UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

Conservation Law Foundation, Inc., Plaintiff v. Equilon Enterprises LLC d/b/a/ Shell Oil Products US, Shell Oil Company, Shell Petroleum Inc., Shell Trading (US) Company, Motiva Enterprises LLC, and Triton Terminaling LLC, Defendants.	No. 1:17-cv-00396-WES-LDA

REPLY MEMORANDUM IN SUPPORT OF MOTION FOR JUDGMENT ON THE PLEADINGS BY DEFENDANTS SHELL OIL COPMANY, SHELL PETROLEUM INC., AND SHELL TRADING (US) COMPANY

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INTRODUCTION

When forced to reconcile its expansive complaint with the narrow scope of its claims, Conservation Law Foundation ("CLF") ignores its pleadings and invents new allegations regarding corporate control. Shoot first, aim later. CLF alleges that Defendants Shell USA, Inc.,[1] Shell Petroleum Inc., and Shell Trading (US) Company (the "Non-Owner/Operator Defendants") are proper parties to this lawsuit because its allegations "allow an inference" that the Non-Owner/Operator Defendants have control over the environmental compliance at the Terminal. Pl. Conservation Law Foundation's Resp. in Opp'n to Mot. for J. on the Pleadings by Defs. Shell Oil Company, Shell Petroleum, Inc., and Shell Trading (US) Company ("Response") 17, ECF No. 73. But CLF never once in its 436-paragraph Third Amended Complaint ("TAC") mentions the "vertically integrated management structure" that appears throughout its Response. The TAC is devoid of any allegations that the Non-Owner/Operator Defendants exercise actual control over the bulk petroleum storage and distribution terminal in Providence, Rhode Island (the "Terminal").

For the first time, CLF alleges that the Non-Owner/Operator Defendants are directly liable for the operation of the Terminal. CLF never alleges how the Non-Owner/Operator Defendants exercise control over, or are in any way involved in, the operation of the Terminal. Instead, CLF doubles down on its group pleading tactic, arguing that its allegations against "Shell" suffice to show that CLF alleges each Defendant is an operator. Supreme Court precedent does not allow such bald, conclusory statements to support a finding of direct liability for corporate affiliates.

Under *United States v. Bestfoods*, a parent company can only be held directly liable as an operator of a facility where it "actively participated in, and exercised control over, the operations of the facility itself . . . ." 524 U.S. 51, 55 (1998). Nowhere in the TAC does CLF allege such

[1] Effective March 1, 2022, Shell Oil Company changed its name to Shell USA, Inc.

active participation and control. CLF's Response is replete with allegations attempting *ex post facto* to draw this connection, but its allegations are either overstated to a point that borders on disingenuous, lack any citation to the TAC, or refer only to the 2016 Sustainability Report – a document incorporated by reference in the TAC. The only allegation in the TAC that attempts to link the Non-Owner/Operator Defendants to the Terminal states that "Defendants, acting through officers, managers, subsidiary companies, and instrumentalities, own or have owned and/or operate or have operated the Providence Terminal." TAC ¶ 48, ECF No. 45. This statement does not meet the legal standard to adequately plead claims premised on a theory of direct liability.

Without any specific allegations showing that the Non-Owner/Operator Defendants have control over the operations and environmental compliance at the Terminal, CLF's claims arising under the Clean Water Act ("CWA") and the Resources Conservation and Recovery Act ("RCRA") against those Defendants must fail. All but one of CLF's CWA claims are for alleged permit violations. CLF erroneously argues that any person may be held liable for a permit violation, again ignoring its own claims. CLF's claims are not for permit exceedances, but for failure to take certain actions related to the permitting documents themselves.[2] As explained *infra*, only the permittee or a party directly in control of environmental compliance can be held liable for such a violation, and CLF has failed to make such allegations against these Defendants.

Similarly, CLF's RCRA claims require that the Non-Owner/Operator Defendants have a certain degree of control over hazardous waste at the Terminal. Again, CLF doubles down on its group pleading arguing that its vague allegations that "Shell" has contributed to handling, storage, or treatment of hazardous waste, and that "Shell" is a generator of hazardous waste are sufficient to bring claims against the Non-Owner/Operator Defendants. That is not the law.

[2] CLF does not rebut Defendants' argument that CLF fails to state a claim against the Non-Owner/Operator Defendants for the alleged CWA non-permit violations at Cause of Action 11, thus conceding the point. *See infra* Section III.

Finally, this motion is timely. CLF distracts from the standard set forth in Federal Rule of Civil Procedure 12(c) by arguing that the pleadings closed in November 2020 and that discovery is underway. However, the Rule only requires that the motion be filed after the close of the pleadings (which it was) and early enough not to delay trial (which it will not). A trial has not yet been scheduled. Accordingly, this Court should enter judgment in favor of the Non-Owner/Operator Defendants and dismiss CLF's TAC with prejudice in its entirety against the Non-Owner/Operator Defendants.[3]

ARGUMENT

CLF has failed to plead specific allegations through which this Court could find that the Non-Owner/Operator Defendants have any connection to the Terminal, let alone control over the Terminal's environmental compliance or daily activities, requisite elements of CLF's claims.

When ruling on a Rule 12(c) motion for judgment on the pleadings, the focus of the court's inquiry is on the pleadings. *R.G. Fin. Corp. v. Vergara-Nunez*, 446 F.3d 178, 182 (1st Cir. 2006). To meet the pleading standard of Rule 8(a), CLF must provide "fair notice" to each Defendant subject to its claims. *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007). This standard requires unambiguous allegations that make clear the basis for the claims against each Defendant. *Sanchez v. Pereira-Castillo*, 590 F.3d 31, 48 (1st Cir. 2009). As discussed below, CLF improperly groups the Defendants together, creating vague and internally contradictory pleadings. Apparently recognizing the insufficiency of its pleadings, CLF's Response invents new allegations of corporate control to try to save its claims. Even these new allegations (which should be disregarded) fail to support cognizable claims against the Non-Owner/Operator Defendants.

[3] CLF does not contest that dismissal with prejudice is the correct standard, thus conceding this point. *See Short v. Brown University*, 320 F. Supp. 3d 363, 369 (citing *Tower v. Leslie-Brown*, 326 F.3d 290, 299 (1st Cir. 2003)) (failing to brief an argument constitutes waiver). Similarly, CLF also does not rebut Defendants' argument that CLF improperly expands the term "Shell" beyond the named Defendants. Defs.' Mem. in Supp. of Mot. for J. on the Pleadings ("Defs.' Memo") 3 n.3, ECF No. 70-1.

I. CLF DOUBLES DOWN ON ITS IMPROPER USE OF GROUP PLEADINGS

Group pleading is not acceptable where it is unclear to which defendant the allegations apply. *See Gillespie v. St. Regis Residence Club*, 343 F. Supp. 3d 332, 352 (S.D.N.Y. 2018) ("'Complaints that rely on group pleading fail to differentiate as to which defendant was involved in the alleged unlawful conduct [and] are insufficient to state a claim.'") (citation omitted). CLF correctly states that it does not need to *prove* Defendants are liable through its TAC, but it does, however, need to aver clear allegations against each Defendant to support its claims. CLF asserts each of its twenty-two causes of actions against all Defendants, and the allegations in its TAC must unambiguously and unequivocally support each claim against *each* Defendant. *Sanchez*, 590 F.3d at 48 (the court "must determine whether, *as to each defendant*, a plaintiff's pleadings are sufficient to state a claim on which relief can be granted") (emphasis in original).

Instead of fulfilling its burden, CLF states that "the TAC is clearly asserting all claims against all the Defendants," Response at 16, and incorrectly argues that where multiple defendants are named in a complaint, the allegations can be read in such a way that each allegation is against each defendant. That is not the standard. To support its argument, CLF cites to a single, non-precedential, pre-*Iqbal* Eleventh Circuit case from twenty-five years ago. *See id.* at 16 (citing *Crowe v. Coleman*, 113 F.3d 1536, 1539 (11th Cir. 1997)). Not only were group pleadings not an issue in the case, but the allegations in that case did not contain contradictions or fail to provide fair notice to each of the parties. *See A & E Auto Body, Inc. v. 21st Century Centennial Ins. Co.*, 120 F. Supp. 3d 1352, 1367 (M.D. Fla. 2015) (citing *Crowe* and remarking it "applied an outdated notice pleading standard that is no longer applicable"), *aff'd in part, vacated in part, and remanded by Quality Auto Painting Center of Roselle, Inc. v. State Farm Indemnity Co.*, 917 F.3d 1249,

1274-75 (11th Cir. 2019) (focusing the inquiry on whether group pleadings provided each party with "fair notice" and finding fair notice had been given due to clear context for allegations).[4]

Group pleading is particularly improper where the allegations are contradictory and demonstrably inapplicable to all defendants. *See, e.g.*, *Di Loreto v. Chase Manhattan Mortg. Corp.*, 2017 WL 5569834, at *5 (N.D. Cal. Nov. 20, 2017) (dismissing claims against defendant where plaintiffs' "group allegations…are contradicted" by exhibit attached to complaint); *Leitner v. Sadhana Temple of New York, Inc.*, 2014 WL 12588643, at *17 (C.D. Cal. Oct. 17, 2014) (dismissing claims where plaintiff had "contradictory allegations" and "engaged in group pleading" that made the court "unable to determine . . . liability imposed on some or all of the individual defendants, or to what extent."). Nineteen of twenty-two of CLF's claims concern compliance with the Terminal's Rhode Island Pollution Discharge Elimination System ("RIPDES") permit. The RIPDES permit states that Motiva Enterprises LLC and Triton Terminaling LLC are the permittees of the 2011 and 2019 RIPDES permits, respectively. *See* TAC Ex. A at 1; TAC Ex. L at 6. Yet CLF alleges that *all* Defendants "operate[] the Providence Terminal . . . " and the RIPDES permit "authorizes *Shell* . . . to discharge stormwater runoff . . . ." TAC ¶¶ 71-72 (emphasis added).

CLF argues that there is nothing inconsistent about the Non-Owner/Operator Defendants exercising control over environmental compliance and corporate policies at the Terminal even if they are not the owners or permittees. Response 16. But as described below, CLF made no such

[4] In an attempt to justify its group pleadings, CLF appears to argue that case law cited in Defs.' Memo is inapplicable because it arose in the fraud context, which requires a higher pleading standard. Response 15-16. However, CLF ignores the many cases in Defs.' Memo concerning group pleadings that did not arise in the fraud context. *See, e.g.*, *Gillespie*, 343 F. Supp. 3d 332 (dismissing breach of contract claims, *inter alia*, for group pleadings); *Chevron U.S.A. Inc. v. Apex Oil Co.*, 113 F. Supp. 3d 807 (D. Md. 2015) (dismissing Oil Pollution Act, Pipeline Safety Act, and other non-fraud claims against a defendant due to impermissible group pleadings); *Via Vadis, LLC v. Skype, Inc.*, 2012 WL 2789733, at *1 (D. Del. July 6, 2012) (dismissing patent infringement claims due to group pleadings); *Zalewski v. T.P. Builders, Inc.*, 2011 WL 3328549, at *5 (N.D.N.Y. Aug. 2, 2011) (dismissing copyright infringement claims due to group pleadings).

allegations in the TAC. Further, it is nonsensical to allege that six separate entities – one of which, Motiva, is not even an entity within the Shell plc corporate structure (a fact of which CLF has repeatedly been informed) – are actively in control of environmental compliance at the Terminal. The allegations that were actually pled are vague, inconsistent with documents attached to the TAC, and do not provide Defendants with fair notice of CLF's claims.[5]

As discussed *infra*, confronted with its confusing group pleadings, CLF attempts to circumvent the pleading standard by stating that it is entitled to plead ambiguously because of "how Shell entities describe and present themselves to the public." Response 16. Regardless of how any public-facing document is drafted, CLF still must meet the pleading standards of Rule 8(a). CLF must have a factual basis upon which to assert its claim against each and every Defendant and allege those facts in a "short and plain statement." Fed. R. Civ. P. 8(a). Each of the Defendants is a separate corporate entity.[6] CLF's group pleadings impermissibly blur these legal distinctions and ignore the express language of the permits; thus, judgment should be entered in favor of the Non-Owner/Operator Defendants.

II. CLF WOULD HAVE THE COURT RECAST *BESTFOODS*

CLF's claims against the Non-Owner/Operator Defendants also fail as a matter of law because they do not satisfy the standard for direct liability set forth in *Bestfoods*. CLF seeks to hold the Non-Owner/Operator Defendants directly liable as operators of the Terminal, but the actual pleadings do nothing more than describe a typical corporate structure with activities that are consistent with the corporate affiliate status. *Bestfoods* and its progeny state that direct liability depends on "the parent's interaction with the subsidiary's facility" and not "the relationship

[5] Since the group pleadings failed to provide sufficient specificity, Defendants sought this further detail through discovery. CLF flatly refused to answer Defendants' interrogatories specifically as to each Defendant, as instructed. *See* Ex. A, at 2, CLF's Resp. to Defs.' Interrog. CLF cannot continue to evade its basic obligations.

[6] Motiva Enterprises, LLC is not a subsidiary or even affiliated with any of the other Defendants.

between the two corporations." *Bestfoods*, 524 U.S. at 67. CLF fails to meet the *Bestfoods* standard, and the Non-Owner/Operator Defendants should be dismissed.

A. CLF Ignores the Bedrock Principles of Corporate Law Set Forth in *Bestfoods*

A parent company can only be directly liable for activities at a subsidiary's facility if it "actively participated in, and exercised control over, the operations of the facility itself." *Bestfoods*, 524 U.S. at 55. In addressing whether a parent company may be held liable for the operations of a subsidiary,[7] the Court held that a parent corporation that "actively participated in, and exercised control over, the operations *of a subsidiary*" may only be charged with derivative liability if the corporate veil may be pierced. *Id.* (emphasis added). In contrast, a parent corporation may be *directly* liable as an operator if the parent "actively participated in, and exercised control over, the operations *of the facility* itself". *Id.* (emphasis added). Despite stating it is not seeking to pierce the corporate veil, CLF attempts to blend these standards and hold the Non-Owner/Operator Defendants directly liable based on their alleged involvement in the corporate governance of the remaining defendants. Adopting this argument would upend these bedrock principles of corporate law.

A finding of direct liability under *Bestfoods* requires an analysis of the relationship between the Non-Owner/Operator Defendants and the Terminal itself. There must be allegations that the Non-Owner/Operator Defendants "manage, direct, or conduct operations specifically related to pollution . . . or decisions about compliance with environmental regulations" at the Terminal. *Bestfoods*, 524 U.S. at 66-68. Some interaction of the corporate affiliates is to be expected. Direct liability is only appropriate where the activities of the corporate affiliates "went far beyond the

[7] The rationale expressed by the Supreme Court in *Bestfoods* is equally applicable to companies with any alleged corporate affiliation. *See* Defs.' Memo 11 n.6.

norms of parental oversight." *United States v. Kayser-Roth Corp.*, 272 F.3d 89, 104 (1st Cir. 2001) (citing *Bestfoods*, 524 U.S. at 66-67).

Case law relied upon by CLF does not find otherwise. In *Kayser-Roth*, the Court recited a litany of findings linking the parent to the facility in question including that the parent had "pervasive control over . . . environmental affairs," that an agent of the parent "directly exerted operational control over environmental matters," "[was] the 'lead man' in making [a] decision about how to handle this pollution problem," and "played a central role in decisions about environmental compliance." *Id.* at 102-04. The Court found that the parent "essentially was in charge in practically all of [the facility's] operational decisions, including those involving environmental concerns." *Id.* The two other cases relied upon by CLF, while distinguishable, also look at a level of control that goes beyond the norms of parental oversight. *See ExxonMobil Corp. v. United States*, 108 F. Supp. 3d 486, 531 (S.D. Tex. 2015) (determining that the federal government was a prior operator under *Bestfoods* where a government official "played a substantial role in overseeing day-to-day operations" and the government "made specific decisions about waste disposal and environmental compliance"); *United States v. Jones*, 267 F. Supp. 2d 1349, 1356 (M.D. Ga. 2003) (finding that a corporate executive *could* be held individually liable based on factual allegations that he was "in charge of the day-to-day environmental compliance, . . . was the primary decision maker over the facility's compliance with environmental regulations . . . [and] was responsible for drafting the facility's 1997 SPCC plan."). As discussed below, CLF has alleged no such facts linking the Non-Owner/Operator Defendants to the Terminal.

B. CLF Does Nothing More Than Allege in Its Pleadings a Typical Corporate Structure

CLF's pleadings describe a typical relationship amongst corporate affiliates, which is insufficient for a finding of direct liability under *Bestfoods*. CLF does not and cannot point to a

single specific allegation in the TAC that any of the Non-Owner/Operator Defendants exert or have exerted control over the environmental matters at the Terminal. CLF's arguments to the contrary do not reflect the text of what was actually alleged in the TAC. For example, CLF cites Paragraph 24 for the proposition that "Shell Petroleum, Inc. . . . serves as the connective tissue assuring that mandatory corporate-wide structures, policies, and standards are followed by all defendants." Response 10. Paragraph 24 of the TAC actually alleges the following:

> Defendant Shell Petroleum, Inc. was founded in 1984 and is headquartered in Houston, Texas. Shell Petroleum, Inc. is a wholly-owned subsidiary of Royal Dutch Shell plc[8] that produced, refines, and markets petroleum products and chemical.

TAC ¶ 24. Similarly, CLF cites Paragraph 25 for the proposition that "Shell Trading Company is primarily responsible for the sale of all of the products stored in the Terminal and moved through the Terminal." Response 10. Paragraph 25 of the TAC actually alleges the following:

> Defendant Shell Trading (US) Company became operational in 1998 and is headquartered in Houston, Texas, Shell Trading (US) Company is a wholly-owned subsidiary of Royal Dutch Shell plc and is one of the world's largest energy trading companies, operating as the market interface of Royal Dutch Shell's US Companies and affiliates.

TAC ¶ 25. Other TAC paragraphs cited by CLF to support propositions that Shell Oil Company exercises control over Defendants Equilon and Triton suffer from the same fatal flaws. *See* Response 10 (citing TAC ¶¶ 22-24, 27-28, 30). The allegations in the TAC do not mention involvement in activity at the Terminal.

CLF raises additional allegations regarding "Shell's vertical integration, management structures, mandatory policy and standards, and use of compensation as a means of mandating and incentivizing performance." Response 12. CLF claims that "[t]hese structures, policies, and

[8] On January 21, 2022, Royal Dutch Shell plc changed its name to Shell plc. *See Royal Dutch Shell plc changes its name to Shell plc*, https://www.shell.com/media/news-and-media-releases/2022/royal-dutch-shell-plc-changes-its-name-to-shell-plc.html (last visited Mar. 29, 2022).

standards are mandatory and apply to all Defendants." *Id.* However, CLF provides no citations for these statements, which are not found within the TAC. A motion for judgment on the pleadings inherently depends on the facts contained in the pleadings. *R.G. Fin. Corp. v. Vergara-Nunez*, 446 F.3d 178, 182 (1st Cir. 2006) (limiting review to the pleadings, "documents fairly incorporated therein and facts susceptible to judicial notice"). Unsupported statements of fact that are not included in the pleadings must be disregarded.[9] *Santiago-Rosario v. Galan-Kercado*, 2013 WL 1429441, at *3 n.2 (D.P.R. Apr. 5, 2013) (stating "Plaintiff['s] brazen[] attempt[] to sneak by additional factual allegations that are not pled in the complaint . . . will be ignored"). Similarly, CLF's unsupported argument that it has documents that make the Non-Owner/Operator Defendants' control over the Terminal an issue of material fact, Response 4, must be disregarded. *See Jordan v. Carter*, 428 F.3d 67, 70 (1st Cir. 2005) ("we may consider only the facts as alleged in the complaint, viewed in the light most favorable to the appellees."). Not only is such an unsupported statement dubious, but it also fails to excuse the paucity of allegations against the Non-Owner/Operator Defendants.

CLF repeats throughout its Response the sole allegation that purports to make any connection between the Non-Owner/Operator Defendants and the Providence Terminal. *See* TAC ¶ 48 ("Defendants, acting through officers, managers, subsidiary companies, and instrumentalities, own or have owned and/or operate or have operated the Providence Terminal.").[10] This lone statement, which inappropriately relies on group pleading, does not "permit the court to infer more

[9] Similarly, CLF directs to Court to TAC Paragraphs 122, 123, 415, 416, 431, and 432. These paragraphs are nothing more than "conclusory allegations that merely parrot the relevant legal standard . . . ." *Manning v. Boston Med. Ctr. Corp.*, 725 F.3d 34, 43 (1st Cir. 2013). These allegations must be disregarded "as they are not entitled to the presumption of truth." *Id.*; *see also Penalbert-Rosa v. Fortuno-Burset*, 631 F.3d 592, 595 (1st Cir. 2011) ("[S]ome allegations, while not stating ultimate legal conclusions, are nevertheless so threadbare or speculative that they fail to cross the line between the conclusory or factual." (internal quotation marks and citation omitted)).

[10] Defendants also cite to TAC Paragraph 63 ("Defendants are, and/or have been, responsible for the operation and maintenance of the Providence Terminal, including compliance with the Permit"), Response 11, but this Paragraph makes no attempt to explain how the Non-Owner/Operator Defendants are involved with the activities of the Terminal.

than the mere possibility of misconduct . . . ." *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009); *see also Twombly*, 550 U.S. at 555 (requiring factual allegations in complaint "be enough to raise a right to relief above the speculative level"). That this is a motion for judgment on the pleadings does not change that standard. *See Stafford v. CSL Plasma, Inc.*, 504 F. Supp. 3d 9, 11-12 (D.R.I. 2020) (finding that "*Ashcroft v. Iqbal* controls the Court's analysis" in a Rule 12(c) motion).

Ignoring its own deficient pleadings, CLF instead focuses on statements made in publicly available documents. Even if the Court considers these allegations, they are insufficient as a matter of law to give rise to direct liability. CLF states that the language in the 2016 Sustainability Report, which is not stated with specificity in its Complaint, supports "the centralized management and policy control applicable through Shell's corporate structure and Shell's own adoption of this generalizing approach" in its public-facing documents. Response 11-12. The cited language does not support CLF's theory. The 2016 Sustainability Report explains in a "cautionary note" that while each company that Shell plc directly and indirectly owns is a separate legal entity, "Shell" is used as a term of convenience when references are made to "Royal Dutch Shell plc and its subsidiaries in general." 2016 Sustainability Report,[11] at 2. This drafting approach makes sense. Shell plc has thousands of subsidiaries around the world. The Sustainability Report would be unreadable if it referred to each subsidiary individually by name in each such instance.

Moreover, the references to the 2016 Sustainability Report are insufficient to support direct liability as they do not show any connection between the Non-Owner/Operator Defendants and the Terminal, let alone involvement that is outside the standards of corporate norms. *Bestfoods* states that activities that are consistent with a parent's investor status such as "monitoring of the subsidiary's performance . . . and articulation of general policies and procedures, should not give

[11] Available at: https://reports.shell.com/sustainability-report/2016/servicepages/download-centre.html

rise to direct liability." 524 U.S. at 72. CLF cites to the 2016 Sustainability Report to allege that governance structures, performance standards and other controls measures are cascaded through the corporate structure. Response 11-15. None of these statements is specifically attributed to the Non-Owner/Operator Defendants or the Terminal. It is unremarkable that a subsidiary within a multi-national group of companies receives general strategic direction from the corporate group. The existence of a Health, Safety, Security, Environment and Social Performance Control Framework that sets forth environmental standards, or the "corporate promulgation of design standards," Response 14, simply does not support a plausible inference that the Non-Owner/Operator Defendants are directly involved in the active management of the Terminal in a way that violates the "accepted norms of parental oversight of a subsidiary's facility." *Bestfoods*, 524 U.S. at 72. Without anything more, CLF has failed to allege even a plausible inference of direct liability against the Non-Owner/Operator Defendants.

III. AS A MATTER OF LAW, CLF CANNOT ALLEGE A CLAIM AGAINST THE NON-OWNER/OPERATOR DEFENDANTS UNDER THE CWA OR RCRA

CLF fails to set forth a plausible claim under the CWA or RCRA against the Non-Owner/Operator Defendants. Again ignoring its own pleadings, CLF argues it has adequately alleged a claim for a permit violation against the Non-Owner/Operator Defendants because any person can violate the CWA, not just a permittee. Response at 7. While the CWA allows parties to bring certain claims against non-permittees, CLF has specifically brought claims for permit violations. *See* TAC at Causes of Action 1-10, 12-20. Simply put, a non-party to a permit is not obligated to comply with that permit. *See* Defs.' Memo 12-15. CLF does not address the four cases cited in Defendants' memorandum that support this proposition. *Id.* at 13-14. If CLF seeks to hold liable a party that it alleges causes a facility to violate its permit, it would need to do so

under a separate provision of the CWA.[12] CLF failed to make any such allegations here. Further, CLF apparently does not address Defendants' argument regarding the non-permit CWA claims and thus has waived any argument against these claims. *See Brown University*, 320 F. Supp. 3d at 369. CLF's claims against the Non-Owner/Operator Defendants arising under the CWA must fail.

CLF also fails to adequately allege that Defendants have "contributed" to the disposal of hazardous waste or that they are generators of hazardous waste to support its RCRA claims. CLF points to one case, *Cmty. Ass'n for Restoration of the Env't v. Cow Palace* ("*Cow Palace*"), 80 F. Supp. 3d 1180 (E.D. Wash. 2015), to argue that the term "contribution" was meant to be "liberally construed." Response 8. However, CLF's argument ignores that control only creates RCRA liability where the defendant directed the specific *activities* of handling, storage, treatment, transportation, or disposal of waste. *See Cow Palace,* 80 F. Supp. 3d at 1230 (defendant's direction of third party's *disposal activities* constituted sufficient control for RCRA liability); *see also Hinds Invs., L.P. v. Angioli*, 654 F.3d 846, 851 (9th Cir. 2011) (defendant lacked sufficient control to be liable under RCRA where it did not direct *disposal* of waste). Courts that have interpreted the term "contribution" require clear, specific, active involvement in the handling or disposal of hazardous waste. *See Sycamore Indus. Park Assocs. v. Ericsson, Inc.*, 546 F.3d 847, 854 (7th Cir. 2008) ("The vast majority of courts that have considered this issue read RCRA to require affirmative action rather than merely passive conduct[.]"); *ABB Indus. Sys., Inc. v. Prime Tech., Inc. et al.*, 120 F.3d 351, 359 (2d Cir. 1997) ("[b]ecause ABB cannot show that General Resistance

[12] *Assateague Coastkeeper v. Alan & Kristin Hudson Farm* stands for the proposition that a party need only have control over discharges to violate the CWA. 727 F. Supp. 2d 433, 442 (D. Md. 2010). The issue was whether a poultry integrator was required to obtain a NPDES Permit, not whether it was in violation of its permit. The plaintiffs pled "specific factual allegations as to the control Defendant Perdue exercised . . ." over the facility in question. *Id.* at 443. CLF pled no such specific factual allegations with respect to the Non-Owner/Operator Defendants.

or Zero–Max *spilled* hazardous chemicals or *otherwise contaminated* the site, ABB cannot establish that the defendants have contributed or are contributing to an endangerment . . . .") (emphasis added). CLF fails to make such allegations here.

Similarly, CLF fails to allege with any specificity that the Non-Owner/Operator Defendants are "generators" of hazardous waste. Again, CLF doubles down on its group pleading theory, arguing broadly (without citation) that the Non-Owner/Operator Defendants "take actions and make decisions that produce hazardous waste and cause hazardous waste to be stored at the Terminals . . . ." Response 9. These unsupported allegations are insufficient and inconsistent with documents attached to the Complaint that show that other of the defendants have direct control over the operation of the Terminal. CLF's RCRA claims against the Non-Owner/Operator Defendants must be dismissed.

IV. DEFENDANTS' MOTION IS TIMELY UNDER FEDERAL RULE OF CIVIL PROCEDURE 12(C)

CLF argues that the motion should be denied as untimely "because the pleadings closed almost sixteen months ago . . . ." Response 2. That is not the standard. A motion for judgment on the pleadings is timely if the pleadings have closed and the motion will not delay trial. *See* Fed. R. Civ. P. 12(c). The pleadings closed on November 20, 2020.[13] Defs.' Ans. to Pl.'s Third Am. Compl., at 2, ECF No. 57. CLF does not point to any concrete reason why this motion would delay trial, a date for which has not even been set.

Instead, CLF puts significant emphasis on the discovery timeline. Response 3. In considering the timeliness of a motion for judgment on the pleadings, the courts focus on the status of discovery, not the amount of time that has transpired. *See Grajales v. Puerto Rico Ports Auth.*, 682 F.3d 40, 45-46 (1st Cir. 2012) (ruling on a Rule 12(c) motion after nine months of discovery

[13] CLF erroneously states that Defendants filed their Answer on November 11, 2020. *See* Response 3.

because the "case can readily be resolved on the merits of the plausibility claim"). As a result of CLF's irrelevant and grossly overbroad discovery requests, the parties are engaged in motions practice regarding the scope of discovery,[14] and CLF has not yet noticed a *single* deposition. CLF does not dispute that despite the length of time this matter has been on file, the parties in this litigation are only at the beginning stages of discovery, making this motion timely.

Finally, this motion comes at an opportune time for the Court to narrow the scope of discovery. The discovery dispute that is currently before the Court will significantly shape the scope of discovery. As CLF has not pled allegations to support the Non-Owner/Operator Defendants, dismissal of those parties from this litigation would eliminate the need for improper parties to engage in discovery. *See Rios-Campbell v. DOC*, 927 F.3d 21, 26 (1st Cir. 2019) ("One of the main goals of the plausibility standard [on a Rule 12(c) motion] is the avoidance of unnecessary discovery.") (internal quotation marks and citation omitted). Notably, when confronted with similar arguments in its companion New Haven case,[15] CLF filed an amended complaint that, *inter alia*, removed Shell Trading (US) Company from the lawsuit. This motion is timely and should be granted in favor of the Non-Owner/Operator Defendants.

[14] CLF misrepresents the nature of the parties' discovery dispute, which is being litigated through separate motions practice before this Court. *See, e.g.*, Pl. Conservation Law Foundation's Motion to Compel Production of Documents Responsive to Pl.'s First Set of Requests for Production to all Defs. ("Motion to Compel"), ECF No. 72. CLF propounded 62 requests for production, the majority of which are either entirely irrelevant to the claims in this litigation, grossly overbroad, or disproportionate to the needs of this case. Defendants have met with CLF in good faith to try to reach an appropriate scope of the requests. Despite Defendants' best efforts, the parties have not finalized the search terms for CLF's document requests, and CLF has not proposed a single revision to its document requests.

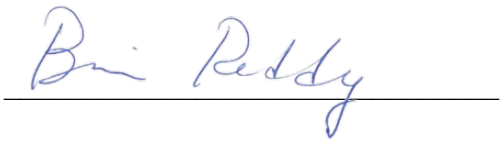
[15] On July 7, 2021, CLF filed a citizen suit in the United States District Court for the District of Connecticut under the CWA and RCRA alleging many of the same claims against the same Defendants in the instant case. ECF No. 1, *Conservation Law Foundation, Inc. v. Shell Oil Co. et al.*, No 3:21-cv-00933-SALM (D. Conn. filed July 7, 2021). On January 21, 2022, Defendants moved to dismiss CLF's complaint on the grounds that, inter alia, CLF impermissibly uses group pleadings and therefore fails to allege any claims specifically against the Non-Owner/Operator Defendants. *See id*. ECF No. 41-1, at 11-14.

CONCLUSION

CLF's pleadings fail to allege cognizable claims against the Non-Owner/Operator Defendants. CLF's Response doubles down on its improper group pleading, mischaracterizes the pleadings, and reaches far beyond the allegations in its Complaint to attempt, for the first time, to make an argument that the Non-Owner/Operator Defendants are directly liable for the operations at the Terminal. Shoot first, aim later. The allegations which are not contained in the pleadings should be disregarded, but, even if taken as true, they fail to meet the *Bestfoods* standard. CLF has failed to allege any connection between the Non-Owner/Operator Defendants and the Terminal, let alone a connection that would give rise to liability under the CWA or RCRA. Accordingly, the Non-Owner/Operator Defendants respectfully request that the Court enter final judgment in their favor and dismiss the claims against the Non-Owner/Operator Defendants with prejudice.

Dated: April 1, 2022

Respectfully submitted,



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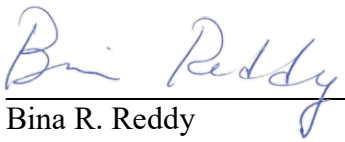
CERTIFICATE OF SERVICE

I hereby certify that on April 1, 2022, the foregoing Reply Memorandum in support of motion for judgment on the pleadings by Defendants Shell USA, Inc., Shell Petroleum Inc. and Shell Trading (US) Company was filed through the Court's electronic filing system ("ECF") by which means 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.



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