MAYOR & CITY COUNCIL OF BALTIMORE, Plaintiff v. BP P.L.C., et al. Defendants	*	IN THE CIRCUIT COURT FOR BALTIMORE CITY Case No. 24-C-18004219

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REPLY IN FURTHER SUPPORT OF EXXONMOBIL'S
SUPPLEMENTAL MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM

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I. INTRODUCTION

Plaintiff's claims against Exxon Mobil Corporation ("ExxonMobil") should be dismissed because they sound in fraud but have not been pleaded with the requisite particularity under Maryland's heightened pleading standard. In grasping for reasons that Plaintiff should be excused from meeting its pleading burden, Plaintiff's Opposition only highlights the fatal deficiencies in its allegations against ExxonMobil. As Plaintiff readily admits, its claims are all premised on an alleged "multi-decade deception and concealment campaign" by Defendants to "maximize continued dependence on their products." Opposition ("Opp.") at 2, 7. But rather than identify with particularity alleged misrepresentations by ExxonMobil that formed part of this alleged decades-long "campaign," Plaintiff's Complaint and Opposition resort to vague and conclusory assertions about statements purportedly made by (or attributed to) ExxonMobil, none of which is alleged to have been made in Maryland, directed at Maryland, or seen by Plaintiff or anyone else in Maryland.

Plaintiff also cannot escape the heightened pleading requirements for claims that sound in fraud by attempting to recast its claims as based on traditional tort or failure-to-warn theories of liability or imputing to ExxonMobil statements by other parties and non-parties.

Because Plaintiff fails to meet its burden to plead its claims with particularity, this Court should dismiss all of Plaintiff's claims against ExxonMobil.

A. Plaintiff's Claims Against ExxonMobil All Sound In Fraud And Must Be Pleaded With Particularity[1]

Plaintiff's Opposition confirms that all of Plaintiff's claims against ExxonMobil are premised on a sweeping theory that ExxonMobil and other defendants allegedly engaged in a

[1] Plaintiff erroneously suggests that ExxonMobil "does not dispute that the City satisfies the ordinary pleading standard." Opp. at 1. That is incorrect. ExxonMobil joined in the Memorandum of Law in Support of Defendants' Motion to Dismiss Plaintiff's Complaint for Failure to State a Claim Upon Which Relief Can Be

"decades-long campaign" to increase public consumption of fossil fuel products allegedly "by failing to warn of their products' climatic risks and spreading disinformation about those risks to deceive consumers." Opp. at 1-2. Under established Maryland law, because these claims sound in fraud, they must be pleaded with heightened particularity. *Kemp* v. *Nationstar Mortg. Ass'n*, 248 Md. App. 1, 40 (2020), *aff'd in part, rev'd in part*, 476 Md. 149 (2021); *see also Cozzarelli* v. *Inspire Pharms. Inc.*, 549 F.3d 618, 629 (4th Cir. 2008); *Layani* v. *Ouazana*, No. SAG-20-420, 2022 WL 11949038, at *3 (D. Md. Oct. 20, 2022); *Oliver* v. *Wells Fargo Bank, N.A.*, No. SAG-22-2128, 2022 WL 17978271, *3 n.1 (D. Md. Dec. 27, 2022). Plaintiff does not dispute that claims sounding in fraud are subject to heightened pleading, but instead insists that only *part* of its Maryland Consumer Protection Act ("MCPA") claim falls within this category. Plaintiff's arguments fail for at least four reasons.

First, Plaintiff argues that the heightened pleading standard does not apply to most of its claims because particularity is only required where a plaintiff seeks "relief on the ground of fraud." Opp. at 4 (quotation omitted). Plaintiff, however, fails to offer any meaningful distinction between this concept and claims "sounding in fraud." because none exists. In fact, the cases relied on by Plaintiff support the conclusion that Plaintiff's claims against ExxonMobil do in fact seek "relief on the ground of fraud." For example, in *Thomas* v. *Nadel*, plaintiffs sought relief from a foreclosure sale by filing an exception, which alleged that certain "defects in the chain of title of the note evidencing [plaintiffs'] debt" resulted in "fraud on the judicial system." 427 Md. 441, 443 (2012) (quotation omitted). Applying the heightened pleading standard, the court determined that plaintiffs failed to state a claim because, among other things, they failed to allege any

Granted ("Joint Motion"), and for the reasons set forth therein, disputes that Plaintiff has satisfied its pleading burden as to any claim.

misrepresentations in the note. *Id.* at 453-54. That is no different from the circumstances here. Plaintiff's claims are based on the premise that ExxonMobil and others allegedly engaged in fraudulent promotion of their fossil fuel products. However, the Complaint fails to identify any specific misrepresentations by ExxonMobil upon which Plaintiff purportedly relied.

For its part, *Spangler* v. *Dan A. Sprosty Bag Co.* merely stands for the principle—undisputed by Plaintiff and ExxonMobil—that a case alleging fraud "must distinctly state the particular facts and circumstances constituting the fraud and the facts so stated must be sufficient in themselves to show that the conduct complained of was fraudulent." 183 Md. 166, 173 (1944). In sum, whether this Court applies a "sounding in fraud" or "relief on the ground of fraud" test, the result is the same: Plaintiff's claims against ExxonMobil must be pleaded with particularity.

Second, Plaintiff suggests that most of its claims (nuisance, trespass, failure-to-warn, and design defect) cannot, by definition, be subject to particularity pleading because Maryland courts have not specifically done so before. Opp. at 4. But if there are no Maryland cases applying a heightened pleading standard to these causes of action, that is presumably because of the novel nature of Plaintiff's claims, which reflect an unprecedented effort to premise these traditional tort claims on a theory of liability grounded in alleged fraud and deception. Through this theory, Plaintiff seeks to "expand traditional tort concepts" beyond what is permissible under Maryland law. *See Gourdine* v. *Crews*, 405 Md. 722, 750 (2008); *see also* Joint Motion 32-55. Plaintiff cannot at once try to allege an unprecedented promotion theory of tort liability and at the same time avoid the pleading consequences of this approach. *Cozzarelli*, 549 F.3d 618, 629 (4th Cir. 2008) ("When a plaintiff makes an allegation that has the substance of fraud, . . . he cannot escape the requirements of Rule 9(b) by adding a superficial label[.]").

Third, Plaintiff contends that only claims involving "fraud as a necessary element"—*i.e.*, those that require a showing of "*specific intent* to induce consumer reliance"—are subject to Maryland's heightened pleading standard. Opp. at 4. On this basis, Plaintiff argues that *only* its claim based on MCPA § 13-301(9) must be pleaded with particularity.[2] *Id.* Not so. The particularity standard applies whenever "the gravamen of the claim is fraud even [if] the theory supporting the claim is not technically termed fraud." *Haley* v. *Corcoran*, 659 F. Supp. 2d 714, 721 (D. Md. 2009) (quotation omitted) (applying the particularity standard to MCPA claims, not limited to § 13-301(9)).[3] Here, Plaintiff's Complaint makes abundantly clear that its claims are based on allegations that Defendants acted intentionally and knowingly to deceive the public. *See, e.g.*, Compl. ¶¶ 1, 221, 284.

Finally, Plaintiff contends that because its claims "rest in substantial part" on "simple failure to provide warnings," the claims need not be pleaded with particularity. Opp. at 5 (emphasis omitted). As an initial matter, this argument assumes that a "simple failure to provide warnings" would not be subject to Maryland's heightened pleading standard. But that assumption is wrong: in *Lloyd* v. *General Motors Corp.*, a case Plaintiff cites, the Supreme Court of Maryland applied the particularity standard to omission-based claims for fraudulent concealment and intentional failure to warn. 397 Md. 108, 153-54 (2007). In any event, this argument misses the point. As the Opposition acknowledges, Plaintiff's theory of liability is premised upon an alleged

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[2] Plaintiff argues in a footnote that "[a]lthough the Complaint expressly refers to only § 13-301(1) and (9) . . . it thus also states a violation of § 13-301(3) against ExxonMobil and other Defendants." Opp. at 3 n.3. Under any pleading standard, Plaintiff's attempt to introduce a brand new cause of action in its brief is improper.

[3] There is no basis for Plaintiff's contention that Maryland's heightened pleading standard differs from the federal standard simply because it is judge-made. See Opp. at. 3-4. Maryland courts routinely look to the Federal Rules of Civil Procedure to interpret the scope of analogous state rules, including in the context of Maryland's heightened pleading standard for fraud. *See McCormick* v. *Medtronic, Inc.*, 219 Md. App. 485, 528 (2014) (citing federal precedent regarding Federal Rule of Procedure 9(b) and describing it as "concerning the analogous federal rule").

"decades-long campaign" in which Defendants allegedly "fail[ed] to warn of their products' climatic risks and spread[] disinformation about those risks to deceive consumers." Opp. at 1-2 (citing Compl.) (internal quotations omitted).[4] The fact that Plaintiff's theory of liability rests on a combination of alleged misrepresentations and omissions does not excuse Plaintiff from pleading the misrepresentations with particularity when they sound in fraud, as they do here.

B. Plaintiff's Allegations Against ExxonMobil Fail To Satisfy The Heightened Pleading Standard

Plaintiff's Opposition confirms that Plaintiff did not (and cannot) plead claims against ExxonMobil with the particularity required by Maryland law. To state a claim sounding in fraud, a plaintiff must identify "who made what false statement, when, and in what manner (*i.e.*, orally, in writing, etc.); why the statement is false; and why a finder of fact would have reason to conclude that the defendant acted with scienter." *McCormick*, 219 Md. App. at 528. The plaintiff must also allege detrimental reliance with particularity. *Walton* v. *Davy*, 86 Md. App. 275, 282-83 (1991). Plaintiff does not dispute that it falls short of the particularity standard as to every claim aside from its claim under MCPA § 13-301(9). Opp. at 1, 7-8. For all other claims, Plaintiff maintains only that its allegations "fully satisfy Maryland Rule 2-305's" ordinary pleading standard. *Id*. at 3.

Plaintiff claims that it "amply pleads" its § 13-301(9) claim under the particularized pleading standard by "exhaustively describing the multi-decade deception and concealment campaign in which Exxon participated." *Id.* at 7. But of the *six* examples Plaintiff provides to illustrate its purported "exhaustive[]" allegations, not one satisfies the heightened pleading standard. *Id.* at 2. Only the first three examples allege that statements were made specifically *by ExxonMobil*; the rest are either too vague to identify any particular statement or refer only to

[4] As explained in Defendants' Joint Motion, Defendants do not have a duty to warn the world about the open and obvious risks of climate change under Maryland law. Joint Motion at 41-44.

statements by trade organizations (or both). And Plaintiff does not even attempt to allege that Plaintiff reasonably relied on any of these alleged misstatements.

Plaintiff also suggests that its allegations are sufficiently pleaded because they "are more robust than those" that were accepted by the Maryland Supreme Court in *Lloyd* v. *General Motors Corp.*, 397 Md. at 150-54. But that conclusion is impossible to draw based on the face of the decision. Although the Court in *Lloyd* held that plaintiffs in that case "amply pled that the respondents made actionable misrepresentations or omissions to support their fraud allegations," *id.* at 153, the decision does not catalog all of the "amply pled" allegations that formed the basis for that ruling. Plaintiff's warped reading of *Lloyd* would effectively gut the very heightened pleading standard that the case endorses and properly applies.

In any event, Plaintiff continues to rest the vast majority of its case on collective allegations that impermissibly "dump … all [Defendants] into the same pot." *Heritage Harbour, L.L.C.* v. *John J. Reynolds, Inc.*, 143 Md. App. 698, 711 (2002). Plaintiff claims that its generalized, collective allegations against all Defendants suffice to make out its claims against ExxonMobil. Opp. at 5-8. But Plaintiff misstates the law. When the heightened pleading standard applies, a plaintiff must "identify *each defendant's* participation in the alleged fraud." *Haley*, 659 F. Supp. at 721 (emphasis added); *Finley Alexander Wealth Mgmt., LLC* v. *M&O Mktg., Inc.*, No. GJH-19-1312, 2020 WL 1322948, at *5, *10 (D. Md. Mar. 20, 2020); *see also Wells.* v. *State*, 100 Md. App. 693, 703 (1994) ("[D]efendants are not fungible."). Aside from one Ninth Circuit case, all of the cases Plaintiff cites for the proposition that group pleading is permissible involve claims subject to the ordinary pleading standard. *See* Opp. at 6-8.

Importantly, and further confirming the fundamental deficiency of Plaintiff's Complaint, earlier this month, the Delaware Superior Court dismissed similar claims in a nearly identical

lawsuit, in part, because the plaintiff failed to allege any purported misrepresentations with the requisite particularity under Delaware's analog to Federal Rule of Civil Procedure 9(b). *Delaware* v. *BP Am. Inc.*, No. N20C-09-097, 2024 WL 98888, at *17 (Del. Sup. Ct. Jan. 9, 2024). That same result is warranted here.

C. Plaintiff Cannot Satisfy the Heightened Pleading Standard by Imputing Third-Party Statements on ExxonMobil

Attempting to explain away its failure to plead alleged misrepresentations *by ExxonMobil* with particularity, Plaintiff resorts to the faulty premise that it can satisfy the heightened pleading standard by attempting to impute to ExxonMobil statements by non-party trade organization API. But Plaintiff cannot make an end run around its insufficient allegations as to ExxonMobil by pulling a concert-of-action theory out of thin air.

As an initial matter, to establish liability under a concert-of-action theory, Plaintiff still must plead "that the conduct of the actor [was] itself tortious" or that the actor provided "substantial assistance" to another's tort. Restatement (Second) of Torts § 876; *see also Consumer Prot. Div.* v. *Morgan*, 387 Md. 125, 185 (2005) ("adopt[ing] the Second Restatement's definition of concerted action"). Put simply, invoking a concert-of-action theory does not give Plaintiff license to avoid making particularized allegations. *Cf. Williams* v. *Stone*, 923 F. Supp. 689, 692 (E.D. Pa. 1996) ("[I]t is axiomatic that before there is joint and several liability, there must be individual liability." (citing Maryland law)); *cf. Tedrow* v. *Deskin*, 265 Md. 546, 550 (1972) ("[P]articipation in the tort is essential to liability."). By failing to meet its heightened burden to plead that ExxonMobil engaged in tortious conduct—for all of the reasons discussed above and in Defendants' Joint Motion—Plaintiff's Complaint also does not state a claim for concert-of-action liability.

In any event, Plaintiff does not adequately allege that ExxonMobil acted in concert with other Defendants through its participation in API. It is well established that mere membership and participation in a group is not sufficient to impose civil liability on a defendant. *N.A.A.C.P.* v. *Claiborne Hardware Co.*, 458 U.S. 886, 918-920 (1982) ("The First Amendment . . . restricts the ability of the State to impose liability on an individual solely because of his association with another."). Indeed, "[t]here is nothing inherently wrong with membership in an industry-wide trade association." *Payton* v. *Abbot Labs*, 512 F. Supp. 1031, 1038 (D. Mass. 1981) (applying Restatement (Second) of Torts § 876(a)); *see also Rojas* v. *Delta Airlines, Inc.*, 425 F. Supp. 3d 524, 543 (D. Md. 2019). ExxonMobil's mere membership in API, a national trade organization that existed long before the allegedly tortious conduct occurred, is plainly insufficient to allege an agreement among the Defendants. *See* Compl. ¶ 31(a); *see also In re Asbestos School Litig.*, 46 F.3d 1284, 1290 (3d Cir. 1994) (Alito, J.) (attendance at meetings not sufficient to impose liability because it did not show defendants "specifically intended to further any allegedly tortious" conduct). This is all the more true when the complaint fails to allege with particularity, or at all, the scope of the activities of the trade organization, how many members it had, or how involved each member was.

Apparently recognizing the deficiencies in the Complaint, Plaintiff attempts belatedly to bolster its argument by alleging purported "judicially noticeable" facts about ExxonMobil's involvement with API, including that "multiple Exxon CEOs chaired API" and that "senior Exxon executives were continuously involved in API for many decades." Opp. at 9 (emphasis omitted). But even if the Court could properly consider these additional allegations, which it cannot,[5] the

[5] At the motion to dismiss stage, the Court's analysis is "limited generally to the four corners of the complaint and its incorporated supporting exhibits, if any." *Converge Servs. Grp., LLC* v. *Curran*, 383 Md. 462, 475 (2004). "[W]hen a trial judge is presented with factual allegations beyond those contained in the complaint to support or oppose or motion to dismiss," the trial judge must either exclude such matters or convert the motion to a motion

fact that ExxonMobil's officers or directors at various times were members of API or in leadership of API does not suffice to adequately plead concerted action between ExxonMobil and API, or between ExxonMobil and any other Defendants. Taken together with the allegations already in the Complaint, these new facts certainly do nothing to show that *any* specific statements made by API were made with ExxonMobil's "substantial assistance or encouragement," which is a necessary predicate for liability under Restatement (Second) of Torts § 876(b).

Plaintiff's fallback acting-in-concert theory relies heavily on *Consumer Protection Division* v. *Morgan*, but that case is readily distinguishable. *Morgan* involved an enforcement action by the Maryland Attorney General's Consumer Protection Division in which the State had already determined that respondents "each . . . violated the Consumer Protection Act." *Morgan*, 387 Md. at 155. Thus, *Morgan*'s analysis of joint-and-several liability solely concerned the allocation of responsibility among multiple wrongdoers for a restitution remedy, and whether "the Consumer Protection Act authorize[s] holding *violators* jointly and severally liable for a restitution order." *Id.* at 159 (emphasis added). The court ultimately determined "that the Division may *award restitution* jointly and severally." *Id.* at 174 (emphasis added). But the case does nothing to disturb the fundamental principle that, in Maryland, "[j]oint 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 by the commission of those wrongs." *Rivera* v. *Prince George's Cnty. Health Dep't*, 102 Md. App. 456, 475 (1994) (emphasis added). Moreover, the *Morgan* holding has no bearing on whether liability may be found in the first instance for claims sounding in fraud, and certainly does not stand for the proposition that a

for summary judgment. *Okwa* v. *Harper*, 360 Md. 161, 177 (2000). Plaintiff offers no reason why this Court is permitted to consider these additional factual allegations at the motion to dismiss stage.

plaintiff's intention to seek joint-and-several liability under a "concert-of-action" theory permits that plaintiff to impute statements by a trade organization onto its members.

II. CONCLUSION

For the reasons set forth above and in ExxonMobil's Opening Brief, Plaintiff's claims against ExxonMobil should be dismissed.

Dated: January 26, 2024

Respectfully submitted,

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I HEREBY CERTIFY that on this 26th day of January, 2024, a copy of Reply in Further Support of ExxonMobil's Supplemental Motion to Dismiss for Failure to State a Claim was sent via electronic mail, to:

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