

MAYOR AND CITY COUNCIL OF  
BALTIMORE,

*Plaintiff,*

v.

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

*Defendants.*

IN THE  
CIRCUIT COURT FOR  
BALTIMORE CITY

CASE NO. 24-C-18-004219

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**DEFENDANTS MARATHON PETROLEUM CORPORATION  
AND SPEEDWAY LLC'S REPLY MEMORANDUM IN SUPPORT OF  
THE MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM**

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Marathon Petroleum Corporation (“MPC”) and Speedway LLC (“Speedway”) respectfully submit this reply brief in further support of the motion to dismiss.

**I. The allegations against MPC and Speedway are deficient.**

MPC and Speedway should be dismissed from this suit because Plaintiff fails to identify any misstatement by them. Plaintiff argues (Opp. at 1) that it need not do so because its claims are for “both affirmative misrepresentations *and* simple failure to warn”—as if its “simple failure to warn” claim were not *also* based on misrepresentations. But the Complaint makes clear Plaintiff’s failure to warn theory is that each Defendant *disseminated “materials that prevented reasonable consumers from recognizing the risk that fossil fuel products would cause”* and so “undermin[ed]” warnings and public awareness of the risks of fossil-fuel use. (Compl. ¶¶ 242, 275 (emphasis added).) And the paragraphs Plaintiff cites to support its “simple failure to warn” claims, ¶¶ 140–170 and 295, generically assert that Defendants made misstatements intended to conceal risks of fossil-fuel use (without identifying any misleading statement by MPC or Speedway).<sup>1</sup> Indeed, in opposing Defendants’ Joint Motion, Plaintiff argues (at 33) that Defendants “breached their duty [to warn] by . . . undertaking a decades-long campaign to . . . misrepresent those hazards,”<sup>2</sup> and acknowledges its assertion that Defendants “wrongfully promoted products while concealing or downplaying the products’ risks” is “central to” its claims.

Assertions of fraud, misrepresentation, deceit, and falsehood are ubiquitous in, and are the

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<sup>1</sup> E.g., Compl. at p. 70 (“Defendants . . . Affirmatively Acted to Obscure Those Harms . . .”); ¶ 146 (“Defendants’ campaign, which focused on concealing, discrediting, and/or misrepresenting . . .”); ¶ 147 (“Defendants took affirmative steps to conceal, from Plaintiff and the general public, the foreseeable impacts of the use of their fossil fuel product . . .”); ¶ 170 (“As a result of Defendants’ tortious, false and misleading conduct . . . consumers . . . have been deliberately and unnecessarily deceived . . .”); ¶ 295 (“Defendants . . . ma[de] false representations and misleading omissions of material fact regarding the known severe risks posed by their fossil fuel with the intent that consumers would rely on those representations. . .”).

<sup>2</sup> Jt. Opp. at 45 (citing Compl. ¶¶ 141–170); *see also id.* at 48 (“A jury could conclude that the dangers of Defendants’ fossil fuel products were not open and obvious *because* of Defendants’ intentional and misleading conduct, which distracted consumers from the harms.”) (emphasis in original).

thrust of, Plaintiff's Complaint—a point it admitted in its Complaint and when seeking remand.<sup>3</sup> Each of Plaintiff's claims, including its failure to warn claims, hinges on misrepresentations and deceit, and so the facts to support each claim must be pleaded with particularity. *See McCormick v. Medtronic, Inc.*, 219 Md. App. 485, 528 (2014) (dismissing fraud-based claims where plaintiffs failed to allege when and how the “defendants made the false statements of material fact (or failed to disclose material facts that were necessary to make other statements not misleading)”).<sup>4</sup>

Plaintiff attempts to sidestep the particularity requirement by arguing it is a “judge-made gloss on the general rules of pleading,” citing *McCormick*, 219 Md. App. at 528, and therefore federal case law interpreting Rule 9(b) is inapposite. But *McCormick* describes the federal rule as “analogous.” *Id.* It also notes that Maryland's particularity standard *preceded* adoption of the Maryland Rules, and that “Maryland courts have long required parties to plead fraud with particularity.” *Id.* (citing *Spaulding v. Wells Fargo Bank*, 714 F.3d 769, 781 (4th Cir. 2013)).<sup>5</sup>

As to MPC and Speedway, the Complaint falls woefully short of the required particularity. The Complaint fails, not only to identify any *statement* made by MPC or Speedway, but even to allege any specific act by MPC or Speedway.<sup>6</sup> *See McCormick*, 219 Md. App. at 528 (particularity

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<sup>3</sup> Pl's Supp. Br., 2021 WL 4108598, at \*8 (4th Cir. Sept. 7, 2021) (asserting that its “actual theory is that [Defendants] are liable for climate change-related harms caused by their *deliberate misrepresentation of the climatic dangers of fossil fuels and their misleading marketing of those products*”) (emphasis added); *see also supra* n.1; Compl. ¶ 60 (“falsehoods, omissions, and deceptions”); ¶¶ 249(e) & 258(e) (“injuries caused by . . . intentional and knowing misrepresentations”), ¶¶ 267 & 279 (dissemination of misleading marketing materials).

<sup>4</sup> Plaintiff concedes that its Maryland Consumer Protection Act (“MCPA”) § 13-301(9) claim must be pleaded with particularity. *See* Opp. at 7. The particularity requirement applies to all of its claims because they all rely on a theory of fraud. *See also Antigua Condo. Ass'n v. Melba Invs. Atl., Inc.*, 307 Md. 700, 735 (1986) (affirming dismissal of contract claims and holding that while not expressly pleading fraud, the plaintiffs needed to show that the defendant Bankers' use of defendant Melba “worked a fraud against the Plaintiffs”).

<sup>5</sup> Indeed, the *McCormick* court affirmed dismissal, finding plaintiff failed to allege when and how defendants made the false statements of material fact. *See* 219 Md. App. at 528; *see also John B. Parsons Home, LLC v. John B. Parsons Found.*, 217 Md. App. 39, 70 (2014) (affirming dismissal of constructive fraud claim where there was an “absence of any particularized facts necessary to withstand a motion to dismiss”); *Greenbelt Homes, Inc. v. Bd. of Ed. of Prince George's Cnty.*, 248 Md. 350, 360 (1968) (affirming dismissal, noting that “[a]llegation of fraud or characterizations of acts, conduct or transactions as fraudulent . . . without alleging facts which make them such, are conclusions of law insufficient to state a cause of action.”).

<sup>6</sup> Plaintiff points to *Lloyd v. General Motors Corp.*, 397 Md. 108 (2007), which involved defendants who allegedly fraudulently concealed defective seats dangers. Opp. at 7. But *Lloyd* validates MPC and Speedway's arguments. The

requires allegations of the who, what, when, where, and how of the fraud). Indeed, the Superior Court of Delaware recently granted MPC and Speedway's motion to dismiss nuisance, trespass, failure to warn, and statutory consumer fraud claims similar to those in the Complaint for failure to plead them with the necessary particularity.<sup>7</sup> This Court should do likewise.<sup>8</sup>

## **II. Plaintiff's group pleading, concert-of-action, agency, and conspiracy arguments fail.**

Unable to identify non-conclusory, factual allegations in the Complaint of acts by MPC or Speedway to support its claims, Plaintiff attempts to impute the purported actions of *other* Defendants to MPC and Speedway. But Plaintiff's own cases underscore the problem with group pleading: "At best, such pleading amounts to a conclusory allegation that each Defendant was somehow responsible for the wrongful conduct. At worst, the repeated refrain that all three individuals committed each and every act must be read as an allegation that one of the three did each act, an assertion that amounts to speculation . . . ." *CASA de Md., Inc. v. Arbor Realty Tr., Inc.*, No. CV DKC 21-1778, 2022 WL 4080320, at \*4 (D. Md. Sept. 6, 2022) (citations omitted).<sup>9</sup> The *CASA* court dismissed certain defendants because plaintiffs failed "to allege additional acts

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*Lloyd* complaint included factual allegations detailing individual acts by *each defendant* to conceal the malfunction and how the defendants worked together. Plaintiff also tries to argue that its allegations are "far more detailed and specific than those in *McCormick*," claiming it shows "who made what false statement, when, and in what manner...." Opp. at 8 (citing *McCormick*, 219 Md. App. at 528). But Plaintiff has identified no statements by MPC or Speedway.<sup>7</sup> See *State of Delaware ex rel. Jennings v. BP Am., Inc.*, No. N20C-09-097, 2024 WL 98888, at \*17 (Del. Super. Ct. Jan. 9, 2024).

<sup>8</sup> Even if Plaintiff's "simple" failure to warn claims did not require it to allege *with specificity* the MPC and Speedway statements it claims "prevented reasonable consumers from recognizing the risk that fossil fuel products would cause," see *supra* at p. 1, Plaintiff's failure to warn claims still must be dismissed as to MPC and Speedway here because, insofar as the Complaint fails to include *any* non-conclusory, factual allegations regarding MPC and Speedway, the Complaint likewise fails to set forth facts that, if taken as true, would suffice to establish the elements of those claims (e.g., knowledge, duty, causation, unreasonable danger) under even the lower pleading standard established in Rule 2-305. See *Margolis v. Sandy Spring Bank*, 221 Md. App. 703, 722 (2015) (absent "factual allegations, as opposed to ambiguous conclusory assertions," plaintiff failed to state a claim) (citing Md. Rule 2-305).

<sup>9</sup> Plaintiff misstates the cases in MPC and Speedway's motion. *Maple Flooring Mfrs.' Ass'n v. United States*, 268 U.S. 563, 586 (1925), found *no* concerted action where defendants gathered and disseminated information in a trade association, in the absence of proof of agreement or concerted action actually reached or attempted. *Merck-Medco Managed Care, Inc. v. Rite Aid Corp.*, 22 F. Supp. 2d 447, 472 (D. Md. 1998), found plaintiff's arguments regarding conspiracy, including defendants' meetings and lobbying together, were "pure speculation."

by those three subsidiaries to justify group pleading against them.” 2022 WL 4080320, at \*5.<sup>10</sup> Similarly, claims against MPC and Speedway should be dismissed.

The Maryland Rules require that facts in the complaint “be pleaded with sufficient specificity; bald assertions and conclusory statements by the pleader will not suffice.” *Walton v. Network Sols.*, 221 Md. App. 656, 666 (2015) (affirming dismissal). Here, Plaintiff’s assertions lumping together all “Defendants” are “too general, too conclusory, too vague, and lacking in specifics” to state a claim against MPC or Speedway. *Parks v. Alpharma, Inc.*, 421 Md. 59, 85 (2011) (affirming dismissal where factual allegations were too generalized) (citation omitted); *see also Samuels v. Tschachtelin*, 135 Md. App. 483, 528–29 (2000) (dismissing claims against certain defendants that were “lumped under the general title of ‘Defendants’ and summarily included”).

Plaintiff also incorrectly argues that the joint and several liability concept of concert-of-action excuses the pleading defects. Joint and several liability is not an independent cause of action, and “it is axiomatic that before there is joint and several liability, there must be *individual liability*.” *Williams v. Stone*, 923 F. Supp. 689, 692 (E.D. Pa. 1996) (citing Maryland law) (emphasis added); *see also Rivera v. Prince George’s Cnty. Health Dep’t*, 102 Md. App. 456, 475 (1994) (“Joint liability is predicated on the existence of two or more individuals who have *each committed wrongs* and are *both legally responsible* for the damage caused to a person or property

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<sup>10</sup> Plaintiff finds no refuge in its other cases. *Frazier v. U.S. Bank N.A.*, No. 11 C 8775, 2013 WL 1337263, at \*3 (N.D. Ill. Mar 29, 2013), specifically recognized that group pleading is *disapproved in cases alleging fraud*. Plaintiff then cites dicta from an Eleventh Circuit case that considered the district court’s denial of a motion to remand. *See Crowe v. Coleman*, 113 F.3d 1536 (11th Cir. 1997). *Crowe* did not concern fraud or pleading with heightened specificity. The analysis in *State v. Exxon Mobil Corp.*, 406 F. Supp. 3d 420, 475 (D. Md. 2019) was limited to statutory claims and concluded dismissal was not warranted *after detailing the complaint’s allegations*. *Chevron U.S.A. Inc. v. Apex Oil Co., Inc.*, 113 F. Supp. 3d 807, 815 (D. Md. 2015) *dismissed* the claims against the parent company because the allegations regarding ownership were conclusory. *Lackey v. MWR Investigations, Inc.*, No. CIV.A. WMN-14-3341, 2015 WL 132613, at \*1 (D. Md. Jan. 8, 2015) was a wage-and-hour case and was limited as such. Likewise, *Robertson* makes clear that while a complaint “need not ‘make a case’ against a defendant or ‘forecast evidence sufficient to prove an element’ of the claim,” it needs to “*allege facts sufficient to state elements of the claim*.” *Robertson v. Sea Pines Real Est. Cos., Inc.*, 679 F.3d 278, 291 (4th Cir. 2012) (citations omitted) (emphasis in original).

by the commission of those wrongs.” (emphasis added)). Plaintiff pleads no facts supporting individual liability of MPC or Speedway, let alone joint and several liability.

Plaintiff cites *Consumer Prot. Div. v. Morgan*, 387 Md. 125, 185 (2005), but that case is readily distinguishable, both factually and procedurally. *Morgan* was a consumer enforcement action under the MCPA where the property seller, mortgage lender, and two appraisers all participated in an illegal “flipping scheme” against first-time home buyers and were each ordered to pay restitution jointly and severally. The *Morgan* court held that, in an enforcement action, MCPA violators acting in concert may be jointly and severally liable for restitution. In doing so, the court described and applied the requirements for concert-of-action as set forth in Restatement (Second) of Torts § 876 (1979) (the “Restatement”).<sup>11</sup> The court detailed the evidence as to the seller, lender, and one of the appraisers, and affirmed that there was “substantial evidence based on documentary evidence and the testimony” to show a “concert-of-action” under grounds (b) and (c) of the Restatement. *Morgan*, 387 Md. at 185. For this reason, imposing restitution jointly and severally was appropriate as to some of the defendants. But notably, the evidence was *insufficient* against one of the appraisers because there was no evidence to indicate his “concerted action with or even knowledge of the other parties’ misrepresentations.” *Id.* at 188.

Plaintiff’s concert-of-action argument is, at bottom, a reprisal of its failed group pleading theory. And *Morgan* does not, as Plaintiff would have it, stand for the principle that a theory of joint and several liability justifies Plaintiff’s group pleading or failure to allege specific facts against each Defendant. Here, Plaintiff alleges no “tortious act” by MPC or Speedway, nor does

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<sup>11</sup> For harm resulting to a third person from tortious conduct by another, one is subject to liability if [s]he “(a) does a tortious act in concert with the other or pursuant to a common design with him [or her], 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 herself], or (c) gives substantial assistance to the other in accomplishing a tortious result and his [or her] own conduct, separately considered, constitutes a breach of duty to the third person.” *Morgan*, 387 Md. at 184–85 (citing Restatement § 876).

it allege facts that, if true, would be sufficient to establish that MPC or Speedway committed a tortious act “in concert” with the other Defendants or “pursuant to a common design.” *Morgan*, 387 Md. at 184. Plaintiff does not allege facts that, if true, could establish that MPC or Speedway knew of alleged activities by other Defendants that would “constitute[] a breach of duty,” or that they gave “substantial assistance or encouragement” to the other Defendants in that regard. *Id.*

Plaintiff newly claims in its opposition that MPC former Chairman and CEO Gary Heminger held previous leadership positions with API from 2012 to 2020, citing MPC’s website and attaching a number of API tax returns. Opp. at 2–3. But none of these new arguments regarding Mr. Heminger are stated in Plaintiff’s Complaint, and it is well-established that Plaintiff cannot add to or amend its Complaint through its opposition brief. *See, e.g., D’Aoust v. Diamond*, 424 Md. 549, 572 (2012) (noting that on a motion to dismiss, the “universe of ‘facts’ pertinent to the court’s analysis” is “limited generally to the four corners of the complaint”) (citations omitted). In any event, ***all of the alleged acts by or involving API in the Complaint—spanning 1958 to 2007—pre-date by many years Mr. Heminger’s alleged service on the Board of Directors from 2012 to 2020.***<sup>12</sup> Plaintiff’s references to MPC’s website and tax returns are thus improper, irrelevant, and outside the Complaint.<sup>13</sup> In sum, none of this establishes that MPC (or Speedway)

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<sup>12</sup> *See* ¶ 31 (API formed in 1919); ¶ 107 (1958 API presentation, 1968 SRI report commissioned by API); ¶ 108 (1969 supplemental SRI report commissioned by API); ¶ 111 (API receiving report in 1972); ¶ 115 (convening API Task Force in 1979); ¶ 116 (API sending background memo in 1979); ¶ 120 (API Task Force discussing oil industry’s responsibilities in 1980); ¶ 121 (API Task Force discussing investigating alternative energy sources in 1980); ¶ 126 (another report prepared for API in 1982); ¶ 129 (symposium in October 1982); ¶ 131 (forming research units on climate modeling during the 1980s); ¶ 154 (API publishing report in 1996); ¶ 158 (API developing Global Science Communications Plan in 1998); ¶ 159 (referencing distribution of a memo “soon after” 1998 and citing 2007 Committee on Oversight and Reform); ¶ 162 (describing research budgets obtained through API and citing 2003 article); ¶ 165 (referencing creation of GCST and citing 1998 API Communications Plan).

<sup>13</sup> Plaintiff’s cited cases—which virtually all look at conspiracies in the federal antitrust context—are unavailing. The plaintiffs in *In re Turkey Antitrust Litigation*, 642 F. Supp. 3d 711, 726 (N.D. Ill. 2022) detailed a series of allegations that showed trade association memberships were used as a method for facilitating an industry push to increase turkey consumption while maintaining historic profit levels. Under these facts, parallel conduct among defendants and several “plus factors” plausibly established an alleged conspiracy under the Sherman Act. Likewise, in *Grasso Enterprises, LLC v. Express Scripts, Inc.*, No. 4:14CV1932 HEA, 2017 WL 365434, at \*3 (E.D. Mo. Jan. 25, 2017), plaintiffs included detailed allegations that defendant pharmacy benefit managers attended specific meetings where

“acted in concert” (Opp. at 2) with API or any other Defendant.

Plaintiff also tepidly argues that API was an “agent” of “MPC and its predecessors.” Opp. at 4.<sup>14</sup> As Plaintiff readily admits, agency is a “*fiduciary relation* which results from the manifestation of consent by one person to another that the other shall act on his behalf and subject to his control, and consent by the other so to act.” *Green v. H & R Block, Inc.*, 355 Md. 488, 503 (1999) (citing Restatement (Second) of Agency § 1 (1958)) (emphasis added). But Plaintiff’s Complaint fails to allege facts that would be sufficient to establish a fiduciary relationship between API and MPC or Speedway: Plaintiff does not and cannot allege that any of these separate corporate entities gave the other legal authority to act on its behalf. *See Patten v. Bd. of Liquor License Comm’rs for Baltimore City*, 107 Md. App. 224, 238 (1995) (finding facts “not substantial enough to convince a reasonable person” that property manager was agent of property partnerships, and noting that “[a]n agency relationship is not simply an employer/employee or contractor/subcontractor relationship.”). Further, for an agency relationship, Plaintiff must plead non-conclusory *facts* which, if true, demonstrate that (1) API was subject to MPC’s and Speedway’s right of control, (2) API had a duty to act primarily for the benefit of MPC and Speedway, and (3) API had the power to alter the legal relations of MPC and Speedway. *See Proctor v. Holden*, 75 Md. App. 1, 20 (1988) (granting motion to dismiss where homeowners failed to sufficiently allege that settlement agents were acting within scope of agency). Plaintiff fails to do so in the Complaint, and it cannot simply add new facts in its opposition.

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they agreed to boycott independent compounding pharmacies. Along with parallel conduct and multiple “plus factors,” the court found a plausible conspiracy stated under the Sherman Act.

<sup>14</sup> Plaintiff contends that existence of an agency relationship is generally a question for the trier of fact, *Copiers Typewriters Calculators, Inc. v. Toshiba Corp.*, 576 F. Supp. 312, 324 (D. Md. 1983), but courts properly dismiss claims premised on an agency relationship at the pleadings stage where sufficient factual allegations are lacking. *See, e.g., Haley v. Corcoran*, 659 F. Supp. 2d 714, 725 (D. Md. 2009) (“Because the existence of an agency relationship is a factual matter under Maryland law, the Court evaluates whether factual allegations are legally sufficient to establish an agency relationship.”); *Proctor v. Metro. Money Store Corp.*, 579 F. Supp. 2d 724, 737 (D. Md. 2008).

### III. Maryland's anti-SLAPP law and the *Noerr-Pennington* doctrine bar this suit.

Plaintiff's opposition on these issues fails to confront the heart of MPC and Speedway's arguments.<sup>15</sup> The Complaint is not a targeted strike at advertisements or other forms of commercial speech. Instead, the Complaint's plain terms would impose liability for an alleged "decades-long campaign," intended to "induce political inertia" against greenhouse-gas regulation and "change public opinion" to "avoid" such regulation. Compl. ¶¶ 145, 151, 152. Bringing suit for statements designed to affect policymaking and public opinion is precisely what the anti-SLAPP law and *Noerr-Pennington* seek to prevent.

First, not disputing that the relevant speech is a matter of public concern, Plaintiff fails to meet its burden that the commercial speech exemption applies. The Supreme Court defines commercial speech as "speech that does no more than propose a commercial transaction." *United States v. United Foods, Inc.*, 533 U.S. 405, 409 (2001). But Plaintiff alleges no particular speech by either MPC or Speedway. The inherent flaws in the Complaint—its vagueness, group pleading, and lack of specific allegations as to MPC or Speedway—thus make it impossible to support Plaintiff's argument that the (unspecified) speech by MPC or Speedway is commercial.

Plaintiff does not contend that the speech alleged generally in the Complaint (*i.e.*, a "concerted public relations campaign") constitutes "proposals to engage in commercial transactions," so it is at best "a close[] question" whether that speech is commercial. *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 66 (1983); *see* Opp. at 9. In these circumstances, courts consider whether "the speech is an advertisement, the speech refers to a particular product, and the speaker has an economic motivation." *Hunt v. City of Los Angeles*, 638 F.3d 703, 715 (9th Cir.

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<sup>15</sup> Plaintiff leads its opposition against MPC and Speedway by incorporating by reference arguments that Plaintiff made in its opposition brief addressing the Chevron Defendants. Opp. at 8. Assuming *arguendo* that a plaintiff may circumvent page limitations by incorporating arguments against a different defendant by reference, MPC and Speedway incorporate by reference the Chevron Defendants' reply brief herein.

2011). But the alleged “advertisements” in that “concerted public relations campaign” (e.g., ¶¶ 151–152, 157, 161) concern climate change generally and do not promote the sale of “particular products.” Further, “the fact that there is an economic motivation for speech does not transform non-commercial speech into commercial speech.” *Nefedro v. Montgomery Cnty.*, 414 Md. 585, 604 (2010) (speech was not commercial where it was not “solely related to the economic interests of the speaker”). Instead, the relevant inquiry is “whether the ‘princip[al] type of expression at issue’ is one that ‘propose[s] a commercial transaction.’” *Id.* at n.14 (quoting *Bd. of Trs. of State Univ. of N.Y. v. Fox*, 492 U.S. 469, 473–74 (1989)). Plaintiff offers no argument on this point.

Even assuming that *some* of the alleged (or, here, not alleged) speech is commercial, such speech “does not retain its commercial character when it is inextricably intertwined with the otherwise fully protected speech.” *Riley v. Nat’l Fed’n of the Blind of N.C., Inc.*, 487 U.S. 781, 782 (1988). Even if Plaintiff’s generic assertions about “Defendants” in this respect were not deficient, the alleged campaigns and public communications are protected, as they are described on their face as speech to policymakers and the citizenry regarding fossil fuels and climate change. *See, e.g.*, Compl. ¶¶ 145, 151, 157, 161. Those are indisputably a matter of public policy and public concern. *See MCB Woodberry Dev. LLC v. Council of Owners of Millrace Condo., Inc.*, 253 Md. App. 279, 304 (2021) (“a matter of ‘public concern’ means ‘fairly considered as relating to any matter of political, social, or other concern to the community . . . .’”).

Second, Plaintiff fails to address the judicially noticeable, public-record facts presented by MPC and Speedway with regard to Plaintiff’s bad faith, including that Baltimore (1) serves as the nation’s second-largest coal export center (handling nearly 25% of all U.S. coal exports, and where coal is the top commodity export by tonnage), (2) functions as major destination for tankers carrying petroleum from other countries, and (3) receives large economic benefits from the transport, marketing, and sale of fossil fuels. *See Br.* at 9. That Plaintiff does not contest these

facts and that, as in *MCB Woodberry*, (i) “the allegations of the complaint [a]re ‘conclusory’ and ‘devoid of any specific facts’ to support the claim that the [defendants] made any false or misleading claims,” and (ii) “the remaining allegations . . . [a]re customarily protected First Amendment activities” demonstrate bad faith. 253 Md. App. at 310–11.

Third, with regard to constitutional malice, Plaintiff merely sidesteps the holding of *MCB Woodberry*, which dismissed plaintiffs’ claims because *plaintiffs failed to show that defendants acted with constitutional malice*—specifically, plaintiffs made no non-conclusory allegations that defendants or those advocating on their behalf made false statements or acted in reckless disregard of the falsity of those statements. *Id.* at 312–13. Plaintiff fails to identify any statement, let alone a knowingly false statement, on behalf of MPC or Speedway.

Finally, the *Noerr-Pennington* doctrine applies and bars this suit.<sup>16</sup> The First Amendment protects “[a] publicity campaign directed at the general public and seeking government action.” *Manistee Town Ctr. v. City of Glendale*, 227 F.3d 1090, 1091–92 (9th Cir. 2000).<sup>17</sup> And Plaintiff’s theory is premised on purported public campaigns that fall squarely within *Noerr-Pennington*’s protection,<sup>18</sup> which applies even when speech is allegedly fraudulent, as *Noerr* itself involved allegations of a “vicious, corrupt, and fraudulent” campaign. *E. R.R. Presidents Conf. v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 129 (1961). Thus, *Noerr-Pennington* bars this suit.

### **CONCLUSION**

Plaintiff’s claims against MPC and Speedway should be dismissed.

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<sup>16</sup> “The application of *Noerr-Pennington* is a question of law,” *IGEN Int’l, Inc. v. Roche Diagnostics GmbH*, 335 F.3d 303, 310 (4th Cir. 2003), so this Court should reject Plaintiff’s entreaty to decline answering it. Opp. at 10.

<sup>17</sup> That is so even when speech involves commercial matters. In *Manistee*, defendants, who “preferred that [plaintiff] lease to a large commercial retailer,” lobbied one of these potential lessors to end negotiations to lease the space. 227 F.3d at 1091–92. Despite that the core dispute concerned the commercial decision of leasing the property, the Ninth Circuit held that such lobbying constituted petitioning and affirmed dismissal under *Noerr-Pennington*. *Id.* at 1096.

<sup>18</sup> See Compl. ¶¶ 6–7 (“denialist campaigns”), 10 (“anti-science campaigns”); 102 (“dogged campaign against regulation”), 143 (“public campaign”), 145–47 (“public relations campaign”).

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**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on this 26<sup>th</sup> day of January 2024, a copy of the foregoing was served upon all counsel of record via email (by agreement of the parties).

  
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