

**IN THE CIRCUIT COURT FOR
FOR BALTIMORE CITY**

MAYOR AND CITY COUNCIL
OF BALTIMORE,

Plaintiff,

vs.

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

Defendants.

Case No. 24-C-18-004219

Hon. Videtta A. Brown

**DEFENDANTS PHILLIPS 66 AND PHILLIPS 66 COMPANY'S REPLY IN
SUPPORT OF INDIVIDUAL MOTION TO DISMISS FOR
FAILURE TO STATE A CLAIM**

Plaintiff's Opposition ("Opp.") does not contest the basic tenets of the Phillips 66 Defendants' Motion to Dismiss ("Mot."). The Complaint does not allege any statement by Phillips 66 or Phillips 66 Company (the "Phillips 66 Defendants"), let alone a false statement. It does not allege any act at all by the Phillips 66 Defendants since they were formed in 2011. That leaves Plaintiff in the precarious position of arguing that its case theory of a "decades-long campaign" need not allege any falsehoods, that the Phillips 66 Defendants have some kind of generalized notice of allegations that are not actually made in the Complaint, and that allegations against other companies and organizations are sufficient to force the Phillips 66 Defendants to participate in this massive litigation. The Court should dismiss the Complaint against the Phillips 66 Defendants.

I. PLAINTIFF FAILS TO IDENTIFY ANY MISREPRESENTATION OR OMISSION BY THE PHILLIPS 66 DEFENDANTS.

Plaintiff's Opposition concedes that it cannot identify a single affirmative misrepresentation or act of concealment by the Phillips 66 Defendants. Instead, it argues the Phillips 66 Defendants are "link[ed]" to "many" unidentified misrepresentations of others under a "concert-of-action" theory. Opp. at 2. (More on that theory below in Section I.A.) If Plaintiff cannot muster a single allegation, then there is no basis for the lawsuit. Plaintiff has sued over two dozen defendants, and its 132-page Complaint is filled with allegations made against parties and non-parties other than the Phillips 66 Defendants. Yet Plaintiff fails to allege any specific statement or act by the Phillips 66 Defendants. Under Maryland's basic pleading standard, a Complaint still must allege the specific tortious acts of each defendant. *See Keyser v. Richards*, 148 Md. 669, 674 (1925); *Wells v. State*, 100 Md. App. 693, 703 (1994). Plaintiff's Complaint fails to provide sufficient notice to the Phillips 66 Defendants to state a claim for relief. Without a single, specific allegation against them, the Phillips 66 Defendants do not have notice of what alleged acts to contest to mount an effective defense.

Nor has Plaintiff identified any actionable omission by the Phillips 66 Defendants. Plaintiff argues that it alleges “the Phillips 66 Defendants pervasively failed to adequately warn” Maryland communities of climate change.¹ Opp. at 2 (citing Compl. ¶¶ 26(i), 142, 241, 274). The allegations Plaintiff cites, however, are untethered to any specific facts concerning the Phillips 66 Defendants. The first one, Paragraph 26(i), alleges only that ConocoPhillips does business in Maryland. The remainder of the allegations (purportedly establishing an actionable omission by the Phillips 66 Defendants) make no reference to the Phillips 66 Defendants at all. Instead, they group together all 26 Defendants and assert the conclusions that “Defendants” had an awareness of steps to mitigate damages caused by fossil fuels, should have made reasonable warnings, breached a duty of care, and acted with conscious disregard. These allegations contain no facts that might support a failure to warn claim against the Phillips 66 Defendants.

Plaintiff’s attempt to manufacture allegations supporting an actionable omission against the Phillips 66 Defendants is just one example of its improper reliance on group pleading. Opp. at 8. According to Plaintiff, lumping all 26 Defendants together in a group “promotes brevity” while still fulfilling the goals of notice pleading. Opp. at 9. Not so. Plaintiff’s allegations rely so heavily on allegations about an undifferentiated group of “Defendants” that they do not provide notice of the nature of the claims against the Phillips 66 Defendants, define the bounds of the litigation as to the Phillips 66 Defendants, or identify sufficient facts to support actionable conduct by them. Indeed, in arguing that the Court must accept its group allegations as adequate, Plaintiff essentially concedes that it has not alleged specific actions taken or misrepresentations made by the Phillips 66 Defendants.

¹ Plaintiff’s failure to warn claim against the Phillips 66 Defendants should be dismissed for the independent reasons that Plaintiff asserts a novel theory that seeks to impose an unprecedented duty of care on Defendants, and because there is no duty to warn when the alleged impact of fossil fuel use on the global climate has been “open and obvious” for decades, as explained in Defendants’ Joint Motion to Dismiss.

Group pleading cannot be used to concoct claims against a defendant when no specific facts can be pled to establish a meritorious claim against it. Plaintiff cites no Maryland authority to support the use of group pleading to state a claim against an individual defendant under these circumstances. Even the federal case upon which Plaintiff relies cautions against the use of group pleading, which, at best, “amounts to a conclusory allegation” and at worst, “amounts to speculation.” *See CASA de Md., Inc. v. Arbor Realty Tr., Inc.*, 2022 WL 4080320, at *4 (D. Md. Sept. 6, 2022). The *CASA* court refused to allow group pleading against three defendants, concluding that the allegations about their “interrelationship” with the other defendants were “an insufficient basis from which to infer that [the three] took actions which would make them individually liable.” *Id.* at *5. To the extent that case allowed group pleading as to some defendants, they were interconnected entities that were part of the same corporate pyramid, and the Complaint described each defendant’s particular conduct and role. *Id.* That is hardly the case here, where Plaintiff lumps the Phillips 66 Defendants together with 24 unaffiliated corporate defendants.

Plaintiff also fails to distinguish the authority cited by the Phillips 66 Defendants. Rather than engage with key cases like *Samuels* and *Heritage Harbour*, Plaintiff half-heartedly asserts in a footnote that the authority cited in the Motion does not categorically “proscribe group pleading.” *Opp.* at 8 n.11. These cases, however, all squarely reject conclusory group pleading in circumstances similar to here. *See Samuels v. Tschechtelin*, 135 Md. App. 483, 528–29 (2000) (affirming dismissal of claims that “lumped [Defendants] under the general title of ‘Defendants’ and summarily included [them] in each of appellant’s seven counts”); *Heritage Harbour, LLC v. John J. Reynolds, Inc.*, 143 Md. App. 698, 710–11 (affirming dismissal of a complaint that “dump[ed]” all the defendants “into the same pot,” without alleging specific acts or omissions

committed by the defendants); *Keyser*, 148 Md. at 677 (allegations that all defendants jointly participated in the care of an individual, without stating the tortious acts or roles of the different defendants, failed to allege joint participation in the alleged wrong); *Delaware v. BP America Inc.*, 2024 WL 98888, at *17 (Del. Super. Ct. Jan. 9, 2024) (dismissing nearly identical “claims alleging misrepresentations” for “fail[ure] to specifically identify” statements and relying on group pleading).

Moreover, the Opposition does not meaningfully confront Plaintiff’s failure to differentiate the Phillips 66 Defendants from the distinct ConocoPhillips entities.² That the Phillips 66 Defendants may consist of certain downstream businesses spun-off from ConocoPhillips does not excuse Plaintiff from specifying the specific allegations against the current Phillips 66 Defendants themselves. Plaintiff chose to name the wholly separate Phillips 66 Defendants as distinct Defendants in its Complaint and therefore must provide the Phillips 66 Defendants with adequate notice of Plaintiff’s specific allegations against them.

A. Plaintiff’s Newfound “Concert-of-Action” Theory Does Not Cure the Pleading Deficiencies As To The Phillips 66 Defendants.

Plaintiff’s Opposition relies on a so-called “concert-of-action” theory that is mentioned nowhere in the Complaint. *See* Opp. at 2–4. To establish joint and several liability for the Phillips 66 Defendants through a concert-of-action theory, Plaintiff would need to allege that the Phillips 66 Defendants “actively participate[d]” in the wrongful act of another, or “[lent] aid, encouragement or countenance” to the wrongdoer or “approval” to its acts. *Consumer Prot. Div.*

² Plaintiff does not contest that Phillips 66 was formed in 2011, and does not oppose Phillips 66’s request for judicial notice of Exhibits A and B, Phillips 66’s Delaware certificate of incorporation. *See* Mot. at 6 n.5, Exs. A & B. The vast majority of the generalized allegations in the Complaint entirely predate the existence of the Phillips 66 Defendants, further supporting the Phillips 66 Defendants’ position that they lack adequate information to prepare an effective defense in this case. *See Scott v. Jenkins*, 345 Md. 21, 27–28 (1997) (discussing policy bases for pleading rules and emphasizing that “notice is paramount”).

v. Morgan, 387 Md. 125, 178 (2005) (requiring “a common design or understanding”). Plaintiff argues in its Opposition that the Phillips 66 Defendants acted in concert with other Defendants to make misrepresentations through a national trade association, American Petroleum Institute (“API”). Opp. at 3. But its allegations make no effort to plead any of the required elements of concert-of-action as to the Phillips 66 Defendants.

The Complaint contains no specific factual allegations at all about any membership or participation by the Phillips 66 Defendants in API. To the extent there are any allegations about the Phillips 66 Defendants and API, Plaintiff lumps the Phillips 66 Defendants in with the ConocoPhillips entities and alleged ConocoPhillips and Phillips 66 predecessors using the defined term “ConocoPhillips” (*see* Compl. ¶ 26(h)), and asserts basic facts about membership in the organization. The Complaint alleges that “ConocoPhillips” and alleged predecessors have been members of API (Compl. ¶ 31(a)), that a predecessor (Phillips) received a report in 1972 (*id.* ¶ 111), and that an API task force that predicted the effects of climate change in 1979 included an employee or engineer from a predecessor (Phillips) (*id.* ¶¶ 115–16). None of these allegations reflects any active participation or substantial assistance in any API statement.³ Membership in a trade organization or association is not enough to establish liability. *See NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 920 (1982) (prohibiting imposition of civil liability “merely because an individual belonged to a group”); *Maple Flooring Mfrs. Ass’n v. United States*, 268 U.S. 563,

³ Plaintiff cites several other paragraphs in its Opposition, but those paragraphs either reference “Defendants” generally or specifically reference other defendants. *See* Opp. at 3 (citing Compl. ¶¶ 137, 141–70). And Plaintiff’s Opposition points to documents outside of the Complaint regarding membership of Phillips 66 (and an alleged predecessor’s) personnel on an API executive committee and Board for discrete periods of time, asking the Court to judicially notice purported facts appearing in these documents. Opp. at 3–4 nn.4–5, 7 & Exs. 2–4. It is improper, however, for the Court to judicially notice facts within documents that are not “(1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot be reasonably questioned.” *See Abrishamian v. Wash. Med. Grp., P.C.*, 216 Md. App. 386, 412–13 (2014) (quoting Md. Rule 5–201). Judicial notice is therefore improper here.

584 (1925) (“We do not conceive that the members of trade associations become [] conspirators merely because they gather and disseminate information”); *In re Asbestos Sch. Litig.*, 46 F.3d 1284, 1295–96 (3d Cir. 1994) (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”); *Rojas v. Delta Airlines, Inc.*, 425 F. Supp. 3d 524, 543 (D. Md. 2019) (“Defendants’ membership in [trade association] does not raise an inference of conspiracy on its own.”); *In re Welding Fume Prods. Liab. Litig.*, 526 F. Supp. 2d 775, 800 (N.D. Ohio 2007) (“[T]rade association membership, alone, cannot be the foundation for liability.”); *Silkworth v. Cedar Hill Cemetery, Inc.*, 95 Md. App. 726, at *4 (1993) (rejecting inference of an agreement when complaint “is devoid of factual allegations pointing to an actual agreement among appellees” and instead “infers such an agreement from the similarity of business practices engaged in by all appellees and their common membership in a statewide trade association”). The Complaint provides no detail whatsoever regarding the specific nature of the Phillips 66 Defendants’ alleged roles in API, or how any conduct by the Phillips 66 Defendants evidenced a goal to advance any allegedly deceptive statements by API. The Court should reject Plaintiff’s attempt to make the Phillips 66 Defendants responsible for industry group statements.

Plaintiff’s case law in support of its concert-of-action theory further undermines its argument. For example, the main case on which Plaintiff relies, *Consumer Protection Division v. Morgan*, does not apply concert-of-action liability to all defendants, but rather only to those defendants who, “[o]n each transaction . . . knew of each other’s activities.” 387 Md. at 185 (emphasis added). Where, like here, Plaintiff had “no evidence to indicate [one defendant]’s concerted action with or even knowledge of the other parties’ misrepresentations,” the court

declined to apply concert-of-action liability. *Id.* at 188. Indeed, just like the defendant found not liable in *Morgan*, participation in a “standard [business] practice,” such as membership in a trade organization, does not amount to concerted action. *See id.*

B. Plaintiff’s Alternative Theories Of Agency, Conspiracy, And Aiding-And-Abetting Fail.

Plaintiff also fails to justify its request to proceed on vague agency, conspiracy, or aiding-and-abetting-based theories in lieu of pleading any specific allegations against the Phillips 66 Defendants.

As to agency, the Complaint’s conclusory assertions fail to allege any facts suggesting that Defendants were agents of one another, rather than competitors. *See* Compl. ¶ 32; *see also Best v. Newrez LLC*, 2020 WL 5513433, at *32 (D. Md. Sept. 11, 2020) (no basis for agency relationship where “vague claim that [one party] acted as the agent [of the other party]” was “conclusory and insufficient” and without “grounds, factual or legal, to support that proposition”). Plaintiff claims to have “provided a bevy of facts supporting an inference that Phillips 66 Defendants . . . engaged in a coordinated disinformation campaign where they acted as each other’s agents,” yet Plaintiff cites only to the generic allegation at Paragraph 32 that “each of the Defendants was the agent, servant, partner, aider and abettor, co-conspirator, and/or joint venturer of each of the remaining Defendants herein.” *Opp.* at 5. This is plainly insufficient to support a claim against the Phillips 66 Defendants.

Plaintiff makes a similarly unsupported assertion in regards to a so-called conspiracy, namely that “the very purpose and nature of [API and other named organization] was to advance the shared goal of spreading deception.” *Opp.* at 6. Yet case law squarely contradicts Plaintiff’s arguments, holding that “every action by a trade association is not concerted action by the association’s members.” *AD/SAT v. Associated Press*, 181 F.3d 216, 233–34 (2d Cir. 1999)

(holding a plaintiff must show “that association members, in their individual capacities, consciously committed themselves to a common scheme designed to achieve an unlawful objective” to establish an antitrust conspiracy).⁴

Finally, Plaintiff attempts to attribute action to the Phillips 66 Defendants under an aiding-and-abetting theory, claiming that “[a]t minimum, the Complaint alleges that Phillips 66 Defendants gave substantial assistance or encouragement to other Defendants and front groups in spreading disinformation they all knew to be false.” Opp. at 6. But to be liable as an aider or abettor, a defendant “must have engaged in assistive conduct that he would know would contribute to the happening of [the tortious] act.” *Saadeh v. Saadeh, Inc.*, 150 Md. App. 305, 327–28 (2003) (discussing *Rice v. Paladin Enters., Inc.*, 128 F.3d 233, 251 (4th Cir. 1997) (applying Maryland law)). Yet again, Plaintiff does not (and cannot) identify any specific allegation of the Complaint that alleges “substantial assistance” or “encouragement” by Phillips 66 Defendants, let alone any “assistive conduct” toward alleged tortious acts.

II. THE COMPLAINT FAILS TO COMPLY WITH THE HEIGHTENED PLEADING STANDARD FOR MCPA SECTION 13-301(9).

Plaintiff concedes that its claim under MCPA Section 13-301(9) is subject to heightened pleading standards required for fraud-based claims. Opp. at 6. That claim is further deficient because it fails to meet the heightened pleading standard. *See McCormick v. Medtronic, Inc.*, 219 Md. App. 485, 528 (2014). Although Plaintiff argues that it has “exhaustively describe[ed] the multi-decade deception and concealment campaign in which Phillips 66 Defendants participated”

⁴ For instance, evidence that a paint industry trade organization aggressively promoted lead products and took measures to ensure that the lead products market remained free and unencumbered was insufficient to establish civil conspiracy among lead carbonate manufacturers, where the manufacturers were members of the organization at varying times, and where the plaintiff did not explain when any agreement was reached to commit tortious acts, who was involved in this agreement, and when other parties entered into this agreement. *See Thomas ex rel. Gramling v. Mallett*, 285 Wis. 2d 236, 325 (2005).

(Opp. at 7), its Complaint shows otherwise. Plaintiff yet again fails to identify any actual participatory activity by the Phillips 66 Defendants.⁵ If the Phillips 66 Defendants allegedly made public misrepresentations and participated in a so-called “campaign” of “deception,” Plaintiff must be able to specify when, how, and with what specific representations. It fails to do so. Plaintiff’s fraud-based claims against the Phillips 66 Defendants should be dismissed.

III. THE COURT SHOULD DISMISS THE COMPLAINT AS TO THE PHILLIPS 66 DEFENDANTS WITH PREJUDICE.

Finally, the Court should dismiss the Complaint against the Phillips 66 Defendants with prejudice. Plaintiff’s Opposition fails to identify any facts it would plead to shore up the deficiencies in its 132-page Complaint with respect to Phillips 66 Defendants. Granting Plaintiff leave to amend the Complaint in this case would therefore be futile, and dismissal with prejudice is appropriate. *See* Mot. at 7–8 (collecting cases).

IV. CONCLUSION

For the reasons stated above and in the Motion, the Phillips 66 Defendants respectfully request that the Court dismiss all claims against them with prejudice.

⁵ Plaintiff resorts in a footnote to arguing that it has pled against the Phillips 66 Defendants with particularity because it purportedly “places equal weight on Phillips 66 Defendants’ omissions.” *See* Opp. at 7 n.9. But “[o]rdinarily, under Maryland law, a mere failure to disclose a material fact does not constitute fraud, in the absence of a legal duty to disclose.” *Galante v. Ocwen Loan Serv. LLC*, No. CIV.A ELH-13-1939, 2014 WL 3616354, at *22 (D. Md. July 18, 2014). Plaintiff has not alleged any such duty on behalf of the Phillips 66 Defendants.

Dated: January 26, 2024

Respectfully submitted,

/s/ Matthew J. Peters

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CERTIFICATE OF SERVICE

I hereby certify that on this 26th day of January, 2024, a copy of the *Defendants Phillips 66 and Phillips 66 Company's Reply in Support of Individual Motion to Dismiss for Failure to State a Claim* was served upon all counsel of record via email (by agreement of the parties).

/s/ Matthew J. Peters

Matthew J. Peters