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

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

DEFENDANT CITGO PETROLEUM CORPORATION'S REPLY IN SUPPORT OF ITS MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM

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INTRODUCTION

Plaintiff does not dispute that its Complaint fails to allege a single misrepresentation by CITGO. Given Plaintiff's insistence that its claims all turn on Defendants' alleged misrepresentations, that concession alone dooms its claims against CITGO. Plaintiff's fallback theory of liability—that CITGO can be held liable for the statements of API and other defendants based on "concert of action" principles—cannot save its misrepresentation-based claims because the Complaint fails to allege any facts suggesting that CITGO "actively participated" in the alleged misconduct of API or any other Defendant. Nor does the Complaint contain a single non-conclusory allegation suggesting that CITGO and API intended to enter an agency relationship. Plaintiff also points to its collective allegations against "Defendants," but group pleading cannot be squared with Maryland law, which prohibits a Plaintiff from lumping all Defendants together without identifying what *each Defendant* supposedly did wrong. These failures require dismissal of every claim grounded in alleged misrepresentations—including Plaintiff's claims for nuisance, trespass, and design defect. Indeed, earlier this month the Delaware Superior Court dismissed nearly identical climate-change claims asserted against CITGO sounding in fraud, including claims for nuisance and trespass. *See Delaware v. BP Am. Inc.*, C.A. No. N20C-09-097 MMJ CCLD, 2024 WL 98888, at *17, *24 (Del. Super. Ct. Jan. 9, 2024). This Court should do likewise.

Plaintiff's failure-to-warn claim also fails because, as Plaintiff concedes, there are no factual allegations that CITGO ever knew anything about the risk of climate change that the public (including Plaintiff) did not. If CITGO can be held liable for failing to warn about the alleged risks despite its lack of special knowledge, then so can myriad other companies that make products that run on fossil fuels, as all of those products likewise contribute to climate change every time they are used. The lack of any limiting principle for Plaintiff's failure-to-warn theory confirms that this

meritless claim should be dismissed.

ARGUMENT

I. Plaintiff's Claims Must Be Pleaded With Particularity

CITGO agrees that fraud is not a usually a "necessary element" of nuisance, trespass, design defect, or failure-to-warn claims. Opp. 8. Plaintiff, however, has deliberately made fraud the linchpin of its entire case, thereby inserting fraud as an element of *every* claim. As Plaintiff told the federal district court, "redressing the kinds of deceptive marketing and promotion campaigns Defendants undertook here" "favors state court jurisdiction." *Mayor & City Council of Balt. v. BP P.L.C., et al.*, No. 1:18-cv-02357-ELH (D. Md. Sept. 11, 2018), ECF No. 111-1, at 42.[1] Having convinced the federal courts to remand based on its repeated assertions that this case is fundamentally about alleged misrepresentations, Plaintiff is estopped from taking an inconsistent position here. *See Underwood-Gary v. Matthews*, 366 Md. 660, 667 n.6 (2001).[2] Indeed, Plaintiff is doubly barred from contending that its claims are not premised on fraud because its opposition to Defendants' joint motion to dismiss repeatedly avers that this case turns on Defendants' alleged misrepresentations. *See* Opp. to Defs.' Joint MTD at 4, 11, 14, 36, 37, 40, 45, 48, 50, 51, 55, 58–60.

As Plaintiff concedes, the particularity requirement applies whenever "a plaintiff seeks 'relief

[1] *See also Mayor & City Council of Balt. v. BP P.L.C., et al.*, No. 19-1644, 2019 WL 4073508, at *1, *4 (4th Cir. Aug. 27, 2019) (response brief); *BP P.L.C. v. Mayor & City Council of Balt., et al.*, No. 19-1189, 2020 WL 7634393, at *3 (U.S. Dec. 16, 2020) (respondent's brief).

[2] In the remand context, courts have held that "because judicial estoppel's purpose is to deter fraud in litigation, judicial estoppel should prevent a party from taking a position in state court counter to the position it used to obtain remand in federal court." *Harr v. Hayes*, 106 N.E.3d 515, 523 (Ind. Ct. App.), *opinion corrected on reh'g*, 108 N.E.3d 405 (Ind. Ct. App. 2018); *see also, e.g.*, *Rankin v. Am. Gen. Fin., Inc.*, 912 So. 2d 725, 729–30 (Miss. 2005); *Hayes v. USAA Cas. Ins. Co.*, No. 70735-3-I, 2015 WL 677143, at *8 (Wash. Ct. App. Feb. 17, 2015); *Cleveland Hous. Renewal Project, Inc. v. Wells Fargo Bank, N.A.*, 2010 Ohio 2351, ¶ 35.

on the ground of fraud.'" Opp. 7 (quoting *Thomas v. Nadel*, 427 Md. 441, 453 (2012)). Accordingly, because Plaintiff's claims all turn on Defendants' alleged deception, the Complaint must satisfy the heightened pleading requirement. *See Cozzarelli v. Inspire Pharms. Inc.*, 549 F.3d 618, 629 (4th Cir. 2008).[3] It does not come close to doing so.

II. The Complaint Alleges No Misrepresentations Attributable to CITGO

Despite grounding its claims in fraud, the Complaint does not contain a single non-conclusory allegation identifying CITGO's supposed misconduct. Plaintiff contends instead that CITGO can be held liable under a "concert-of-action" theory. Opp. 3–4 (citing *Consumer Protection Div. v. Morgan*, 387 Md. 125 (2005)). But the essential ingredient for such a claim, as Plaintiff concedes, is that the named defendant "actively participate[d] in the wrongful act," Opp. 4 (quoting *Morgan*, 387 Md. at 178),[4] and Plaintiff fails to identify any action CITGO supposedly took to further the alleged campaign of deception.

Plaintiff points to assertions that Defendants acted "individually and in concert with each other" in "knowingly promoting the sale and use of fossil fuel products [they] knew to be hazardous" and "[d]isseminating and funding the dissemination of information intended to mislead" consumers and others about climate risks. Opp. 4. But these "conclusory allegations of

[3] Plaintiff contends that particularity is not required because the Complaint vaguely cites Md. Code § 13-301(1) and (3), which do not require scienter and thus do not "replicate[] common-law fraud." Opp. 8 (quoting *McCormick v. Medtronic, Inc.*, 219 Md. App. 485, 493 (2014)). But Plaintiff has insisted that the gravamen of its case is that Defendants *knowingly misrepresented* the connection between their products and climate change, which would be actionable (if at all) under Md. Code § 13-301(9), which *does* replicate common-law fraud and thus must be pleaded with particularity. *McCormick*, 219 Md. App. at 493; *see also* Compl. ¶ 292 (citing Md. Code § 13-301(9)).

[4] A defendant may be held liable for another's conduct when it "(a) *does a tortious act* in concert with the other or pursuant to a common design with him, or (b) knows that the other's conduct constitutes a breach of duty and *gives substantial assistance or encouragement* to the other so to conduct himself, or (c) gives substantial assistance to the other in accomplishing a tortious result *and his own conduct, separately considered, constitutes a breach of duty to the third person*." *Morgan*, 387 Md. at 184–85 (emphasis added) (quoting Restatement (Second) of Torts § 876).

fraud" do not apprise CITGO of *its* alleged role in the campaign and are plainly insufficient to state a claim under Maryland law. *Antigua Condo. Ass'n v. Melba Invs. Atl., Inc.*, 307 Md. 700, 735 (1986).

Plaintiff also points to conclusory statements that CITGO acted "in concert with other Defendants" through the API industry group. Opp. 4. But even under Rule 2-305's more liberal pleading standard, such "[b]ald assertions and conclusory statements by the pleader will not suffice." *Bobo v. State*, 346 Md. 706, 708–09 (1997); *Margolis v. Sandy Spring Bank*, 221 Md. App. 703, 713 (2015) ("A court … need not accept the truth of pure legal conclusions"). Plaintiff contends that CITGO "participated in API's misleading messaging through its executives' involvement on API's Board," Opp. 5, but neither the Complaint nor the documents Plaintiff improperly attaches to its Opposition alleges that anyone from CITGO was involved in API's "messaging" decisions—or that anyone from CITGO was even on API's Board when any purported misrepresentation was made.[5] The bare allegation that CITGO was a member of API or served on its board is "not [be] enough, standing alone, to provide the 'plus factors' needed to allege a conspiracy." *PharmacyChecker.com, LLC v. Nat'l Ass'n of Bds. of Pharm.*, 530 F. Supp.

[5] Tellingly, the Complaint does not allege that CITGO was even a *member* of API, much less that CITGO enjoyed a seat on API's board. *See* Compl. ¶ 31(a) (alleging six non-CITGO Defendants were API members "at times relevant to this litigation"). Plaintiff asks this Court to take judicial notice of documents purporting to show CITGO's representation on API's board "in at least 1995 and 1997 through 2002." Opp. 5 & n.5. But Plaintiff cannot amend its Complaint through a request for judicial notice. *See Gerritsen v. Warner Bros. Ent. Inc.*, 112 F. Supp. 3d 1011, 1033 n.93 (C.D. Cal. 2015) ("It appears that [Plaintiff] relies on the facts contained in the various documents that are the subject of her judicial notice request to supplement the allegations in her complaint. This is improper . . . . Plaintiffs cannot utilize the documents to amend the complaint and defeat defendants' motions to dismiss."); *Temple of 1001 Buddhas v. City of Fremont*, 562 F. Supp. 3d 408, 426 n.13 (N.D. Cal. 2021) ("[T]he Court denies [Plaintiff]'s requests for judicial notice as improper attempts to amend her complaint during briefing on [Defendant's] motion to dismiss."). The court should thus ignore those documents for purposes of deciding CITGO's motion to dismiss.

3d 301 (S.D.N.Y. 2021) (gathering cases); *see also NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 918–19 (1982) ("The First Amendment . . . restricts the ability of the State to impose liability on an individual solely because of his association with another."). At most, those allegations would suggest an *opportunity* to conspire, but "[p]roof of opportunity to conspire, without more, will not sustain an inference that a conspiracy has taken place." *Tose v. First Pa. Bank, N.A.*, 648 F.2d 879, 894 (3d Cir. 1981).

Plaintiff contends that CITGO's membership in API "*can* give rise to liability ***if*** CITGO and the group intended and acted to undertake unlawful conduct." Opp. 6 (second emphasis added). That "if" is fatal to Plaintiff's claims because the Complaint does *not* allege any facts suggesting that CITGO intended to act or did act unlawfully—CITGO is alleged to have refined and sold gasoline, nothing more. Plaintiff's argument, which improperly relies on group pleading, is thus foreclosed by binding precedent holding that it is insufficient to allege merely that the Defendant belonged to a trade association that purportedly engaged in unlawful conduct. *See* Mot. at 8 (citing cases); *see also In re Asbestos Sch. Litig.*, 46 F.3d 1284, 1290 (3d Cir. 1994) (Alito, J.) (complaint must allege that defendant took "actions" "specifically intended to further [the] wrongful conduct"). Because the Complaint does not allege any affirmative misconduct on the part of CITGO, there is no basis for holding CITGO liable on a "concert of action" theory.

Plaintiff's half-hearted attempt to salvage its agency theory is even less persuasive. Instead of pointing to a single factual allegation indicating that CITGO or API intended to enter an agency relationship, Plaintiff gestures at "a mosaic of facts" supposedly "supporting an inference that CITGO and other Defendants . . . acted as each other's agents, and where API and other groups acted as Defendants' agents." Opp. 7. But no amount of gazing at the Complaint's "mosaic" would reveal any facts supporting such an inference, because there are none. *See Newcomb v. Babu*, No.

GJH-19-2046, 2020 WL 5106714, at *8 (D. Md. Aug. 30, 2020) ("When an agency relationship is allegedly part of the fraud," Plaintiff must allege "the facts constituting the underlying fraud and the *facts* establishing the agency relationship"). Because Plaintiff has failed to plead an agency relationship, it is irrelevant whether Plaintiff satisfied the particularity requirement as to *non-party* API, which is all Plaintiff claims to have done. Opp. 9.

Finally, Plaintiff's arguments in support of its group pleading fall flat. Plaintiff points to allegations in the Complaint that all "Defendants" failed to "warn of their products' climatic risks" and engaged in "widespread campaigns to deceive consumers." Opp. 1–2 (citing Compl. ¶¶ 1, 6–7, 141–70, 221, 242, 275, 295–96).[6] But Maryland law requires dismissal of fraud-based claims when the complaint "dump[s]" all defendants "into the same pot" rather than identifying each defendant's alleged misconduct. *Heritage Harbour, L.L.C. v. John J. Reynolds, Inc.*, 143 Md. App. 698, 711 (2002); *see also Haley v. Corcoran*, 659 F. Supp. 2d 714, 721 (D. Md. 2009); *In re Cable & Wireless, PLC*, 321 F. Supp. 2d 749, 773 (E.D. Va. 2004) ("group pleading goes against the grain of the particularity requirement," and "Plaintiffs, by grouping defendants in their Complaint, have failed to meet this test"). Plaintiffs cite just one case for the proposition that group pleading is permissible under a heightened pleading standard. *See* Opp. 2–3 n.2 (citing *United States v. United Healthcare Ins. Co.*, 848 F.3d 1161 (9th Cir. 2016)). But in fact that case directly contradicts Plaintiff's erroneous assertion that group pleading is sufficient under Rule 9(b). As the Ninth Circuit explained, "Rule 9(b) does *not* allow a complaint to merely lump multiple defendants together but requires plaintiffs to differentiate their allegations when suing more than one defendant and inform each defendant separately of the allegations surrounding his alleged

[6] Although Plaintiff avers that these paragraphs describe "CITGO's and other Defendants'" conduct, Opp. 1–2, CITGO is not mentioned in *any* of the 38 Complaint paragraphs cited by Plaintiff.

participation in the fraud." *United Healthcare*, 848 F.3d at 1184 (emphasis added) (citation omitted). "A plaintiff must 'identify the role of each defendant in the alleged fraudulent scheme.'" *Id.* (citation omitted). That is precisely what Plaintiff has failed to do here.

Even under Rule 2-305's more liberal pleading standard, complaints treating defendants as "fungible" must be dismissed. *Wells v. State*, 100 Md. App. 693, 703 (1994). Plaintiff protests that a ban on group pleading would violate "Maryland pleading principles," Opp. 3, but Maryland courts routinely dismiss claims premised on group pleading in instances where the complaints fail to provide each defendant with notice of its allegedly wrongful conduct.[7] *See Ledvinka v. Ledvinka*, 154 Md. App. 420, 429 (2003); Mot. 6–7 & n.1 (citing cases). Here, the Complaint does not give CITGO *any* notice as to what it allegedly did wrong. Plaintiff's assertion that "collective allegations are permissible because the City alleges each Defendant engaged in the same wrongful conduct," Opp. 3, is thus incorrect as a matter of law. *See id.*; *see also, e.g.*, *Stewart v. Hudson Hall LLC*, No. 20-CIV-885-PGG-SLC, 2020 WL 8732875, at *7–8 (S.D.N.Y. Oct. 19, 2020) (complaint alleging that "Defendants were engaged in the same wrongful conduct" is impermissible group pleading, even under a non-heightened pleading standard), *report and*

[7] Plaintiff cites *Chevron U.S.A. Inc. v. Apex Oil Co.*, 113 F. Supp. 3d 807 (D. Md. 2015), and *Lackey v. MWR Investigations Inc.*, No. WMN-14-3341, 2015 WL 132613 (D. Md. Jan. 8, 2015), for the proposition that group pleading is permissible under the analogous federal pleading standard. Opp. 2 n.2; *see also* Opp. 2 (citing *State v. Exxon Mobil Corp.*, 406 F. Supp. 3d 420 (D. Md. 2019)). But both *Chevron* and *Lackey* highlight the deficiencies of Plaintiff's complaint. *Chevron* makes clear that even under Rule 8 of the Federal Rules of Civil Procedure, group pleading is impermissible unless a plaintiff "provide[s] sufficient factual detail about the nature of his allegations and about *each defendant* to provide fair notice of his claims." 113 F. Supp. 3d at 815 n.1 (emphasis added) (citation omitted); *see Exxon*, 406 F. Supp. 3d at 476 (relying on *Chevron*). The Complaint has not provided such "factual detail" regarding CITGO. Similarly, *Lackey* allowed a plaintiff to make collective allegations against two defendants—the plaintiff's employer and its owner—where plaintiff alleged that the owner "managed, owned, and operated" the employer. 2015 WL 132613, at *2. Here, Plaintiff alleges no facts that would similarly justify treating CITGO and the other Defendants as a single unit.

recommendation adopted, 2021 WL 735244 (S.D.N.Y. Feb. 24, 2021).

The Delaware Superior Court recently dismissed substantially similar climate-change claims asserted against CITGO by the State of Delaware. *See Delaware v. BP Am. Inc.,* No. N20C-09-097 MMJ CCLD, 2024 WL 98888, at *14–17 (Del. Super. Ct. Jan. 9, 2024); Opp. 10 n.16. As here, Delaware "failed to specifically identify alleged misrepresentations" *that CITGO* made about its products' connection to global climate change. *Delaware* at *17; *see id.* at *14–15. The Delaware Court rejected the State's attempt to rely on group pleading, concert of action, and agency as a basis for collective liability and dismissed all claims against CITGO "alleging misrepresentations," which included State's claims for nuisance and trespass. *Id.* at *17. This Court should reject those same failed arguments under Maryland law and dismiss, because, as in Delaware, Plaintiff has failed to allege any factual basis for holding CITGO liable for any other Defendant's statements.[8]

III. Plaintiff Has Not Adequately Pleaded a Failure to Warn Claim Against CITGO

Plaintiff does not dispute that there are no alleged facts showing that CITGO had special knowledge about the "danger[]" of fossil fuels, which is necessary to plead a duty-to-warn claim. *Eagle-Picher Indus., Inc. v. Balbos*, 326 Md. 179, 198 n.9 (1992). Instead, it contends that CITGO *should have known* about the dangers because of information supposedly passed on from "Defendants' internal research divisions, trade associations, and industry groups." Opp. 10 (citing Compl. ¶¶ 103–31, 137, 239–40). But of the cited paragraphs, only one even *mentions* CITGO,

[8] CITGO incorporates by reference Chevron's Anti-SLAPP motion, and its reply in support, which show that 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, as they involve speech on matters of public concern. Plaintiff incorrectly suggests that whether a statement is a matter of public concern is a "factual dispute [that] cannot be resolved on the pleadings." Opp. 7. On the contrary, courts "assess as a matter of law whether challenged speech involves a matter of public concern[.]" *Snyder v. Phelps*, 580 F.3d 206, 219–20 (4th Cir. 2009).

Compl. ¶ 111, and that paragraph simply alleges that API members, including CITGO's predecessor-in-interest (Cities Service) received a status report in 1972 on environmental research projects funded by API. *Id.* The Complaint does not allege that anyone at Cities Service read the report or that the report was passed on to anyone at CITGO when it was spun off in the early 1980s. Nor does the Complaint allege that the report contained any non-public information about the supposed "danger" of fossil fuel products.

Plaintiff contends that CITGO is responsible for "what was generally known in the scientific or expert community." Opp. 10 (citation omitted). But Plaintiff fails to allege when any such scientific consensus occurred. Moreover, Plaintiff concedes that the risks of climate change were widely known by 1988, at the latest, Compl. ¶ 143, and there are no allegations that CITGO knew any more about climate change before that time than Plaintiff. CITGO had "no duty to warn" its customers (or anyone else) of risks that it learned of at the same time as the public. *Figgie Int'l, Inc., Snorkel-Econ. Div. v. Tognocchi*, 96 Md. App. 228, 240 (1993). Indeed, if CITGO can be held liable for failing to warn consumers and the public, similar claims could be asserted against *every* company that made or distributed products over the past half century that run on fossil fuels—such as cars, furnaces, water heaters, leaf blowers, gas stoves, lawn mowers, and countless others—on the theory that use of those products similarly contribute to global emissions and those companies should have issued a warning. Indeed, such a claim could be directed at Plaintiff itself for failing to warn Baltimore residents decades ago that riding the city bus, instead of walking or riding a bicycle, contributed to climate change. Such an expansive theory of liability finds no support in Maryland law.

CONCLUSION

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

DATED: January 26, 2024

Respectfully submitted,

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CERTIFICATE OF SERVICE

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

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