IN THE CIRCUIT COURT
FOR BALTIMORE CITY, MARYLAND

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

REPLY IN SUPPORT OF MARATHON OIL CORPORATION'S AND MARATHON OIL COMPANY'S SUPPLEMENTAL MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED

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Pursuant to Maryland Rule 2-322(b)(2) and the Court's August 15, 2023, Scheduling Order, Defendants Marathon Oil Corporation ("MRO") and Marathon Oil Company ("MOC") respectfully submit this Reply in Support of their Supplemental Motion to Dismiss.

INTRODUCTION

MRO and MOC explained in their Supplemental Motion why the City's allegations are inadequately pled. The 132-page Complaint mentions MRO and MOC in just one paragraph. And that one paragraph consists of conclusory and nondescript allegations that do not constitute "facts" on which a claim must be based. They fail to satisfy even the most basic notice-pleading standard, let alone the heightened standard applicable to the City's claims sounding in fraud. The assertions do not apprise MRO and MOC of their supposed part in a decades-long campaign of deception—a pervasively odd omission given that such allegations should be easily advanced if, as the City alleges, the prolonged cover-up has since been exposed.

Plaintiff doubles down on its vague assertions, arguing in effect that invocation of a "concert of action" theory absolves it of the obligation to provide specific allegations concerning MRO and MOC. The contention is confounding given that the City also acknowledges mere membership in an association is not a basis for liability (indeed, it characterizes the proposition as "unremarkable" (Opp'n 4)) and that it must identify "firsthand misconduct." Opp'n 1. This it fails to do.

Indeed, the City tacitly acknowledges its allegations are insufficient by levying new ones for the first time in its Opposition. Whether, as stated, under the guise of asking this Court to take judicial notice, this is improper: Plaintiff cannot amend a complaint through an opposition. Regardless, the new allegations do not overcome Plaintiff's pleading deficiencies. The City simply notes that MRO or MOC executives served on API's board of directors. But board service is not enough to support a claim of "concert of action." Plaintiff offers no explanation for how such service

constituted tortious conduct or substantial assistance in carrying out an allegedly decades-long campaign of deception. It does not.

ARGUMENT

I. The City Does Not Allege Any "Firsthand" Misconduct by MRO or MOC.

The City's Opposition largely cuts and pastes the plainly inadequate allegations from its Complaint, offering no specifics and no meaningful discussion of MRO's or MOC's alleged role in conduct allegedly undertaken by others. Instead of facts, the Opposition continues to offer only the wave of a hand and vague conclusory references to improper conduct. Despite claiming that it has "*thoroughly* describe[d] Marathon's *firsthand* misconduct," Opp'n 1 (emphasis added) (initial caps deleted), the allegations the City points to are sweeping assertions that refer broadly to all Defendants, providing no specific or "firsthand" allegations as to MRO or MOC. For instance, in describing its purported allegations against MRO and MOC, the City highlights that it alleged "the *fossil fuel industry* have—since the 1960s—studied the climatic dangers posed by the normal use of their products on coastal communities like Baltimore, and that *key players like Marathon* learned this critical information early on." *Id*. (emphasis added). It then says that "Marathon—just like other Defendants—did not adequately warn of its products' dangers" and "Marathon and other Defendants in the 1980s 'embarked on a decades-long campaign'" of deception, which "inflated consumer demand for their products." Opp'n 1-2. Adding "just like others" or "like Marathon" to broad-brush allegations that characterize conduct attributable to an entire industry does nothing to overcome a plainly inadequate pleading that is devoid of any "firsthand" account of MRO or MOC's conduct.

The City deploys the same flawed approach in pursuing its "concert of action" theory. There, it highlights its allegations that "Marathon and other Defendants engaged in a 'concerted public relations campaign to cast doubt on the science connecting climate change to fossil fuel products.'"

Opp'n 3. It continues, noting that its Complaint alleges, "Marathon and its collaborators had a common design: using the early 'discredited and/or misrepresented information that tended to support restricting consumption of . . . their products." *Id.* (internal citations and brackets omitted). But here too the City offers no specifics. Instead, it largely reverts to its erroneous contention that API's conduct is attributable to MRO or MOC, which we address below. Otherwise, it offers no reason to think that a generic allegation against an entire industry is anything more than that. The City does not, for example, identify any actual advertisement, pamphlet, or marketing material prepared or produced by MRO and MOC, or action taken by MRO and MOC that could provide factual support for the allegations. It thus leaves the companies guessing as to basic information such as the year, location, medium, and instances in which they allegedly engaged in improper behavior, much less the particular substance of the conduct itself.

II. The City Cannot Excuse Its Lack of Specificity by Resorting to Group Pleading.

The City generally tries to justify its sweeping and undifferentiated characterizations of all defendants by stating that Maryland courts embrace group pleading. Indeed, the City goes so far as to claim its conclusory allegations are preferred because they "maintain[] brevity" and that more than naked and undifferentiated assertions of wrongdoing would amount to a "technical pleading" requirement. Opp'n 6-7. But the City turns these principles on their head, misrepresenting its failure to satisfy pleading standards as a virtue and seeking to misuse group pleading to excuse its failure to plead any facts against MRO and MOC to begin with. None of the cases cited by the City suggests that group pleading serves this improbable role.[1] On the contrary, *CASA de Maryland, Inc. v. Arbor*

[1] The City's contention that only some allegations are subject to the heightened pleading standard evinces the precise problem of its conclusory allegations. Opp'n 8-10. MRO and MOC are left guessing as to which allegations fall within which provision of the MCPA. In any event, contrary to the City's assertions, all of its claims are predicated upon misrepresentations and, as the City's own authority indicates, Maryland courts have recognized their particularity rule is "analogous" to

Realty Trust, explains that group pleading: "[a]t best, . . . amounts to a conclusory allegation that . . . [each Defendant] [was] somehow responsible for the wrongful conduct" and, "[a]t worst, . . . an allegation that one of the [defendants] did each act, an assertion that amounts to speculation . . . ." No. DKC 21-1778, 2022 WL 4080320, at *4 (D. Md. Sept. 6, 2022). Indeed, in even the cases cited by the City, courts approved group pleading *only* where the plaintiff plausibly described each individual defendant's particular conduct, and rejected allegations that were mere conclusory characterizations of the parties' relationships. *See, e.g.*, *id.* (allegations of parental control of corporate subsidiaries insufficient to justify group pleading); *Chevron U.S.A. Inc. v. Apex Oil Co.,* 113 F. Supp. 3d 807, 815 (D. Md. 2015) (conclusory allegations that defendants both owned pipeline rejected); *State v. Exxon Mobil Corp*., 406 F. Supp. 3d 420, 476 (D. Md. 2019) (permitting group pleading where allegations involved direct conduct of mishandling); *Lackey v. MWR Inves., Inc.*, No. WMN-14-3341, 2015 WL 132613, at *2 (D. Md. Jan. 8, 2015) (group pleading permitted where owners and operators were alleged to have controlled companies and adopted and carried out wage scheme in violation of labor laws).[2] The City's excuse that it has "only limited 'available information,'" Opp'n 7, does not authorize a failure to allege *any* facts, especially where public

Federal Rule 9(b), which applies a heightened pleading standard in these circumstances. *See McCormick v. Medtronic, Inc*., 219 Md. App. 485, 528 (2014).

[2] Plaintiffs' reliance on an outdated and out-of-circuit decision is misplaced. Opp'n 7 n.7 (quoting *Crowe v. Coleman*, 113 F.3d 1536, 1539 (11th Cir. 1997)). As one district court in the Eleventh Circuit explained, *Crowe* is "a pre-*Iqbal* case" that "applied an outdated notice pleading standard that is no longer applicable." *A & E Auto Body, Inc. v. 21st Century Centennial Ins. Co*., 120 F. Supp. 3d 1352, 1367 (M.D. Fla. 2015) (subsequent history omitted).

statements over decades are supposedly the basis for liability[3] and it musters nearly 300 paragraphs that do not involve MRO or MOC.[4]

III. The City Has Not Alleged Any Conduct by API Attributable to MRO or MOC.

The balance of the City's Opposition is not targeted at MRO's or MOC's individual actions at all but rather conduct attributed to them as members of API. Here too, the City offers only generic statements, claiming that "Marathon also participated in the American Petroleum Institute ("API"), a locus for Defendants' deceptive activities" and "[f]ar from a passive member, Marathon was an API leader that—with other Defendants—controlled API and represented it in important proceedings." Opp'n 3. It goes onto to describe generally actions taken by API without any mention of MRO and MOC. Opp'n 3-4. These statements are not actionable against MRO and MOC.

The City all but concedes the allegations are insufficient by asking this Court to now take notice of additional facts concerning MRO and MOC involvement with API. However, a party cannot amend a complaint through an opposition. *See, e.g., Johnson v. SecTek, Inc*., No. CIV.A. ELH-13-03798, 2014 WL 1464378, at *2 (D. Md. Apr. 14, 2014) ("Although plaintiff's Opposition further elucidated the facts in support of her claim, a plaintiff cannot, through the use of motion

[3] Indeed, the City's new reliance upon publicly-available SEC filings in support of its claims belies its supposed inability to access information necessary to identify *public* misrepresentations. *See* Opp'n 3-4 n.2.

[4] The City also claims it is entitled to refer to MRO and MOC together with Marathon Petroleum Corporation and Speedway LLC because "Marathon Oil Co. is an ancestor of both Marathon Oil Corp. and Marathon Petroleum" and "Marathon Oil Corp. spun off Marathon Petroleum Corp. and its wholly owned subsidiary Speedway LLC in 2011." Opp'n 6. But this cuts the *opposite* direction. As the City acknowledges, these are distinct corporate entities. Simply noting corporate evolution does not supply a basis for treating entities interchangeably and failing to differentiate among their alleged conduct, particularly where the City's own judicially noticeable documents reflect their distinct operations.

briefs, amend the complaint.") (citation omitted); *D'Aoust v. Diamond*, 424 Md. 549, 572 (2012) (resolution of a motion to dismiss is "limited generally to the four corners of the complaint"). The Court should therefore decline the City's invitation to proceed otherwise.

In any event, the City's additional facts also do not supply adequate notice. As the City itself asserts, to prove its claims it would have to demonstrate that MRO and MOC "controlled API" during the period in which the alleged deception occurred. Opp'n 3. The City's new allegations do none of that. The City asks the Court to consider that MRO executives served on API's board and executive committee.[5] But it cites no authority that holds board membership alone is sufficient to impute liability to an association's members. In fact, the City's own authority requires "active[] participat[ion] in the wrongful act," engagement in a "tortious act," or "substantial assistance" in "breach of duty." Opp'n 3 (quoting *Consumer Prot. Div. v. Morgan*, 387 Md. 125, 178, 184-85 (2005)). The Complaint offers no detail on any of this. Instead, the City asks the Court to hold that board membership alone supplies a basis for liability—a proposition rejected by the very authorities upon which *Morgan* relied.[6] *See Tedrow v. Deskin*, 265 Md. 546, 551 (1972) ("an officer or director is not liable for torts of which he has no knowledge, or to which he has not consented"); *see also Metromedia Co. v. WCBM Maryland, Inc.*, 327 Md. 514, 519 (1992) (CEO liable where "the decision to refuse to vacate the premises upon the demand of Metromedia *was made by Mangione*

[5] Moreover, the bulk of the City's references are to years that post-date cessation of the alleged campaign of deception. *Compare* Opp'n 4 at 3-4 n.2 (identifying API board/committee members for 2023, 2018, 2015, 2013, and 2009) *with State ex rel. Jennings v. BP Am. Inc.*, No. N20C-09-097 MMJ CCLD, 2024 WL 98888, at *19 (Del. Super. Ct. Jan. 9, 2024) (holding that "general public had knowledge of or had access to information about" climate change since at least 2008).

[6] The same is true with respect to the City's new allegation that a Marathon Oil Co. executive testified to Congress on behalf of API. Opp'n 3 n.1. The City offers no explanation for how that demonstrates control or active participation in any wrongful act. In fact, nothing in the appended testimony even addresses the issue of climate change, much less a claimed misrepresentation. City Ex. 1. That the City would suggest testimony on topics irrelevant to climate change evince active participation by MRO or MOC in misrepresenting climate change is befuddling.

as the chief executive officer of WCBM") (emphasis added). And, of course, *Morgan*—and the cases cited therein—presented facts with far greater involvement than that alleged against MRO and MOC.[7]

Ultimately, the City all but concedes it has no allegations specific to MRO or MOC. Rather, it tries to rewrite the law, claiming that innocent membership in a trade association becomes actionable upon the naked assertion that the association (here, a century-old, registered non-profit) exists only to facilitate defendants' alleged conspiracy to commit deception. The City says, the Complaint "alleges that *the very purpose and nature of Defendants' organizations—like API*—was to advance the shared goal of spreading deception." Opp'n 5 (emphasis added). This trumped-up characterization of the Complaint is just name-calling, the very type of "bald assertion[] and conclusory statement[]" that "will not suffice." *Wireless One, Inc. v. Mayor & City Council of Baltimore*, 465 Md. 588, 604 (2019).[8]

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[7] *See Morgan*, 387 Md. at 184-85 (investor, lender, and appraiser jointly liable due to active participation and intimate involvement in illegal home flipping scheme); *F.T.C v. Cyberspace.com, LLC*, 2002 WL 32060289, at *4 (W.D. Wash. July 10, 2002) (finding liability where defendant "was directly involved in the development of the deceptive marketing scheme"); *State Cent. Collection Unit v. Kossol*, 138 Md. App. 338, 349 (2001) (finding liability where "over a six-year period appellee participated extensively in the creation, development, and deceptive practices of two corporations"); *F.T.C. v. Amy Travel Serv., Inc*., 875 F.2d 564, 575 (7th Cir. 1989) ("defendants wrote or reviewed many of the scripts that were found to be deceptive and they were undoubtedly aware of the avalanche of consumer complaints"), *overruled on other grounds by F.T.C. v. Credit Bureau Ctr*., *LLC*, 937 F.3d 764 (7th Cir. 2019); *F.T.C. v. Gill*, 71 F. Supp. 2d 1030, 1046 (C.D. Cal. 1999), *aff'd*, 265 F.3d 944 (9th Cir. 2001) (defendant "personally liable as a participant and a primary violator" where he made "direct misleading representations").

[8] The City's authority does not support a contrary conclusion. Opp'n 5 n.3. First, in those cases, the parties' interaction through an association was just one factor among many that evinced a conspiracy whereas, here, the City alleges the association itself *is* the conspiracy. *See In re Turkey Antitrust Litig*., 642 F. Supp. 3d 711, 727 (N.D. Ill. 2022); *Grasso Enters., LLC v. Express Scripts, Inc*., No. 4:14CV1932 HEA, 2017 WL 365434, at *4 (E.D. Mo. Jan. 25, 2017). Second, even if courts may treat "trade associations as continuing conspiracies when they regulate areas where their members are in competition," there is no contention that API "regulate[s] areas where members are in competition." *Compass, Inc. v. Real Est. Bd. of New York, Inc*., No. 21-cv-2195 (AJN), 2022 WL 992628, at *8 (S.D.N.Y. Mar. 31, 2022). Third, *N.A.A.C.P. v. Claiborne Hardware Co*., 458 U.S.

I. CONCLUSION

For the foregoing reasons and those set forth in the opening memorandum, the Complaint as to MRO and MOC should be dismissed with prejudice.

Respectfully submitted,

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886, 920 (1982) expressly stated that "[c]ivil liability may not be imposed merely because an individual belonged to a group." He must have "held a specific intent to further those illegal aims." *Id.* The City must therefore allege particularized knowledge, not mere membership.

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Dated: January 26, 2024

CERTIFICATE OF SERVICE

I hereby certify that on this 26th day of January 2024, a copy of the foregoing Reply in Support of Marathon Oil Corporation's and Marathon Oil Company's Supplemental Motion to Dismiss for Failure to State a Claim Upon Which Relief Can Be Granted was served on all counsel of record via email (by agreement of the parties).

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