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

REPLY IN FURTHER SUPPORT OF BP P.L.C., BP AMERICA INC., AND BP PRODUCTS NORTH AMERICA INC.'S INDIVIDUAL MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM

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ARGUMENT[1]

1. Plaintiff concedes that it does not allege that BP made any false or misleading statements about climate-related risks of its fossil fuel products. To convince the federal courts to remand this action to this Court, Plaintiff spoke clearly and consistently about its theory of the case: Defendants should be held liable "for climate change-related harms caused by their deliberate misrepresentations of the climatic dangers of fossil fuels and their misleading marketing of those products." Supp. Br. of Appellee, *Mayor & City Council of Baltimore* v. *BP P.L.C., et al.*, No. 19-1644, ECF No. 212, at 8 (4th Cir. Sept. 7, 2021); *see also id.* at 25-26. Plaintiff doubles down on this theory in its Opposition by arguing that BP is liable for "deceiving consumers about those [climate] risks." (Opp'n 2.) But Plaintiff also admits in its Opposition that the 298-paragraph Complaint does not identify a single alleged misrepresentation by BP about the impact of its fossil fuel products on climate change. (*See id.* at 1-2; *see also* BP Opening Br. 2, 4-6.) This is fatal to Plaintiff's claims. Indeed, in a largely identical case brought by the same counsel, the Delaware Superior Court recently dismissed all misrepresentation-based claims against BP because the plaintiff "failed to specifically identify alleged misrepresentations" by BP. *Delaware* v. *BP Am. Inc.*, 2024 WL 98888, at *17 (Del. Super. Ct. Jan. 9, 2024). This Court should do the same.

2. Plaintiff cannot identify any other tortious or deceptive conduct by BP. Faced with the reality that it has no claim for misrepresentation against BP, Plaintiff pivots to a different theory and argues that BP "failed to warn about its products' climatic risks, and knowingly concealed and omitted information about such risks." (Opp'n 2.) But the Complaint's pleaded facts show just the opposite, detailing BP's efforts, beginning over 25 years ago, to inform the public about the effects of "current emissions" on the climate and warn that it would be "unwise and potentially

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[1] Defendants BP p.l.c. and BP America Inc. submit this reply brief subject to, and without waiver of, their jurisdictional defenses.

dangerous to ignore the mounting concern." (Compl. ¶ 181.) Plaintiff's only response to these allegations is to argue that the Complaint does not affirmatively allege that BP's warnings "accurately portrayed climate change risks" or "w[ere] provided to *Maryland consumers*." (Opp'n 4.) In fact, the Complaint *does* allege that BP's 1997 warning of "anthropogenic climate change" was accurate (Compl. ¶ 181), and regardless of whether that warning was directed specifically at Maryland consumers, it defeats Plaintiff's claims that BP "failed to warn about its products' climatic risks" and engaged in a "campaign of deception" (Opp'n 2). Plaintiff cannot proceed on a theory of liability that its own Complaint refutes. *See Ark. Nursing Home Acquisition, LLC* v. *CFG Cmty. Bank*, 460 F. Supp. 3d 621, 637 (D. Md. 2020).[2]

Plaintiff also points to BP's use of the slogan "Beyond Petroleum" and its name change from "British Petroleum" to "BP." (Opp'n 2-3.) According to Plaintiff, these actions "had the capacity to mislead consumers" because BP "remained overwhelmingly invested in fossil fuels" and ultimately "abandon[ed] its wind and solar assets" and the "'Beyond Petroleum' moniker" a few years after adopting it. (*Id.*; *see also* Compl. ¶ 187.) This argument is facially deficient. Plaintiff never explains how the "Beyond Petroleum" slogan or name change possibly could have misled consumers about the climate-related risks of fossil fuel products. (Opp'n 2-3.) Moreover, adopting a new corporate slogan and name is plainly not the type of "clear and definite representation of a[] particular fact" that could mislead consumers about the effect of BP's fossil fuel products on climate change. *McGraw* v. *Loyola Ford, Inc.*, 124 Md. App. 560, 584 (1999). The Court should reject Plaintiff's attempt to premise liability on a corporate slogan and name that

[2] Plaintiff also attempts to plead—in a footnote in its Opposition—a new omission-based claim under Section 13-301(3) of the MCPA not alleged anywhere in the Complaint. (Opp'n 3 n.3.) This attempt is improper and should be disregarded. *See State Farm Mut. Auto. Ins. Co.* v. *Slade Healthcare, Inc.*, 381 F. Supp. 3d 536, 573 (D. Md. 2019) ("[I]t is axiomatic that the complaint may not be amended by the briefs in opposition to a motion to dismiss.").

say nothing about fossil fuel products' climate risks. *See Pruitt* v. *Alba Law Grp., P.A.*, 2015 WL 5032014, at *9 (D. Md. Aug. 24, 2015) (dismissing MCPA claim because statements did not have "the capacity, tendency, or effect of misleading"); *Daniyan* v. *Viridian Energy LLC*, 2015 WL 4031752, at *2 & n.1 (D. Md. June 30, 2015) (dismissing MCPA and tort claims based on "vague generalities and puffery").

3. Plaintiff cannot salvage its claims against BP by attempting to impute others' statements to BP. In tacit recognition of the absence of BP-specific allegations in the Complaint that are sufficient to state a claim against BP, Plaintiff dedicates a significant portion of its Opposition to contending that BP should be held liable for the alleged statements and conduct of others. (*See* Opp'n 4-8.) To that end, Plaintiff continues to rely on the Complaint's generalized allegations directed at all 26 "Defendants" as a group, contending that "[n]o Maryland case law proscribes collective allegations." (*Id.* at 4.) Even if it were possible to plead a claim against BP by relying on generalized assertions directed at a group of 26 different companies, the group-pled allegations here are entirely conclusory. (*See, e.g.*, Compl. ¶ 170.) These "naked allegation[s]" are "too general, too conclusory, too vague, and lacking in specifics" to state a claim. *Parks* v. *Alpharma, Inc.*, 421 Md. 59, 85 (2011); *see also Heritage Harbour, L.L.C.* v. *John J. Reynolds, Inc.*, 143 Md. App. 698, 711 (2002) (Plaintiff must "set forth any acts or omissions committed by [each defendant] that would serve as a basis for an imposition of liability."). And it is demonstrably false to assert, as Plaintiff does, that "each Defendant engaged in the same wrongful conduct." (Opp'n 5.) Even the Complaint acknowledges BP's public warning of the risks of "anthropogenic climate change" in 1997. (*See* Compl. ¶ 181.)

Plaintiff also argues that BP can be held liable for the statements of a non-party trade organization, the American Petroleum Institute ("API"). (Opp'n 6-8.) According to Plaintiff, BP

is "jointly liable for API's misrepresentations and other deceptive conduct" because it supposedly "acted in concert with other Defendants and [API]." (*Id.* at 6.) But Plaintiff pleads no facts to support this theory. The Complaint alleges only that (i) BP and its predecessors "have been API members," (ii) BP "received a status report on all environmental research projects funded by API," and (iii) BP was a member of an API task force that discussed climate research in 1979 and 1980. (Compl. ¶¶ 31(a), 111, 115-116, 120-121.) Plaintiff attempts to bolster these allegations with an exhibit attached to its Opposition showing that executives from BP and certain of its predecessors briefly served in leadership roles at API in 1998. (Opp'n 6-7.) These allegations are plainly insufficient to plead that BP "acted in concert with other Defendants and API" under Maryland law. *See Consumer Prot. Div.* v. *Morgan*, 387 Md. 125, 184-85 (2005) ("concert of action" requires joint or separate tortious act or knowledge of and substantial assistance to another's tort).

More fundamentally, "trade association membership, alone, cannot be the foundation for liability." *In re Welding Fume Prods. Liab. Litig.*, 526 F. Supp. 2d 775, 800 (N.D. Ohio 2007). Indeed, well-established case law prohibits the imposition of civil liability "merely because an individual belonged to a group" like API. *NAACP* v. *Claiborne Hardware Co.*, 458 U.S. 886, 920 (1982). As the Third Circuit observed, holding a business liable solely based on its participation in a trade association could "chill the exercise of the freedom of association by those who wish to contribute to, attend the meetings of, and otherwise associate with trade groups and other organizations that engage in public advocacy and debate." *In re Asbestos Sch. Litig.*, 46 F.3d 1284, 1295-96 (3d Cir. 1994). Under this case law, the Court should reject Plaintiff's attempt to hold BP liable for API's statements based on BP's "participation in API." (Opp'n 6.)

In a final attempt to impute others' conduct to BP, Plaintiff returns to its conclusory allegation that Defendants "acted as each other's agents." (*Id.* at 8.) But Plaintiff never identifies

any support for its agency theory beyond a vague reference to a "mosaic of facts" (*id.*) and the Complaint's single conclusory paragraph purporting to allege agency (Compl. ¶ 32). An agency relationship requires much more than Plaintiff's boilerplate: the principal must have the "right to control the agent," and the agent must have the "duty to act primarily for the benefit of the principal" and the "power to alter the legal relations of the principal." *Green* v. *H & R Block, Inc.*, 355 Md. 488, 503 (1999). Plaintiff's "mosaic" of unidentified facts and conclusory one-paragraph agency allegation are textbook examples of the type of "bald assertions" and "conclusory statements" that are insufficient to plead an agency relationship. *Wireless One, Inc.* v. *Mayor & City Council of Baltimore*, 465 Md. 588, 604 (2019); *see also Armellini* v. *Levin*, 2020 WL 104899, at *10-11 (D. Md. Jan. 9, 2020) (dismissing claim because "unadorned contention" that defendant was "acting as an agent" of another was insufficient to sustain a claim).

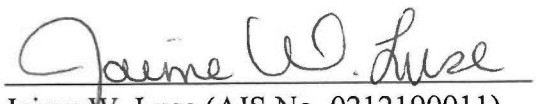
4. Plaintiff's claims fail to satisfy Maryland's heightened pleading standard for fraud. Plaintiff acknowledges that its claims that "replicate[] common-law fraud" or seek "relief on the ground of fraud"—such as its claims under Section 13-301(9) of the MCPA—must satisfy a heightened pleading standard. (Opp'n 8-9.) To satisfy that standard, Plaintiff "must identify who made what false statement, when, and in what manner . . . ; 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." *McCormick* v. *Medtronic, Inc.*, 219 Md. App. 485, 492-93 (2014). Plaintiff's failure to plead a single misrepresentation or material omission by BP eviscerates Plaintiff's assertion that it has pleaded its fraud-based claims against BP with particularity. *See Delaware*, 2024 WL 98888, at *17 (claims dismissed because complaint did not "specifically identify alleged misrepresentations for each individual defendant").

CONCLUSION

The Court should dismiss Plaintiff's claims against BP in their entirety and with prejudice.

Dated: January 26, 2024

Respectfully submitted,



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that, on January 26, 2024, a copy of the foregoing Reply In Further Support Of BP p.l.c., BP America Inc., and BP Products North America Inc.'s Individual Motion To Dismiss For Failure To State A Claim was sent by email to all counsel of record in this case.

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