UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

CONSERVATION LAW FOUNDATION, INC., Plaintiff, v. SHELL OIL PRODUCTS US, SHELL OIL COMPANY, SHELL PETROLEUM, INC., SHELL TRADING (US) COMPANY, MOTIVA ENTERPRISES LLC, TRITON TERMINALING LLC, and EQUILON ENTERPRISES LLC, Defendants.	C.A. No. 1:17-cv-00396-WES-LDA

PLAINTIFF CONSERVATION LAW FOUNDATION'S RESPONSE IN OPPOSITION TO MOTION FOR JUDGMENT ON THE PLEADINGS BY DEFENDANTS SHELL OIL COMPANY, SHELL PETROLEUM, INC., AND SHELL TRADING (US) COMPANY

Table of Contents

I. Introduction ... 1

II. Defendants' Motion Is Untimely ... 2

III. CLF Has Sufficiently Pleaded its Claims ... 4

A. A Parent Company is Directly Liable Under the Clean Water Act and RCRA Where It Has Control Over Environmental Matters at a Facility ... 5

B. CLF Has Adequately Alleged Facts That Allow for an Inference of Control by Defendants ... 10

C. The TAC Sufficiently Alleges Violations by the Parent Defendants and Does Not Violate the Group Pleading Doctrine ... 15

IV. Conclusion ... 17

Plaintiff Conservation Law Foundation, Inc. ("CLF") hereby files this Response in Opposition to Defendants Shell Oil Company, Shell Petroleum, Inc., and Shell Trading (US) Company's (collectively, the "Parent Defendants")[1] Motion for Judgment on the Pleadings ("Motion") (ECF No. 70). As detailed below, CLF has sufficiently pleaded its claims against the Parent Defendants throughout the Third Amended Complaint ("TAC") (ECF No. 45).

I. INTRODUCTION

Shell plc and the Shell group of companies have long been aware of the impacts and risks of climate change, as indicated by Shell's statements to the public and government regulators. For example, in 1991 Shell published a twenty-eight-minute educational film entitled "Climate of Concern," which warned about the risks of climate change. *See* TAC at ¶ 133 (citing Damian Carrington & Jelmer Mommers, *'Shell Knew': Oil Giant's 1991 Film Warned of Climate Danger*, The Guardian, Feb. 28, 2017, https://www.theguardian.com/environment/2017/feb/28/shell-knew-oil-giants-1991-film-warned-climate-change-danger). Shell takes the following public policy position on climate change: "We have recognised the importance of the climate challenge for a long time now, and we share our knowledge, experience and understanding of the energy system with policymakers." TAC at 131 (quoting Shell Global, *Climate Change – Public Policy Position*). Shell has described itself as "one of the first energy companies to recognise the climate change threat and to call for action." TAC at ¶ 133 (quoting Royal Dutch Shell plc, Responsible Energy Sustainability Report 12 (2008), *available at* https://www.unglobalcompact.org/system/attachments/1307/original/COP.pdf?1262614257).

[1] The TAC names six Defendants: Shell Oil Company, Shell Petroleum, Inc., Shell Trading (US) Company, Motiva Enterprises LLC, Triton Terminaling LLC, and Equilon Enterprises d/b/a Shell Oil Products US (collectively, the "Defendants"). Only the Parent Defendants are parties to the instant Motion.

Possessing this understanding of climate risks, Shell has made numerous statements describing centralization of climate change risk and resilience consideration. For example, in its 2016 Sustainability Report, Shell stated, "[W]e are taking steps at our facilities around the world to ensure that they are resilient to climate change. . . . We progressively adjust our design standards for new projects while, for existing assets, we identify those that are most vulnerable to climate change and take appropriate action." TAC ¶ 270 (quoting Royal Dutch Shell plc, *Sustainability Report 2016* 2 (2017), *available at* https://reports.shell.com/sustainability-report/2016/servicepages/download-centre.html.).

As supported by public statements and upon current knowledge pending further discovery production, the TAC plausibly alleges that all Defendants named in the TAC exercise sufficient control over the Terminal to be subject to the Court's jurisdiction. The Parent Defendants manage and implement corporate policies and processes governing environmental compliance, severe weather preparedness and response, and Shell's centralized corporate policies and control related to climate change. Additionally, as noted below, Shell blurs the lines between parents and subsidiaries by using nomenclature in its public-facing statements that fails to distinguish between corporate entities, further supporting CLF's pleading approach and confounding CLF and the Court as to its corporate control structure. Thus, for the reasons described below, the Parent Defendants' Motion for Judgment on the Pleadings should be denied.

II. DEFENDANTS' MOTION IS UNTIMELY

The Parent Defendants' Motion for Judgment on the Pleadings should be considered untimely and denied accordingly because the pleadings closed almost sixteen months ago when Defendants filed their Answer. Federal Rule of Civil Procedure 12(c) states that a party may file a motion for judgment on the pleadings "[a]fter the pleadings have closed—but early enough not to delay trial." "[F]or purposes of 12(c), 'the pleadings are closed upon the filing of a complaint and

an answer (absent a court-ordered reply), unless a counterclaim, crossclaim, or third-party claim is interposed.'" *Mandujano v. City of Pharr, Texas*, 786 F. App'x 434, 436 (5th Cir. 2019) (quoting 5C Charles A. Wright & Arthur R. Miller, Federal Practice and Procedure § 1367 (3d ed. Apr. 2019 Update)). Defendants filed their Answer (ECF No. 57) on November 11, 2020, so the pleadings closed on November 11, 2020.[2]

The Parent Defendants filed the instant Motion almost *fifteen months* after the pleadings had closed, over ten months after a scheduling order was entered, over eight months after CLF served its first discovery requests, and over four months after the deadline to amend pleadings had passed. The First Circuit has opined that "once the parties have invested substantial resources in discovery, a district court should hesitate to entertain a Rule 12(c) motion that asserts a complaint's failure to satisfy the plausibility requirement." *Grajales v. Puerto Rico Ports Auth.*, 682 F.3d 40, 46 (1st Cir. 2012). While the Parent Defendants maintain that "discovery is just underway and this motion will not delay trial," Memorandum of Law in Support of Motion ("Memo") (ECF No. 70-1) at 5 n.4, discovery has only been delayed *because of Defendants*. Even putting aside the discovery disputes the Parties are currently litigating, the main reason discovery is still ongoing is because Defendants have failed to produce many documents that even *they agree are relevant* in a timely fashion and have failed to timely run agreed-upon search terms. *See* Motion to Compel, 26–29 (ECF No. 72) (discussing, among other things, Defendants' limited production so far and failure to run agreed-upon search terms). Moreover, despite receiving little discovery from Defendants, CLF has expended substantial resources attempting to obtain discovery from

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[2] The Parent Defendants appear to argue in a roundabout way that the pleadings did not close until after the deadline to amend the pleadings. Memorandum of Law in Support of Motion (ECF No. 70-1) at 1 ("The deadline to amend the pleadings has passed and it is appropriate now to streamline CLF's unwieldly case."), 18 ("now that the pleadings are closed"); *see also id.* at 3, 3 n.1, 5, 5 n.4. However, the ability to amend the pleadings does not alter when the pleadings have closed. *Mandujano*, 786 F. App'x at 436 (dismissing the plaintiff's argument that the pleadings had not closed because he could still amend his complaint as a matter of course).

Defendants, including conducting many meetings with Defendants, two conferences with the Court, and filing a motion to compel. *See id.* at 4–7.

"When the window for filing either a motion to dismiss for failure to state a claim or a motion for judgment on the pleadings has shut and substantial discovery has taken place . . . a party seeking to end a civil action short of trial ordinarily must" turn to a motion for summary judgment. *Rios-Campbell v. U.S. Dep't of Commerce*, 927 F.3d 21, 24 (1st Cir. 2019). In that vein, the few documents CLF has received in discovery confirm that there is, at a minimum, an issue of material fact as to the control exercised by the Parent Defendants. The Parent Defendants should not be allowed to benefit from their delay tactics, especially where the arguments the Parent Defendants make here could have been made in Defendants' sixty-page Motion to Dismiss (ECF No. 46-1) filed in 2019. This Court should exercise its discretion, deny Defendant's Rule 12(c) motion, and order that any arguments the Parent Defendants have about their lack of control over the Terminal should be made in a motion for summary judgment *after* the close of all discovery.

III. CLF HAS SUFFICIENTLY PLEADED ITS CLAIMS

A Rule 12(c) motion is governed by the same standards as a motion to dismiss under Rule 12(b). "Because [a Rule 12(c)] motion calls for an assessment of the merits of the case at an embryonic stage, the court must view the facts contained in the pleadings in the light most favorable to the nonmovant and draw all reasonable inferences therefrom . . . ." *Perez-Acevedo v. Rivero-Cubano*, 520 F.3d 26, 29 (1st Cir. 2008) (quoting *R.G. Fin. Corp. v. Vergara–Nunez*, 446 F.3d 178, 182 (1st Cir. 2006)). "The First Circuit has further held that a court may only grant a Rule 12(c) motion if 'it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.'" *Stafford v. CSL Plasma, Inc.*, 504 F. Supp. 3d 9, 12 (D.R.I. 2020) (quoting *Curran v. Cousins*, 509 F.3d 36, 43 (1st Cir. 2007)).

A. A Parent Company is Directly Liable Under the Clean Water Act and RCRA Where It Has Control Over Environmental Matters at a Facility

Defendants admit that allegations of control and/or operation are sufficient for liability under the permit and statutory violations CLF alleges, Memo at 1 ("CLF's allegations of permit violations and concerns over the Terminal's operation and compliance are claims that can only be brought against an entity that has at one point owned, operated, or controlled the Terminal."), but seek to limit the breadth of who may be considered liable in a manner inconsistent with case law and the language of the relevant statutes and regulations.

As CLF has alleged, the Parent Defendants are directly liable for violations of the Clean Water Act and Resource Conservation and Recovery Act ("RCRA") at the Terminal because they exercise control over facility operations and qualify as "operators." A parent is directly liable as an "operator" where the parent is involved "with 'operations having to do with the leakage or disposal of hazardous waste, or decisions about compliance with environmental regulations.'" *United States v. Kayser-Roth Corp.*, 272 F.3d 89, 102 (1st Cir. 2001) (quoting *United States v. Bestfoods*, 524 U.S. 51, 68 (1998)).[3]

CLF has not sought to hold defendants liable by way of piercing the corporate veil, nor are such allegations necessary for the Parent Defendants to be directly liable as outlined in the TAC. While Defendants imply that CLF must meet the "high standard" of veil piercing by virtue of having utilized group pleading, Defendants cite no case demonstrating such a requirement. Memo at 10–12. Instead, Defendants rely heavily on *Bestfoods* to argue for a standard requiring a showing

[3] While *Kayser-Roth Corp.* and *Bestfoods* interpret the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA"), their interpretation also applies to questions of RCRA and Clean Water Act liability. *See, e.g.*, *LeClercq v. Lockformer Co.*, No. 1:00-cv-7164, 2002 WL 908037, at *2 (N.D. Ill. May 6, 2002) ("[T]he statutory definition of 'owner' and 'operator' are the same under RCRA and CERCLA, and the standards for owner and operator liability under the two statutes are identical."); *United States v. Jones*, 267 F. Supp. 2d 1349, 1355 (M.D. Ga. 2003) (applying CERCLA case law to question of direct operator liability in Clean Water Act and Oil Pollution Act case).

of derivative liability, Memo at 10–12; however, not only does *Bestfoods* make no mention of pleading requirements (being decided on appeal after a trial on liability, *Bestfoods*, 524 U.S. at 58–60), it explicitly allows for direct liability of a parent company, *id.* at 55 ("[A] corporate parent that actively participated in, and exercised control over, the operations of the facility itself may be held directly liable in its own right as an operator of the facility."). More specifically, the Supreme Court found that a parent could be directly liable as an operator for violations of environmental laws where its agent "played a conspicuous part in dealing with the toxic risks emanating from the operation of the plant" and "actively participated in and exerted control over a variety of . . . environmental matters." *Bestfoods*, 524 U.S. at 72.

Other courts have reached the same conclusion. In *Kayser-Roth Corp.*, the parent company was determined to be liable where it "directed [the subsidiary]'s activities with respect to environmental matters, in general, and operation of the facility utilizing [the pollutant], in particular." *Kayser-Roth Corp.*, 272 F.3d at 103. Other cases have also focused on control to determine when a parent company is directly liable for violations of environmental laws. In *Exxon Mobil Corp. v. United States*, the federal government was determined to be liable as an operator for violations of environmental laws at a facility owned by Exxon because the government directed certain aspects of the plant's operations and waste disposal activities. 108 F. Supp. 3d 486 (S.D. Tex. 2015). Similarly, in *United States v. Jones*, a corporate executive was held personally directly liable as an owner for violations of environmental laws "even though he was not in charge of the day-to-day environmental compliance," because he was "the primary decision maker over the facility's compliance with environmental regulations." 267 F. Supp. 2d 1349, 1356 (M.D. Ga. 2003).

The Parent Defendants argue that CLF does not allege that they acted as owners, operators, or had "any control whatsoever over operations," ECF No. 70-1 at 10, but their argument is contradicted by the express allegations in the TAC. The TAC makes clear, as discussed more fully in Section III.B below, that CLF has alleged that *all* the Defendants, including the Parent Defendants, operate the Terminal. As the Parent Defendants quote in their Motion, CLF alleges that "'Defendants, acting through officers, managers, subsidiary companies, and instrumentalities, own or have owned and/or operate or have operated the Providence Terminal.'" Memo at 8 and 15 (quoting TAC at ¶ 48). As operators, the Parent Defendants are directly liable for violations that occur at the Terminal.

The Parent Defendants argue—and CLF does not dispute—that Clean Water Act regulations require that a "permittee shall comply" with the terms of its permits. Memo at 13 (citing 40 C.F.R. §§ 122.41(a)(1), 123.25). But the Parent Defendants ignore the subsequent paragraph in the same regulation, which provides that "any *person* who violates sections 301, 302, 306, 307, 308, 313 or 405 of the [Clean Water] Act, or any permit condition . . . is subject to a civil penalty." 40 C.F.R. § 122.41(a)(2) (emphasis added). The regulations do not restrict liability for permit violations to a "permittee," they extend to any "person." 40 C.F.R. § 122.41(a)(2); *see also* 40 CFR § 122.2 ("Owner or operator means the owner or operator of any facility or activity subject to regulation under the NPDES program.");[4] *cf. Assateague Coastkeeper v. Alan & Kristin Hudson Farm*, 727 F. Supp. 2d 433, 442 (D. Md. 2010) ("The statute clearly makes violations by 'any person' unlawful, not solely permit-holders." (discussing concentrated animal feeding operation NPDES permits) (collecting various NPDES permit cases)). The Parent Defendants are "persons"

[4] Defendants appear to invent the term "named permittee"—it does not appear in the regulations cited by Defendants, nor, to CLF's knowledge, in any relevant statute or regulation. *See* Memo at 13; 40 C.F.R. §§ 122.41(a)(1), 123.25; *see generally* 40 CFR Part 122.

under the statute's and regulations' definitions, and as operators of the Terminal, are liable for the violations of the Clean Water Act and the permits issued under the Act's authority.

Similarly, with respect to violations of RCRA's imminent and substantial endangerment provision, the statute allows a citizen suit

> against any person . . . *including* any past or present generator, past or present transporter, or past or present owner or operator of a treatment, storage, or disposal facility, *who has contributed or who is contributing* to the past or present handling, storage, treatment, transportation, or disposal of any solid or hazardous waste which may present an imminent and substantial endangerment to health or the environment.

42 U.S.C. § 6972(a)(1)(B) (emphasis added). While the language notes that a "past or present generator" can be considered a "person" for purposes of the statute, the use of the term "including" means that the subsequent list of possible violators is not exclusive; instead, the focus of the statutory language is on the alleged violator's *contribution* to the "past or present handling, storage, treatment, transportation, or disposal" of solid or hazardous waste. "Congress intended that the term 'contribution' be 'liberally construed,' and such term includes 'a share in any act or effect' giving rise to disposal of the wastes that may present an endangerment." *Cmty. Ass'n for Restoration of the Env't, Inc. v. Cow Palace, LLC*, 80 F. Supp. 3d 1180, 1229 (E.D. Wash. 2015) (citing *United States v. Aceto Agric. Chems. Corp.*, 872 F.2d 1373, 1383–84 (8th Cir.1989)). "[T]o state a claim predicated on RCRA liability for 'contributing to' the disposal of hazardous waste, a plaintiff must allege that the defendant had a measure of control over the waste at the time of its disposal or was otherwise actively involved in the waste disposal process." *Id.* (quoting *Hinds Invs., L.P. v. Angioli*, 654 F.3d 846, 850 (9th Cir. 2011)). CLF has adequately alleged facts to support an inference that the Parent Defendants exercised control for purposes of its RCRA imminent and substantial endangerment claim. *See* Section III.B below.

Regardless, the Parent Defendants qualify as "generators" of hazardous waste and are, therefore, "persons" who are directly liable for violations of RCRA and its implementing regulations at the Terminal. A generator is any "person" (including corporations, 40 C.F.R. § 260.10; 250 R.I. Code R. 140-10-1.5(75)), "whose act or process produces hazardous waste . . . or whose act first causes a hazardous waste to become subject to regulation." 40 C.F.R. § 260.10; *see also* 250 R.I. Code R. 140-10-1.5(36).[5] And a generator "must maintain and operate its facility to minimize the possibility of . . . any unplanned sudden or non-sudden release of hazardous waste . . . ." 40 C.F.R. § 262.16(b)(8)(i) (for small quantity generators); 40 C.F.R. § 262.251 (same, for large quantity generators); s*ee also* 250 R.I. Code R. § 140-10-1.7.13(H)(1) (small quantity generators); 250 R.I. Code R. § 140-10-1.7.12(I)(1) (large quantity generators); 250 R.I. Code R. § 140-10-1.7.14(H)(1) (conditionally exempt small quantity generators). As discussed below, the Parent Defendants take actions and make decisions that produce hazardous waste and cause hazardous waste to be stored at the Terminals, where it is subject to regulation. The allegations in the TAC sufficiently allege the Parent Defendants are directly liable for violations of RCRA's Generator Rule at the Terminal.

As the Parent Defendants have conceded, control is sufficient to maintain direct liability under both the Clean Water Act and RCRA. CLF has adequately made such allegations to satisfy the lenient standard at the pleading stage.

[5] Parent Defendants cite to the federal regulations in their Motion, Memo at 17–18, but CLF's RCRA Generator Claim is governed by Rhode Island regulations. *See* Memorandum and Order, 7 (ECF No. 55) ("[N]o federal regulation applies where Rhode Island maintains its own program."). For consistency's sake, and because the definitions in both regulations are substantially similar, CLF has cited to both the federal and state regulations.

B. CLF Has Adequately Alleged Facts That Allow for an Inference of Control by Defendants

The allegations in CLF's TAC are adequate to support an inference that the Parent Defendants exercised sufficient control over environmental compliance activities at the Terminal to be subject to suit. At the pleading stage, CLF does not need to *prove* that the Parent Defendants are liable, but simply include allegations sufficient to support an inference of liability. *Stafford*,504 F. Supp. 3d at 12 (quoting *Curran*, 509 F.3d at 43). CLF has done so here.

Each of the Parent Defendants is a person alleged to be in violation of Clean Water Act effluent standards and limitations and in violation of RCRA. *See* Section III.A above. Parent Defendant Shell Petroleum, Inc. is the top-level United States subsidiary of Royal Dutch Shell (now Shell plc) and serves as the connective tissue assuring that mandatory corporate-wide structures, policies, and standards are followed by all defendants. *See* TAC at ¶ 24. Parent Defendant Shell Oil Company is the top-level United States operating entity exercising control over US subsidiaries including Defendants Equilon and Triton. *See* TAC at ¶ 22–23, 27–28, 30. Parent Defendant Shell Trading Company is primarily responsible for the sale of all of the products stored in the Terminal and moved through the Terminal. *See* TAC at ¶ 25. Each of the Parent Defendants were properly notified of suit pursuant to the Clean Water Act and RCRA and are subject to the Court's jurisdiction pursuant to the citizen suit provisions of those statutes. TAC at ¶¶ 5–6; 33 U.S.C. § 1365 (Clean Water Act citizen suit provision); 42 U.S.C. § 6972 (RCRA citizen suit provision).

As stated in the TAC:

> Plaintiff CLF seeks declaratory and injunctive relief, civil penalties, and relief the Court deems proper to remedy Defendants' Shell Oil Products US, Shell Oil Company, Shell Petroleum, Inc., Shell Trading (US) Company, Motiva Enterprises LLC, Triton Terminaling LLC, and Equilon Enterprises LLC (hereinafter, collectively, "Defendants" or "Shell") violations of federal law, which include: (1) Shell's past and ongoing failures to comply with Rhode Island Pollutant

> Discharge Elimination System ("RIPDES") Permit No. RI0001481 (the "Permit"),1 and the Clean Water Act; and (2) that Shell has contributed and is contributing to past and present handling, storage, treatment, transportation, or disposal of solid and hazardous wastes which may present an imminent and substantial endangerment to health or the environment in violation of RCRA.

TAC at ¶ 1. Each Defendant is alleged to be in violation of the Clean Water Act and RCRA stemming from their exercise of control over decision-making, policy-setting, and regulatory compliance activities applicable to the Terminal, including the design, operation, and maintenance of the Terminal to assure preparedness for severe weather and climate change risks. Specifically, CLF alleges that "Defendants, acting through officers, managers, subsidiary companies, and instrumentalities, own or have owned and/or operate or have operated the Providence Terminal." TAC at ¶ 48. CLF further alleges that "Defendants are, and/or have been, responsible for the operation and maintenance of the Providence Terminal, including compliance with the Permit." TAC at ¶ 63. These pleading paragraphs apply equally to all Defendants and are drawn from the Shell corporate governance structure that applies to environmental compliance at the Terminal, including compliance with the Clean Water Act and RCRA at the Terminal. Paragraphs 122 and 123 of the TAC similarly apply to all Defendants:

> 122. Shell has failed to design and operate the Providence Terminal, including, but not limited to, its wastewater treatment system, in accordance with good engineering practices and otherwise in accordance with the mandatory conditions of the Permit, which are intended to prevent the discharge and/or release of pollutants from the Providence Terminal in amounts or concentrations greater than allowed under the Permit.
>
> 123. Because Shell has not designed and operated the Providence Terminal in accordance with good engineering practices, the Providence Terminal has discharged and/or released, and is likely to discharge and/or release, pollutants in amounts or concentrations greater than allowed under the Permit due to, including, but not limited to, inadequate infrastructure design and infrastructure failures.

As explained in Section III.C below below, CLF's use of the terms "Defendants" and "Shell" as defined terms identifying all Defendants is based on the centralized management and

policy control applicable throughout Shell's corporate structure and Shell's own adoption of this generalizing approach in its worldwide, public-facing presence, including its webpage, corporate reports, and management structures. For example, Shell's 2016 Sustainability Report, incorporated by reference into the TAC at Paragraph 270, states:

> The companies in which Royal Dutch Shell plc directly and indirectly owns investments are separate legal entities. In this report, "Shell", "Shell group" and "Royal Dutch Shell" are sometimes used for convenience where references are made to Royal Dutch Shell plc and its subsidiaries in general. Likewise, the words "we", "us" and "our" are also used to refer to subsidiaries in general or to those who work for them. These expressions are also used where no useful purpose is served by identifying the particular company or companies. "Subsidiaries", "Shell subsidiaries" and "Shell companies" as used in this publication refer to companies over which Royal Dutch Shell plc either directly or indirectly has control. Entities and unincorporated arrangements over which Shell has joint control are generally referred to as "joint ventures" and "joint operations" respectively. Entities over which Shell has significant influence but neither control nor joint control are referred to as "associates". The term "Shell interest" is used for convenience to indicate the direct and/or indirect (for example, through our 23% shareholding in Woodside Petroleum Ltd.) ownership interest held by Shell in a venture, partnership or company, after exclusion of all third-party interest.

Sustainability Report 2016 at 2.

Viewed in the light most favorable to CLF, the governance and control structures implemented throughout the Shell companies, as detailed in the TAC and referenced documents, are sufficient to support an inference that the Parent Defendants are persons alleged to be in violation of the respective environmental laws and are subject to the Court's jurisdiction. The Parent Defendants' control is documented through Shell's vertical integration, management structures, mandatory policy and standards, and use of compensation as a means of mandating and incentivizing performance. These structures, policies, and standards are mandatory and apply to all Defendants. The structural controls enforced through Shell's corporate management control structure are clearly set forth in the 2016 Sustainability Report:

> Shell has strong governance structures, supported by standards, policies and controls. These are the foundations of our decisions and actions *at every level of*

> *the company*. We have put clear and effective governance structures in place throughout Shell, along with many performance standards and other controls. These influence the decisions we make and the actions we take*, at every level of our company*.
>
> Our governance procedures involve the Board of Royal Dutch Shell plc, four Board Committees, our Executive Committee (EC), and the teams and individuals who work in our operations. *We take rigorous care to ensure decisions are cascaded within the business.*
>
> The overall accountability for sustainability within Shell lies with the Chief Executive Officer and the EC. They are assisted by the health, safety, security, environment and social performance (HSSE&SP) executive team. Our standards are set out in our HSSE&SP Control Framework and *apply to every Shell company*. The process safety and HSSE&SP assurance team, with a mandate from the Corporate and Social Responsibility Committee (CSRC), provides independent assurance on compliance with the Control Framework.

Sustainability Report 2016 at 14. The 2016 Sustainability Report goes on to say that "Shell's Health, Safety, Security, Environment and Social Performance (HSSE&SP) Control Framework defines standards and accountabilities *at each level of the organisation*, and sets out the procedures people are required to follow. For example, our environmental standards include the requirement to set up GHG and energy management plans." *Sustainability Report 2016* at 20 (emphasis added). These corporate-wide policies even apply to Shell joint ventures:

> More than half of Shell's joint ventures (JVs) are not operated by Shell. For these ventures, our Shell JV representatives and the Shell-appointed JV board require our partners to adopt the Shell commitment and policy on Health, Safety, Security and Environment and Social Performance (HSSE&SP) or one materially equivalent to our own. They are also required to put in place standards to adequately address HSSE&SP risks.

Id. at 64.

This integrated, top-down corporate oversight structure, when viewed in the light most favorable to CLF, supports a plausible inference that the Parent Defendants are actively involved in environmental compliance at the Terminal, including the design, maintenance, and operation of the Terminal. One aspect of the Parent Defendants' control can be inferred from Paragraph 270 of

the TAC, where Shell's 2016 Sustainability Report explains how the corporate promulgation of design standards is applied to existing infrastructure, such as the Terminal, to ensure it is resilient to climate change:

> ADAPTATION
>
> The effects of climate change mean that governments, businesses and local communities are adapting their infrastructure to the changing environment. At Shell, we are taking steps at our facilities around the world to ensure that they are resilient to climate change. This reduces the vulnerability of our facilities and infrastructure to potential extreme variability in weather conditions.
>
> We take different approaches to adaptation for existing facilities and new projects. We progressively adjust our design standards for new projects while, *for existing assets, we identify those that are most vulnerable to climate change and take appropriate action*.

TAC ¶ 270 (quoting *Sustainability Report 2016* at 19 (emphasis added)). The responsibility at the parent corporation level to identify vulnerable facilities and then ensure appropriate action is taken supports CLF's allegations that *all* Defendants have a role in the design, operation, and maintenance of the Terminal. *See, e.g.*, TAC ¶¶ 122, 123, 415 ("Shell has failed to address the factors discussed in Section IV.A, *supra*, and the substantial risks of pollutant discharges and/or releases associated with these factors, in its RCRA and other compliance and permitting filings."), 416 ("Shell has not modified the Providence Terminal to prevent pollutant discharges and/or releases associated with the factors discussed in Section IV.A, *supra*."), 431 ("Shell has not integrated the factors discussed in Section IV.A, *supra*, and the risks of spills, discharges, and/or releases of pollutants, hazardous waste, or hazardous waste constituents into planning, operation or maintenance at the Providence Terminal."), 432 ("As a consequence of these failures, Shell is not maintaining and operating the facility in a manner that 'minimizes the possibility of . . . any unplanned spill or release of hazardous waste or hazardous waste constituents to the air, soil, or surface waters of the State.'" (citation omitted)).

In sum, Shell's Health, Safety, Security, Environment and Social Performance Control Framework and Policy and management structures apply to all Defendants and are enforced through cross-cutting management structures and by chain of command of parent entities over subsidiaries. CLF has stated a claim against all Defendants because, taken in the light most favorable to CLF, the TAC's allegations support an inference that each Defendant exercises control and oversight over environmental compliance activities at the Terminal through this management structure.

C. The TAC Sufficiently Alleges Violations by the Parent Defendants and Does Not Violate the Group Pleading Doctrine

CLF's allegations referring to "Defendants" and "Shell" in the TAC comply with Federal Rule of Civil Procedure 8(a) and are sufficient as to the Parent Defendants. The TAC sets forth "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). The TAC contains "sufficient detail . . . to give a defendant fair notice of the claim and the grounds upon which it rests." *Colón-Fontánez v. Municipality of San Juan*, 660 F.3d 17, 46 (1st Cir. 2011) (citation omitted). "[H]eightened fact pleading of specifics" is not required, "but only enough facts to state a claim to relief that is plausible on its face." *Ocasio-Hernández v. Fortuño-Burset*, 640 F.3d 1, 8 (1st Cir. 2011) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)).

There is nothing inherently impermissible about group pleading. "Whilst a pleading, group or otherwise, must be sufficiently clear to put the defendants on notice as to 'who did what to whom, when, where and why,' . . . group pleadings are not, *prima facie*, excluded by Rule 8(a)." *Zond, Inc. v. Fujitsu Semiconductor Ltd.,* 990 F. Supp. 2d 50, 53 (D. Mass. 2014) (quoting *Educadores Puertorriqueños en Acción v. Hernández*, 367 F.3d 61, 68 (1st Cir. 2004)). In fact, most of the cases addressing "'group pleading' arise in the fraud context," which requires a higher

pleading standard pursuant to Federal Rule of Civil Procedure 9(b). *In re Auto Body Shop Antitrust Litig.*, No. 6:14-cv-6006, 2015 WL 4887882, at *5 (M.D. Fla. June 3, 2015) (citing *Frazier v. U.S. Bank Nat. Ass'n*, No. 11-cv-8775, 2013 WL 1337263, at *3 (N.D. Ill. Mar. 29, 2013)).

Here, while Defendants claim that CLF's "chosen shorthand" of "Defendants" or "Shell" is "ambiguous and misleading," Memo at 7–8, the TAC is clearly asserting all claims against all the Defendants. "When multiple defendants are named in a complaint, the allegations can be and usually are to be read in such a way that each defendant is having the allegation made about him individually." *Crowe v. Coleman*, 113 F.3d 1536, 1539 (11th Cir. 1997). Moreover, the shorthand and any resultant ambiguity derives from how the Shell entities describe and present themselves to the public. *See Sustainability Report 2016* at 2 ("'Shell', 'Shell group' and 'Royal Dutch Shell' are sometimes used for convenience where references are made to Royal Dutch Shell plc and its subsidiaries in general. Likewise, the words 'we', 'us' and 'our' are also used to refer to subsidiaries in general or to those who work for them. . . . 'Subsidiaries', 'Shell subsidiaries' and 'Shell companies' as used in this publication refer to companies over which Royal Dutch Shell plc either directly or indirectly has control."). CLF cannot be expected to have intimate knowledge of the corporate structure of a sophisticated, global enterprise at the pleading stage of the case when public-facing statements about the corporate structure invite such ambiguity. The Parent Defendants claim that it is vague and contradictory that "CLF specifically alleges and attaches as exhibits documents that show that the Owner/Operator Defendants are or have been the owner, operator, and/or permittee" of the Terminal, Memo at 10, but there is nothing inconsistent or implausible with the "Owner/Operator" Defendants owning, operating, and being named as the permittee of the Terminal and the Parent Defendants simultaneously exercising control over environmental compliance and corporate policies and procedures at the Terminal.

Nevertheless, as discussed in Sections III.A and III.B aboveIII.B above, CLF has pleaded sufficient allegations to allow an inference that the Parent Defendants have control, exercised through Shell's vertically integrated management structure, over the environmental compliance at the Terminal so as to make them independently subject to suit for violations of the Clean Water Act and RCRA. CLF's TAC satisfies Rule 8.

IV. CONCLUSION

For the foregoing reasons, CLF respectfully submits that the Court should deny Defendants' Motion in total.

DATED: March 11, 2022

Respectfully submitted,

CONSERVATION LAW FOUNDATION, INC., by its attorneys

/s/ Alexandra St. Pierre
Alexandra St. Pierre, Esq.*
Ian Coghill, Esq.*
Conservation Law Foundation
62 Summer Street
Boston, MA 02110
(617) 850-1732
Fax (617) 350-4030
aestpierre@clf.org
icoghill@clf.org

/s/ James Crowley
James Crowley, Esq.
RI Bar # 9405
Conservation Law Foundation
235 Promenade Street
Suite 560, Mailbox 28
Providence, RI 02908
(401) 228-1905
Fax (401) 351-1130
jcrowely@clf.org

Christopher M. Kilian, Esq.*
Conservation Law Foundation
15 East State Street, Suite 4
Montpelier, VT 05602

(802) 223-5992 x4015
ckilian@clf.org

Allan Kanner, Esq.*
Elizabeth B. Petersen, Esq.*
Allison S. Brouk, Esq.*
Kanner & Whiteley, LLC
701 Camp Street
New Orleans, LA 70130
(504) 524-5777
a.kanner@kanner-law.com
e.petersen@kanner-law.com
a.brouk@kanner-law.com

**Admitted Pro Hac Vice*

CERTIFICATE OF SERVICE

I hereby certify that on March 11, 2022 the foregoing Response in Opposition to Motion for Judgment on the Pleadings by Defendants Shell Oil Company, Shell Petroleum, Inc., and Shell Trading (US) Company was filed through the Court's electronic filing system ("ECF"), through which the document is available for viewing and downloading from the ECF system, and a copy of the filing will be sent electronically to all parties registered with the ECF system.

/s/ Alexandra St. Pierre
Alexandra St. Pierre