow for a reasonable inference" that the statements were misleading). And any statement in 2016 is too recent to have changed Plaintiff's alleged climate-change-related injuries. *See infra* p. 4; *see also* Compl. ¶¶ 186, 196.

impermissible duty to the world. Plaintiff alleges (*see, e.g.*, Compl. ¶¶ 38, 44) climate change has global causes and impacts.[2] Plaintiff's argument (at 4) that Shell's warning (*i.e.*, the report and film) was inadequate also misses the point. Plaintiff failed to plead a failure-to-warn claim because its only specific allegation was that Shell, in fact, warned the public about climate change.

B. The Shell Defendants Are Not Liable For Statements By Others

Plaintiff's attempt to hold Shell liable for statements by API also fails. It does not explain (at 4) how it pled joint-and-several liability as to Shell. Plaintiff asserts (at 5), without any allegations of facts, that "Shell did more than merely 'belong to' API" (cleaned up). Plaintiff cites (at 4-5) external documents to argue that Shell Oil Company's presidents had leadership roles at API, but Plaintiff did not allege this in its Complaint. Even if the Court can take judicial notice of those documents and rely on allegations outside the Complaint,[3] having a leadership role is not a factual allegation of active participation in any *statements*. Plaintiff nowhere alleges Shell "inten[ded] to further" any wrongful conduct. *Cf.* Opp. 5 n.12; *In re Asbestos School Litig.*, 46 F.3d 1284, 1290 (3d Cir. 1994) (attending meetings insufficient because it did not show defendant "specifically intended to further any allegedly tortious" conduct).[4] At bottom, Plaintiff seeks to base liability on trade association membership, which courts consistently have rejected.

C. Plaintiff Fails To Allege Causation

Plaintiff acknowledges (at 5) that if "the facts admit of but one inference" the Court may appropriately resolve causation on a motion to dismiss. This is such a case.

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[2] Plaintiff has it backward in its attempts (at 3 n.7) to fault Shell for not showing that "risks of fossil fuels were well known to average Maryland consumers." Plaintiff had to allege that those risks were unknown. It did not. In fact, it alleged that the risks were reported widely, such as "on the front page of the New York Times." Compl. ¶ 143(a).

[3] *See, e.g.*, *State Farm Mut. Auto. Ins. v. Slade Healthcare, Inc.*, 381 F. Supp. 3d 536, 573 (D. Md. 2019); *Abrishamian v. Washington Med. Grp., P.C.*, 216 Md. App. 386, 414 (2014). Shell preserves all rights to challenge the documents.

[4] Plaintiff's attempt (at 5 n.12) to distinguish *In re Asbestos School Litigation* fails. It involved an "extraordinary" grant of mandamus, demonstrating that such a claim cannot proceed. 46 F.3d at 1288. Moreover, *Delaware v. BP America Inc.*, 2024 WL 98888, at *17 (Del. Super. Ct. Jan. 9, 2024), dismissed near-identical "claims alleging misrepresentations" for "fail[ure] to specifically identify" statements and relying on group pleading.

1. Plaintiff fails to plead factual causation because its Complaint lacks any allegation that Shell's words were a factual cause of its injuries. Conduct that is not a but-for cause is only a substantial factor if it is one of two or more separate forces each "sufficient" to bring about the injury. Restatement (Second) of Torts § 432 (1965). *See also* Mot. 5-6. The opinion in *Yonce v. SmithKline Beecham Clinical Laboratories, Inc.*, 111 Md. App. 124 (1996), does not help Plaintiff. There, it was "undisputed" that the injuries "would not have occurred but for the negligent act." *Id.* at 141. In other words, the defendants' conduct was a but-for cause of the injury and it did not matter whether it was sufficient. Here, Plaintiff does not—and cannot—allege that Shell's statements were a but-for cause. Plaintiff's claimed injuries allegedly arising from effects of global climate change would have been the same regardless of what Shell said. Because Shell's speech was not a but-for cause of Plaintiff's alleged injuries, Plaintiff must allege it was a sufficient cause of the injuries. But, as it implicitly acknowledges, Plaintiff does not and cannot meet that burden.[5]

Plaintiff does not address its failure to plead each link in the causal chain—merely asserting (at 6) that its "theory of cause-in-fact is straightforward." Plaintiff does not dispute that its alleged causal theory first requires that "consumers changed their behavior" because of Shell's statements. Mot. 6. Plaintiff points (at 8) to a conclusory allegation that "consumers" were "deceived" about the relationship between fossil-fuel combustion and climate change. But that is not a factual allegation that consumers *changed* their behavior due to Shell's statements, an allegation of how those consumers changed their behavior, or an allegation that net consumption would have decreased absent those statements. Moreover, Plaintiff does not allege how any statements changed government policies, national security demands, or hydrocarbon use worldwide, such that

[5] Even if Plaintiff could rely on the substantial-factor test without establishing that Shell's speech is a sufficient cause of its injuries, Plaintiff's causal chain fails because, for one, it relies on conclusory group pleading. It alleges only "that Shell's deceptive conduct, *in combination with other Defendants'*, is a substantial factor in causing the City's injuries." Opp. 1 (emphasis added). Plaintiff does not plead facts to attribute others' conduct to Shell. *See supra* p. 2.

its injuries would otherwise not have occurred. In short, Plaintiff alleges injuries due to undifferentiated greenhouse gas emissions from global fossil-fuel consumption that cannot be traced to any Shell statements. Compl. ¶¶ 8, 235; *see Native Vill. of Kivalina v. ExxonMobil Corp.*, 663 F. Supp. 2d 863, 880-81 (N.D. Cal. 2009) (dismissing similar claims).

2. Plaintiff also has not met its obligation to plead legal causation, because it relies on an attenuated chain of intermediate causes, which Plaintiff's counsel admitted contains at least seven links. *See* Mot. 2. Plaintiff admits (at 9) that there are "many intervening causes of [its] injuries," but it argues (at 8) that those links are not "*superseding* cause[s]" severing liability, because "Shell could have and did foresee the climatic harms of *its products' intended uses*" (at 6) (emphasis added); *see also* Opp. 7 (alleging knowledge of "the reasonably foreseeable hazards . . . of their fossil fuel products") (ellipsis in original). The relevant inquiry, though, is about Shell's speech, not the use of its products. Because Plaintiff's claims all rely on Shell's speech, the relevant foreseeability inquiry is whether the harms that Plaintiff alleges it has suffered were the foreseeable result of the challenged *speech*. Plaintiff has no response because it did not—and cannot—plead that its alleged injuries were the foreseeable result of Shell acknowledging in 1994 the potential "economic effects" of addressing climate change, issuing a 2016 "public relations campaign around energy transitions," or allegedly making any other statements.[6]

Fundamentally, attenuated causal chains do not support legal causation because there must be an "acceptable nexus" between the negligent conduct and the harm. *Stone*, 330 Md. at 341. Whereas *Yonce* held the limited "temporal and spatial chain" of a few weeks was "not so attenuated as to relieve . . . liability," 111 Md. App. at 142, *Stone* noted the delay of "almost a year" in holding

[6] Compl. ¶¶ 149, 186. Plaintiff's reliance (at 9) on dicta in *Stone v. Chicago Title Insurance. Co. of Maryland*, 330 Md. 329 (1993), fails for the same reason. There, if the plaintiff had disclosed the underlying facts, each link might have been foreseeable. Here, Plaintiff never alleges injuries were foreseeable from Shell's speech. And contrary to Plaintiff's suggestion (at 10 n.16), it was unforeseeable that *any* climate-change harms would result from mere speech.

there was no legal causation, 330 Md. at 341. Here, Plaintiff alleges a causal chain encompassing various conduct stretching across decades and around the world, and that is simply too remote.

3. Finally, after trying to fault Shell (at 9-10) for relying on Maryland cases dismissing claims for lack of causation involving different facts, Plaintiff fails to address the most analogous cases. *See* Mot. 9-10. Here, as in *Comer v. Murphy Oil USA, Inc.*, "[t]he assertion that [Shell's speech induced increased] emissions combin[ing] over a period of decades or centuries with other natural and man-made gases to cause or strengthen [weather events] is precisely the type of remote, improbable, and extraordinary occurrence that is excluded from liability." 839 F. Supp. 2d 849, 868 (S.D. Miss. 2012), *aff'd on other grounds*, 718 F.3d 460 (5th Cir. 2013). Plaintiff's attempts (at 10) to distinguish two other federal court cases dismissing analogous claims also fail. *First*, *Native Village of Kivalina*'s holding of no traceability under a standing inquiry is highly relevant to concluding no causation here because it held that traceability is a lower burden. 663 F. Supp. 2d at 878-80. *Second*, contrary to Plaintiff's insinuation, Shell did not argue that *City of New York v. Chevron Corp.*, 993 F.3d 81, 92 (2d Cir. 2021), addressed causation. But it recognized that claims for alleged injuries from global climate change seek damages for global conduct; emissions from any State "comingle in the atmosphere" and "may contribute no more to flooding in [that State] than emissions in China." *Id. Third*, Plaintiff's attempt to distinguish both cases as beginning with emissions and involving a *shorter* causal chain backfires. Both complaints similarly alleged a "campaign of deception."[7] And premising liability on deception that must precede emissions only makes the causal chain more attenuated. Indeed, Plaintiff never alleges its injuries were foreseeable from Shell's speech.[8] These federal cases are instructive. The Court should dismiss with prejudice.

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[7] Compl. ¶ 162, *Native Vill. of Kivalina v. ExxonMobil Corp.*, Dkt. 08-cv-1138, ECF 1 (N.D. Cal. Feb. 26, 2008); First Am. Compl. ¶¶ 6-7, *City of New York v. Chevron Corp.*, Dkt. 18-cv-182, ECF 80 (S.D.N.Y. Mar. 16, 2018).

[8] In any event, Plaintiff cannot have it both ways: It cannot rely on its deception allegations to distinguish its case and then ignore them when arguing that its injuries were a foreseeable result of *using* fossil fuels.

Dated: January 26, 2024

Respectfully submitted,

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REQUEST FOR HEARING

Pursuant to Maryland Rule 2-311(f), Shell respectfully requests a hearing on all issues raised in this Reply memorandum and the underlying Motion.

William N. Sinclair

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CERTIFICATE OF REDACTION

I HEREBY CERTIFY that this submission does not contain any restricted information OR, if it does, I have stated the reason and legal basis for including it and I have redacted and unredacted copies marked appropriately as required by Maryland Rule 20-201.

William N. Sinclair

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that, on this 26th day of January 2024, counsel in this matter have consented to service by email and that a copy of the foregoing Reply was emailed to all counsel of record in this matter.

William N. Sinclair

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