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Case No. N20C-09-097 MMJ CCLD

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

STATE OF DELAWARE, *ex rel.* KATHLEEN JENNINGS, Attorney General of the State of Delaware,	)	
Plaintiff,	)	
	)	C.A. No. N20C-09-097 MMJ CCLD
v.	)	
BP AMERICA INC., *et al.*	)	
Defendants.	)	

CONSOL ENERGY INC.'S OPENING BRIEF IN SUPPORT OF MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM

Dated: May 18, 2023

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CONSOL Energy Inc. ("CONSOL Energy") incorporates by reference the arguments in Defendants' Joint Opening Brief in Support of Motion to Dismiss Plaintiff's Complaint for Failure to State a Claim (the "Joint Brief") and submits this supplemental brief in support of its motion to dismiss for failure to state a claim.

INTRODUCTION

Plaintiff seeks to hold 30 energy companies liable under Delaware law for the effects of global climate change in Delaware. As the Joint Brief explains, the Court should dismiss plaintiff's complaint because federal law precludes state law from regulating out-of-state emissions, plaintiff's claims present non-justiciable political questions, and plaintiff failed to allege essential elements of its claims under state law. *See generally* Joint Brief. If the Court dismisses the complaint on any of these grounds, it need not consider plaintiff's additional pleading deficiencies as to CONSOL Energy.

CONSOL Energy files this supplemental brief because plaintiff has sought to emphasize its allegations about misrepresentations, yet the complaint fails to allege any misrepresentation by CONSOL Energy. The Joint Brief explains why plaintiff's claims and alleged injuries are necessarily predicated on emissions and that, as a result, state law cannot apply here. But even if the Court accepts plaintiff's framing of its claims (it should not), the Court should dismiss the claims against CONSOL Energy because the complaint does not allege that CONSOL Energy said anything

about its products' connection to global climate change, or that CONSOL Energy made any misrepresentation that misled the public about the risks of climate change. To the extent plaintiff bases its claims on misrepresentations, those claims fail.

The complaint also fails to state a claim that CONSOL Energy failed to warn consumers about alleged climate dangers that could result from the use of its products. Plaintiff does not allege that CONSOL Energy ever studied climate change, obtained special information about the risks of climate change, or concealed any information about climate change from its customers or the public at large. Given the absence of facts that could support finding a duty to warn under Delaware law, plaintiff has failed to state a negligent failure to warn claim against CONSOL Energy.

BACKGROUND[1]

A. Plaintiff's Allegations

Of the 280 paragraphs in the complaint, only four contain any specific reference to CONSOL Energy. *Id.* ¶ 34 (referring to CONSOL Energy); *id.* ¶¶ 36, 40, 42 (referring to CONSOL Energy and CNX Resources Corporation collectively as "CONSOL"). The complaint explains that CNX Resources Corporation ("CNX") was formerly known as CONSOL Energy Inc. and, in 2017, CNX spun off its coal

[1] CONSOL Energy incorporates by reference the "Statement of the Case" in the Joint Brief.

mining operations into a new entity called CONSOL Energy Inc. *Id.* ¶ 34(a). The complaint describes CONSOL Energy, the new entity formed in 2017, as incorporated in Delaware with its principal place of business in Canonsburg, Pennsylvania and as the successor in liability to CONSOL Mining Corporation and/or CNX. *Id.* ¶ 34(d).

The complaint also includes boilerplate allegations asserted against all defendants, including CONSOL Energy, claiming that they "controlled companywide decisions" on "marketing, advertising, climate change and greenhouse gas emissions from its fossil fuel products, and communication strategies concerning climate change and the link between fossil fuel use and climate-related impacts on the environment and communities." *Id.* ¶ 34(e), (f). Those boilerplate allegations fail to identify a single decision or communication CONSOL Energy made on those topics.

The complaint defines CNX and CONSOL Energy collectively as "CONSOL," *id.* ¶ 34(g), and then claims that

> CONSOL's statements in and outside of Delaware made in furtherance of its campaign of deception and denial, and its chronic failure to warn consumers of global warming-related hazards when it marketed, advertised, and sold its products, were intended to conceal and mislead consumers and the public about the serious adverse consequences from continued use of CONSOL's products.

Id. ¶ 34(h). But the complaint does not identify a single statement or misrepresentation that CONSOL Energy purportedly made.

The complaint next lumps "CONSOL" together with other defendants "collectively referred to as 'Fossil Fuel Defendants.'" *Id.* ¶ 36. Most of the complaint's general allegations are asserted against "Fossil Fuel Defendants" collectively.

The complaint alleges that "CONSOL" is a member of the National Mining Association ("NMA"), a national trade association, and that "CONSOL's president and CEO" is the vice chairman of the NMA board. *Id.* ¶ 40(a)-(b). The complaint also states that "CONSOL (as Consolidation Coal Company)" was a member of the Global Climate Coalition ("GCC"), which "disbanded in or around 2001." *Id.* ¶ 42.

Three of the complaint's four causes of action are asserted against CONSOL Energy: (1) negligent failure to warn, on the theory that the Fossil Fuel Defendants had and breached a duty to warn the public regarding the "climate effects that inevitably flow from the intended or foreseeable use of their fossil fuel products," *id.* ¶ 236; (2) trespass, on the theory that the Fossil Fuel Defendants "caused flood waters, extreme precipitation, saltwater, and other materials to enter the State's real property," *id.* ¶ 249; and (3) nuisance, on the theory that the Fossil Fuel Defendants' operations created or contributed to a public nuisance, *id.* ¶ 257.[2]

[2] The Delaware Consumer Fraud Act cause of action is not asserted against CONSOL Energy.

B. Removal Proceedings

To keep this case in state court, plaintiff told every federal court—from the district court to the Supreme Court—that it seeks to hold defendants liable for their alleged misstatements and omissions, not for interstate greenhouse-gas emissions. *See* Opening Br. in Supp. of Mot. to Remand at 23, *Delaware v. BP America Inc.*, No. 1:20-cv-01429-LPS (D. Del. Jan. 5, 2021), D.I. 89; Pl.'s Reply Brief in Support of Motion to Remand at 2-3, *Delaware v. BP America Inc.*, No. 1:20-cv-01429-LPS (D. Del. Apr. 6, 2021), D.I. 101; Ans. Br. at 1, *Delaware v. BP America Inc.*, No. 22-1096 (3d Cir. Apr. 14, 2022), D.I. 134; Br. in Opp. at 1, *BP America Inc. v. State of Delaware*, No. 22-821 (U.S.).

The Third Circuit correctly rejected this contention: "Delaware . . . tr[ies] to cast [its] suit[ ] as just about misrepresentations. But [its] own complaint[ ] belie[s] that suggestion. [It] charge[s] the [defendant] companies with not just misrepresentations, but also trespasses and nuisances. Those are caused by burning fossil fuels and emitting carbon dioxide." *City of Hoboken v. Chevron Corp.*, 45 F.4th 699, 712 (3d Cir. 2022).

The Third Circuit affirmed the district court's remand order, and the Supreme Court denied defendants' petition for certiorari.

STATEMENT OF QUESTIONS INVOLVED

1. Whether plaintiff states a claim against CONSOL Energy based on its misrepresentation theory of liability where the complaint does not identify a single statement made by CONSOL Energy.

2. Whether plaintiff states a claim against CONSOL Energy based on its misrepresentation theory of liability where the complaint fails to allege facts establishing that any alleged misrepresentations of others can be imputed to CONSOL Energy.

3. Whether plaintiff states a negligent failure to warn claim against CONSOL Energy where the complaint fails to allege any facts showing CONSOL Energy had actual or constructive knowledge about any purported connection between its products and climate change before such information was widely available.

LEGAL STANDARD

A court must dismiss a complaint for failure to state a claim under Rule 12(b)(6) where the plaintiff fails to allege facts supporting a "reasonably conceivable set of circumstances" under which it would be entitled to relief. *Cent. Mort. Co. v. Morgan Stanley Mort. Cap. Holdings LLC*, 27 A.3d 531, 536 (Del. 2011). The trial court "is not required to accept every strained interpretation of the allegations proposed by the plaintiff." *Malpiede v. Townson*, 780 A.2d 1075, 1083 (Del. 2001).

Even under notice-pleading standards, a "[c]ourt will 'ignore conclusory allegations that lack specific supporting factual allegations."' *Black v. New Castle Cnty.*, 2021 WL 4191453, at *2 (Del. Super. Ct. Sept. 14, 2021) (quoting *Ramunno v. Cawley*, 705 A.2d 1029, 1034 (Del. 1998)). When the plaintiff "fails to plead facts supporting an element of its claim," "[d]ismissal is warranted." *Brightstar Corp. v. PCS Wireless, LLC*, 2019 WL 3714917, at *3 (Del. Super. Ct. Aug. 7, 2019).

ARGUMENT

The Court should dismiss plaintiff's complaint for the reasons set forth in the Joint Brief. If the case is not dismissed in its entirety, at a minimum, the claims against CONSOL Energy should be dismissed because the complaint does not allege that CONSOL Energy made any misrepresentation that deceived Delaware consumers or the public about its products' connection to global climate change or had any special knowledge that use of its products would likely contribute to climate change.

I. THE COMPLAINT DOES NOT CONTAIN ANY ALLEGED MISREPRESENTATIONS ABOUT CLIMATE CHANGE MADE BY OR ATTRIBUTABLE TO CONSOL ENERGY.

Claims based on misrepresentations must be pleaded with particularity under Rule 9(b) of the Superior Court Civil Rules. *See*, *e.g.*, *Rinaldi v. Iomega Corp.*, 1999 WL 1442014, at *8–9 (Del. Super. Ct. Sept. 3, 1999); *Browne v. Robb*, 583 A.2d 949, 955 (Del. 1990). Despite this well-settled rule, plaintiff not only fails to allege

misrepresentations by CONSOL Energy with the particularity the rule requires; plaintiff alleges no misrepresentations by CONSOL Energy whatsoever. Plaintiff does not allege that CONSOL Energy said anything about its products' alleged connection to global climate change, and the complaint offers no basis for attributing others' alleged misrepresentations to CONSOL Energy.

A. The complaint does not identify a single alleged misrepresentation made by CONSOL Energy.

The few paragraphs in the complaint that refer to CONSOL Energy do not identify a single alleged misrepresentation made by CONSOL Energy. This is not surprising given that CONSOL Energy (f/k/a CONSOL Mining Corporation) was formed only three years before plaintiff filed its complaint. *See* Compl. ¶ 34(a).[3]

Paragraph 34(f) states that CONSOL Energy "controlled companywide decisions" "related to marketing, advertising, climate change and greenhouse gas emissions from its fossil fuel products." Compl. ¶ 34(c). But it does not identify any alleged misrepresentation about climate change or greenhouse gas emissions. After lumping CNX and CONSOL Energy together as "CONSOL," the complaint alleges that CONSOL made unspecified statements "in furtherance of its campaign of deception and denial." *Id.* ¶ 34(h).

[3] Given this short time period, it would not have been difficult or burdensome for plaintiff to study CONSOL Energy's history of public statements before filing the complaint.

Because the complaint never alleges that CONSOL Energy made any specific statements, the complaint fails Rule 9(b)'s requirement to specify the "time, place, and contents" of the alleged misrepresentations. *See Browne*, 583 A.2d at 955 (internal quotation marks and citation omitted).

The complaint does not even satisfy Rule 8(a)'s basic requirement to put CONSOL Energy on "notice of what [it] allegedly did wrong." *See Hupan v. Alliance One Int'l, Inc.*, 2015 WL 7776659, at *12 (Del. Super. Ct. Nov. 30, 2015), *aff'd sub nom. Aranda v. Philip Morris USA Inc.*, 183 A.3d 1245 (Del. 2018). For these reasons, the complaint does not state a viable claim against CONSOL Energy under plaintiff's misrepresentation theory.

B. No alleged misrepresentations by other defendants or non-parties are attributable to CONSOL Energy.

There is no basis for attributing any alleged misrepresentations of other defendants or non-parties to CONSOL Energy, particularly since CONSOL Energy has existed only since 2017. While the complaint purports to allege statements by others,[4] *see*, *e.g.*, Compl. ¶¶ 114–21, even if those statements were actionable, it does not allege any basis for attributing those statements to CONSOL Energy. "[O]blique references to false statements allegedly made by 'each defendant' will not serve to attribute misrepresentations to all defendants in an action." *Hupan*, 2015 WL

[4] These representations are not actionable for the reasons explained in the Joint Brief and other defendants' supplemental briefs.

7776659, at *12 n.70 (alteration in original) (citation and internal quotation marks omitted). The "first element" of a fraud claim is that the defendant made "a false statement," and "only '[t]he speaker who makes a false representation is, of course, accountable for it.'" *In re Swervepay Acquisition, LLC*, 2022 WL 3701723, at *9 (Del. Ch. Aug. 26, 2022) (quoting *Prairie Cap. III, L.P. v. Double E Hldg. Corp.*, 132 A.3d 35, 59 (Del. Ch. 2015)). As a result, plaintiff cannot attribute any other defendant's alleged misrepresentations to CONSOL Energy.

Although the complaint alleges that "CONSOL" was a member of GCC for some unspecified period over two decades ago, Compl. ¶ 42, any attempt to hold CONSOL Energy liable for GCC's speech would fail for at least three reasons.

First, CONSOL Energy was formed in 2017, *id.* ¶ 34(a), approximately sixteen years after "GCC [was] disbanded in or around 2001," *id.* ¶ 42.

Second, plaintiff does not allege that GCC made any actionable misrepresentations about climate change, in Delaware or elsewhere. The complaint describes GCC statements that were published "with the specific purpose of preventing U.S. adoption of the Kyoto Protocol." *Id.* ¶¶ 129–30. Even if they could be construed as "misleading," such statements are protected by the First Amendment and thus not actionable. *See* Def. American Petroleum Institute's Motion to Dismiss for Failure to State a Claim API Brief, Section II.

Third, even if actionable, the complaint does not allege any facts suggesting that CONSOL Energy could be held liable for those statements. Delaware courts apply the Restatement (Second) of Torts, which permits a defendant's liability for a third-party's tortious conduct under theories sounding in civil conspiracy, aiding and abetting, and breach of duty to a third party. *See* Restatement (Second) of Torts §876; *Kuczynski v. McLaughlin*, 835 A.2d 150, 156 n.26 (Del. Super. Ct. 2003). But none of those theories is alleged as to CONSOL Energy.

Plaintiff does not claim that CONSOL Energy "conspired" with GCC. At most, it alleges that CONSOL Energy was a member of GCC for some unspecified period more than two decades ago, which is impossible given that CONSOL Energy was formed in 2017. Even setting aside this impossibility, "mere membership in a trade association, including attendance at meetings, is not sufficient to give rise to an inference of conspiracy, absent proof of 'knowing participation' in the wrongful conduct." *In re Asbestos Litig.*, 509 A.2d 1116, 1120 (Del Super. Ct. 1986), *aff'd sub nom. Nocolet, Inc. v. Nutt*, 525 A.2d 146 (Del. 1987); *see also Maple Flooring Mfrs.' Ass'n v. United States*, 268 U.S. 563, 584 (1925) ("We do not conceive the members of trade associations become [ ] conspirators merely because they gather and disseminate information . . . ."); *In re Ins. Brokerage Antitrust Litig.*, 618 F.3d 300, 349 (3d Cir. 2010) ("But neither defendants' membership in the [trade

association], nor their common adoption of the trade group's suggestions, plausibly suggest conspiracy.").

Plaintiff also does not claim that CONSOL Energy "aided and abetted" any alleged GCC misrepresentations. A defendant cannot be liable for aiding and abetting wrongdoing unless it knew "that the [association's] conduct constitute[d] a breach of duty" and nevertheless gave "substantial assistance or encouragement to [the association]." Restatement (Second) of Torts §876(b). Here, because there are no allegations that CONSOL Energy knew of any alleged wrongdoing by GCC, let alone gave substantial assistance and encouragement in furtherance of it, an aiding and abetting theory cannot save plaintiff's claims. *See Riverside Fund V, L.P. v. Shyamsundar*, 2015 WL 5004924, at *5 (Del. Super. Ct. Aug. 17, 2015) ("A plaintiff alleging an aiding and abetting fraud claim must allege the existence of the underlying fraud, actual knowledge, and substantial assistance"—"[m]ere awareness is not sufficient to rise to the level of substantial assistance.").

Plaintiff also cannot prevail on the third theory, which requires that CONSOL Energy's own conduct breached a duty to a third party. *See* Restatement (Second) of Torts § 876. Plaintiff does not allege that CONSOL Energy made any specific misrepresentation or assisted GCC or anyone else in purportedly publishing specific misrepresentations. There is simply no basis in the complaint to attribute to CONSOL Energy any alleged misrepresentations or omissions by others. Plaintiff

has therefore failed to state a claim against CONSOL Energy based on alleged misrepresentations and omissions.

II. THE COMPLAINT DOES NOT ALLEGE THAT CONSOL ENERGY HAD ANY SPECIAL KNOWLEDGE ABOUT CLIMATE CHANGE THAT COULD GIVE RISE TO A DUTY TO WARN.

Plaintiff also claims all defendants are liable for failure to warn because they had superior knowledge about the risks of climate change but concealed this information from the public. This theory of liability fails because the risks of climate change have been widely known for nearly half a century. *See* Joint Brief, Section IV.C. But the failure-to-warn theory is further deficient as to CONSOL Energy because plaintiff alleges no facts about CONSOL Energy's knowledge of the potential dangers of climate change during the relevant time.

A supplier's duty to warn hinges "on whether it had knowledge of the hazards associated with its product" at a time when those hazards were not widely known. *In re Asbestos Litig.*, 799 A.2d 1151, 1152 (Del. 2002) (per curiam); *Jones v. Clyde Spinelli, LLC*, 2016 WL 3752409, at *2 (Del. Super. Ct. July 8, 2016) ("[T]here is no duty to warn or protect [ ] from an open and obvious danger."). Where the supplier lacks "actual or constructive knowledge of the hazards associated" with its product, the supplier does not have a duty to warn. *Asbestos*, 799 A.2d at 1152.

Here, the complaint alleges no facts suggesting that CONSOL Energy had actual or constructive knowledge about the dangers of climate change or the role its

products allegedly played in contributing to climate change before such knowledge became readily available to the public. Nor does it allege that CONSOL Energy conducted research into climate change.

Collective and vague allegations that "[d]efendants knew or should have known" that fossil-fuel products cause climate change "based on information passed to them from their internal research divisions and affiliates, trade associations and industry groups, and/or from the international scientific community," *e.g.*, *id.* ¶¶ 46, 237, do not suffice. The complaint does not allege that CONSOL Energy ever had a "research division" or facts suggesting that it received information from a trade association or industry group at a time when the public was not aware of the possible causes of climate change. To the extent CONSOL Energy is lumped with other defendants and alleged to have learned about the risks of climate change from reports published by the "international scientific community," that allegation establishes only that CONSOL Energy had access to the same information as the public concerning the possible consequences of fossil-fuel usage.

Without facts suggesting CONSOL Energy had actual or constructive knowledge about any purported connection between its products and climate change before such information was widely available, plaintiff cannot state a failure to warn claim. Because CONSOL Energy did not have a duty to warn, plaintiff's claims

should be dismissed as to CONSOL Energy to the extent they are based on alleged concealment.

CONCLUSION

For these additional reasons, plaintiff's claims against CONSOL Energy should be dismissed.

Dated: May 18, 2023

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