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Clerk
Circuit Court for Baltimore City
111 N. Calvert Street, Room 462
Baltimore, Maryland 21202

Re: *Mayor and City Council v. BP P.L.C., et al.*
Case No.: 24-C-18-004219

Dear Sir or Madam:

Enclosed for filing in the above-captioned case please find an original and one copy of a Reply Memorandum in Support of ConocoPhillips's, ConocoPhillips Company's, and Louisiana Land & Exploration Co., LLC's Motion to Dismiss for Failure to State a Claim Upon Which Relief Can Be Granted. Please file the original and date-stamp the copy and return it in enclosed self-addressed stamped envelope.

Thank you in advance for your assistance in this regard.

Very truly yours,

A handwritten signature in blue ink, appearing to read 'Will F. Kiniry, III', written over a horizontal line.

William F. Kiniry, III

WFK/ans

Enclosures
cc: All Counsel of Record (via e-mail)

**IN THE CIRCUIT COURT
FOR BALTIMORE CITY**

MAYOR AND CITY COUNCIL
OF BALTIMORE,

Plaintiff,

vs.

BP P.L.C., *et al.*,

Defendants.

Case No. 24-C-18-004219

**REPLY MEMORANDUM IN SUPPORT OF CONOCOPHILLIPS'S,
CONOCOPHILLIPS COMPANY'S, AND LOUISIANA LAND & EXPLORATION CO.,
LLC'S MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM
UPON WHICH RELIEF CAN BE GRANTED**

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INTRODUCTION

Plaintiff's Opposition confirms that the Complaint fails to state a claim against Defendants ConocoPhillips, ConocoPhillips Company, and Louisiana Land & Exploration Co., LLC (collectively, "COP"). Rather than defend the adequacy of any allegations with respect to COP itself, Plaintiff doubles down on the Complaint's flawed attempt to hold COP liable for the acts of others. The Complaint fails, however, to allege any basis for imputing the purported acts of others to COP, and Plaintiff's conclusory assertions that "Defendants" acted in concert are insufficient to state any claim against COP. The Complaint's complete lack of allegations of any fraudulent, deceptive, or misleading conduct by COP dooms each of Plaintiff's claims, regardless of the pleading standard applied. Plaintiff's failure-to-warn and tolling arguments are independently insufficient because, as Plaintiff does not deny, the public, including Plaintiff, has known of the climate risks associated with fossil fuel use since the 1960s. This Court should therefore dismiss all claims against COP.

ARGUMENT

I. Plaintiff's Opposition Confirms That Its Complaint Fails to Meet the Relevant Pleading Standards

Plaintiff's Opposition does not deny that the Complaint lacks any significant allegation of wrongful conduct by COP itself. Plaintiff gestures at general statements about COP's business that no reasonable consumer could find misleading (Pl. Mem. of Law in Opp'n to Defs.' Suppl. Mot. to Dismiss for Failure to State a Claim 2 ("Opp.")), but ultimately doubles down on its undifferentiated group allegations against "Defendants" without identifying any particular act by which COP can be liable for the alleged conduct of other Defendants (*id.* at 2–4). Plaintiff thus fails to establish the plausibility of its claims against COP under either the heightened standard applicable to fraud-based claims or Maryland's general pleading requirements. Finally, the new

allegations Plaintiff seeks to add through judicial notice, even were they properly considered, are still not enough to make out a claim against COP.

A. Plaintiff Fails to Show That It Has Pleaded Fraud Allegations Against COP with Sufficient Particularity

As Plaintiff concedes, Opp. 6-7, allegations of fraud must be pleaded with particularity. *McCormick v. Medtronic, Inc.*, 219 Md. App. 485, 527 (2014). Plaintiff contends that the heightened pleading standard applies only to its claim under Section 13-301(9) of the Maryland Consumer Protection Act (“MCPA”) and that, with respect to that claim, it has pleaded fraud with the requisite particularity.¹ Plaintiff is wrong on both points. (And, regardless of the pleading standard applied, all claims fail for the reasons stated *infra* Parts I.B–D, II & III)

First, Plaintiff’s public nuisance claim (Count I) must also be pleaded with particularity because fraud is undeniably “[t]he basis of ... the relief sought.” *Spangler v. Dan A. Sprosty Bag Co.*, 183 Md. 166, 173 (1944). Plaintiff concedes that the heightened pleading standard applies to its Section 13-301(9) claim because that claim is based on allegations of “COP’s deception with the *specific intent* to induce consumer reliance” (Opp. 7), but the same is true of Plaintiff’s public-nuisance allegations: Defendants “[a]ffirmatively and knowingly promot[ed]” their products which they “knew to be hazardous and knew” would lead to the alleged harms to Plaintiff, Compl. ¶ 221(b); “[a]ffirmatively and knowingly conceal[ed] the hazards ... by misrepresenting ... scientific information related to climate change,” *id.* ¶ 221(c); “[d]isseminat[ed] ... information intended to mislead customers, consumers, and regulators,” *id.*

¹ Despite the Complaint only stating MCPA claims under Sections 13-301(1) and 13-301(9), Plaintiff argues that the Complaint somehow should be read as implicitly stating a claim under Section 13-301(3), based on citations to scattered paragraphs from throughout the Complaint, none of which actually mentions Section 13-301(3). Opp. 7 n.9. That is improper. If Plaintiff wants to add claims to its Complaint, it must amend the Complaint.

¶ 221(d); and “[a]ffirmatively and knowingly campaign[ed] against the regulation of their fossil fuel products, despite knowing the hazards,” *id.* ¶ 221(e); *see also id.* ¶ 222.

Second, Plaintiff all but concedes it has not adequately pleaded fraud against COP directly. Plaintiff contends that its allegations are “more robust” and “detailed than those in *McCormick*” and “*Lloyd [v. General Motors Corp., 397 Md. 108 (2007).]*” Opp. 7-8. But Plaintiff points only to “particular misrepresentations *by API* that are” allegedly “attributable to COP.” Opp. 8 (emphasis added). That is insufficient to allege that “the defendant,” COP itself, “acted with scienter.” *McCormick*, 219 Md. App. at 528.

Plaintiff offers no response to COP’s showing (Defs. Suppl. Mot. to Dismiss for Failure to State a Claim upon Which Relief Can Be Granted 5-6 (“Opening Br.”)) that the sole statements the Complaint attributes to COP—drawn from COP’s 2012 Sustainable Development Report and SEC Form 10-K—are insufficient to allege fraud. Plaintiff’s footnote argument that these statements satisfy the generally applicable pleading standard (Opp. 2 n.1) does not support the Complaint’s adequacy under even that lower bar, let alone the heightened bar for fraud-based claims, because—as COP explained (Opening Br. 5-6)—there can be no “reasonable inference that a consumer would likely be deceived or misled” by the alleged statements. *Walton v. Network Sols.*, 221 Md. App. 656, 672 (2015). Plaintiff failed to explain how a reasonable consumer could be misled by the statements in the Sustainable Development Report and 2012 10-K filing.

B. Plaintiff’s Reliance on Undifferentiated Group Allegations Is Insufficient to State a Claim Against COP

As COP argued (Opening Br. 5-8), Plaintiff’s almost exclusive reliance on generalized allegations against undifferentiated “Defendants” is insufficient under Maryland’s general

pleading Rule 2-305. Plaintiff's response that generalized allegations that "each Defendant engaged in the same wrongful conduct" can satisfy the pleading requirements (Opp. 3-4) only begs the question: The Complaint does not explain how COP's conduct was "the same" as that of other Defendants. The paragraphs of the Complaint that Plaintiff cites *never once* mention COP. *See* Opp. 4 (citing Compl. ¶¶ 1, 6-7, 141-70, 295-96). Those paragraphs include allegations about *other* individual Defendants' conduct and the conduct of trade groups, such as API, but do not explain COP's involvement or participation in that conduct (beyond its mere membership in trade associations). *See* Compl. ¶¶ 148-62, 165, 167. Plaintiff's unelaborated assertion that COP's conduct was "the same" as that of other Defendants, without any factual allegations to support that inference, is precisely the kind of conclusory statement insufficient to survive a motion to dismiss. *See Heritage Harbour, LLC v. John J. Reynolds, Inc.*, 143 Md. App. 698, 711 (2002). The Complaint needed to, but did not, set forth "acts or omissions committed by [COP] that would serve as a basis for an imposition of liability," and instead impermissibly "dump[ed] ... all [defendants] into the same pot." *Id.*

C. API's Conduct Cannot Be Imputed to COP

Plaintiff contends that its effort to impose enormous financial liability on COP for the acts of a trade association (API) of which COP was a member does not "threaten to impair COP's associational rights because the City's claims target tortious conduct that API and COP undertook in concert, not COP's mere association with API." Opp. 5. But, again, the Complaint does not allege how COP acted in concert with API; the Complaint alleges nothing more than COP's association with API, which is not a sufficient basis for imputing API's conduct to COP. *See In re Asbestos Sch. Litig.*, 46 F.3d 1284, 1290 (3d Cir. 1994); *Santopietro v. Howell*, 73 F.4th 1016, 1025 (9th Cir. 2023).

Plaintiff cites (Opp. 4) *Consumer Protection Division v. Morgan*, 387 Md. 125, 177 (2005), for the unremarkable proposition that “‘true’ joint tortfeasors” that “act in concert” can be held jointly and severally liable. But *Morgan* requires Plaintiff to establish that “(1) the individual [defendant] participated directly in or had authority to control the deceptions or misrepresentations, and (2) the individual [defendant] had knowledge of the practices.” *Id.* at 176. Plaintiff makes no attempt to argue that the Complaint satisfies this test. Nor could it. As COP explained (Opening Br. 5), the Complaint alleges only that COP is a member of API, not that it participated in, had authority to control, or even had knowledge of alleged misrepresentations. *See Morgan*, 387 Md. at 176.

Plaintiff’s Opposition relies on bald assertions that do not differentiate between Defendants or indicate what each individual Defendants’ role in API was. Opp. 4 (citing Compl. ¶¶ 31, 147, 219, 242, 254, 275). For example, Paragraph 219 merely asserts: “Defendants, individually and in concert with each other, by their affirmative acts and omissions, have created, contributed to, and/or assisted in creating, conditions that significantly interfere with rights general to the public, including the public health, public safety, the public peace, the public comfort, and the public convenience.” That conclusory statement about “Defendants” does not inform COP of the basis for the claims against it specifically.

Imputing the actions of a trade association to each of its members without any further allegation of the defendant’s specific behavior is a direct attack on associational rights protected under the First Amendment and does not suffice to state a claim against the individual members—here COP.

D. Plaintiff's Request for Judicial Notice of Unpleaded Facts Does Not Save Plaintiff's Claims Against COP

Perhaps recognizing the infirmity of its claims against COP, Plaintiff's Opposition asks the Court to take judicial notice of unpleaded factual allegations regarding COP Chairman and CEO Ryan Lance's participation in API. *See* Opp. 5 nn. 5 & 6. Plaintiff's last-ditch effort to save its claims fails.

Mr. Lance's current service on API's Executive Committee and prior service as its chairman from 2016-17 do not bolster Plaintiff's claims against COP. Plaintiff still does not plausibly allege that COP, by virtue of Mr. Lance's service at API, participated in, controlled, or had knowledge of the alleged misrepresentations. Indeed, Plaintiff's invocation of unpleaded factual allegations regarding Mr. Lance's service with API in 2016-17 and today to somehow make COP liable for API's alleged conduct *in the 1990s*, years before Mr. Lance's positions with API, is devoid of both logic and merit. Opp. 5. These unpleaded facts do nothing to bolster the Complaint's failure to allege any details about COP's supposed role in API during the relevant time periods, including the 1990s.

II. Plaintiff's Fraudulent Concealment Arguments Are Insufficient to Render Its MCPA Claim Timely

Plaintiff confusingly argues that the MCPA's statute of limitations was tolled when COP failed to warn the public of risks of which the public was already aware. As explained in COP's Opening Brief (at 8), that is wrong.

First, the Complaint never alleges that COP, specifically, concealed anything from the public. Thus, Plaintiff fails to allege fraudulent concealment with the requisite particularity. *See Bacon v. Arey*, 203 Md. App. 606, 653 (2012). *Second*, Plaintiff's argument fails independently, because fraudulent concealment requires "specific allegations of how [defendant's alleged] fraud

kept the plaintiff in ignorance of a cause of action ... and why there was a delay in discovering the fraud.” *Id.* Here, Plaintiff’s MCPA claims are based on supposed misrepresentations and/or omissions regarding the “risks posed by [its] fossil fuel products.” Compl. ¶ 295. Even if Plaintiff had plausibly alleged that COP “conceal[ed] and misrepresent[ed] its products’ climatic dangers,” Opp. 10, the undisputed public knowledge regarding the climate-related risks associated with fossil-fuel combustion as early as 1965, *see* Compl. ¶¶ 103-105, means any such misrepresentations could not have kept Plaintiff in ignorance of its cause of action. The Superior Court of Delaware recently dismissed analogous Delaware state-law claims as time-barred on precisely these grounds. *See Delaware v. BP Am. Inc.*, 2024 WL 98888, *19 (Del. Super. Ct. Jan 9, 2024) (unpublished).² To the extent Plaintiff means to contend that there is some material (but unarticulated) distinction between public knowledge of the risks of climate change and knowledge that COP knew or should have known that its allegedly deceptive statements were deceptive, Plaintiff’s claims still fail because, at the very least, Plaintiff should have been aware of the basis for its claim as of 2012, when COP itself publicly acknowledged the connection between fossil-fuel consumption and climate change. *See* Compl. ¶ 185 n.213.

III. Plaintiff Cannot Establish a Duty to Warn

As COP explained (Opening Br. 9), Plaintiff has not plausibly alleged that COP had a duty to warn regarding the risks of climate change, because the Complaint fails to allege any special knowledge unique to COP and, indeed, Plaintiff’s own allegations show that the public was just as aware of the climate-related risks associated with fossil-fuel combustion as COP. Plaintiff responds primarily by pointing to its undifferentiated allegations regarding what

² The Delaware Rules, and thus Maryland Rules, permit citation of unpublished Delaware court decisions. *See* Del. Sup. Ct. R.(b)(vi)(B)(2); Md. Gen. Prov. 1-104(b).

“Defendants” knew, Opp. 8, but that fails for the reasons stated above, *see supra* Part I.B.

Plaintiff next points to a 1972 report from API “describing the global warming impacts of fossil fuel products,” Opp. 8, but that fails to identify knowledge of any “danger of which [Plaintiff] is [not] already aware,” *Figgie Int’l, Inc., Snorkel-Econ. Div. v. Tognocchi*, 96 Md. App. 228, 240 (1993), in light of the Complaint’s allegations that the public was aware of the climate-related risks associated with fossil-fuel combustion in the 1960s, *see* Compl. ¶¶ 103-105. Indeed, the Complaint alleges that public statements from President Johnson in 1965 “*put Defendants on notice* of the potentially substantial dangers ... of ... fossil fuel products.” *Id.* ¶ 104 (emphasis added). That is plainly inconsistent with any special knowledge on behalf of COP. Finally, Plaintiff contends (Opp. 9) that “Defendants’ deceptive tactics”—i.e., the alleged misrepresentations and omissions on which Plaintiff’s claims are based—somehow negate the public knowledge Plaintiff itself alleges. That circular reasoning cannot support Plaintiff’s claims; the requirement of special knowledge to establish a duty to warn would be meaningless if omissions by the Defendants (i.e., the alleged failures to warn) somehow removed publicly known risks from public knowledge. *Mazda Motor of Am. v. Rogowski*, 105 Md. App. 318, 327 (1995) (“There is no duty to warn on the part of a manufacturer or supplier of a product if the plaintiff knows, should know, or reasonably may be expected to know of a particular danger inherent in the product” (citation omitted)).

CONCLUSION

This Court should dismiss all claims against COP.

Dated: January 26, 2024

Respectfully submitted,



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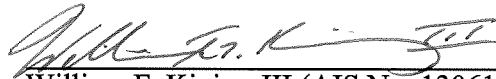
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 26th day of January 2024, a copy of the foregoing was served on all counsel of record via email.



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