IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

STATE OF DELAWARE,

Plaintiff,

v.

BP AMERICA INC., BP P.L.C., CHEVRON CORPORATION, CHEVRON U.S.A. INC., CONOCOPHILLIPS, CONOCOPHILLIPS COMPANY, PHILLIPS 66, PHILLIPS 66 COMPANY, EXXON MOBIL CORPORATION, EXXONMOBIL OIL CORPORATION, XTO ENERGY INC., HESS CORPORATION, MARATHON OIL CORPORATION, MARATHON OIL COMPANY, MARATHON PETROLEUM CORPORATION, MARATHON PETROLEUM COMPANY LP, SPEEDWAY LLC, MURPHY OIL CORPORATION, MURPHY USA INC., ROYAL DUTCH SHELL PLC, SHELL OIL COMPANY, CITGO PETROLEUM CORPORATION, TOTAL S.A., TOTAL SPECIALTIES USA INC., OCCIDENTAL PETROLEUM CORPORATION, DEVON ENERGY CORPORATION, APACHE CORPORATION, CNX RESOURCES CORPORATION, CONSOL ENERGY INC., OVINTIV, INC., and AMERICAN PETROLEUM INSTITUTE,

Defendants.

C.A. No. N20C-09-097 MMJ-CCLD

CNX RESOURCES CORPORATION'S MEMORANDUM OF LAW IN SUPPORT OF ITS MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Pages

CASES

STATUTES

OTHER AUTHORITIES

Defendant CNX Resources Corporation ("CNX") incorporates by reference the arguments set forth in Defendants' Joint Memorandum in Support of Motion to Dismiss for Failure to State a Claim (the "Joint Brief") and Defendant CITGO Petroleum Corporation's Memorandum of Law in Support of its Motion to Dismiss (the "CITGO Brief"), and submits this memorandum in support of CNX's motion to dismiss for failure to state a claim.

INTRODUCTION

Plaintiff filed this lawsuit to remedy alleged injuries from a century's worth of worldwide greenhouse-gas emissions by billions of individuals, companies, and government entities. Rather than sue billions of greenhouse-gas emitters, however, Plaintiff seeks to saddle 30 companies—which play various roles in the production of fossil fuels—with liability under Delaware law for global climate change.

This brazen tactic is outrageous and unfair—but more important for present purposes, it is legally unsustainable. As the Joint Brief explains, federal law categorically prohibits state law from regulating out-of-state emissions, Plaintiff's claims present non-justiciable political questions, and, in all events, Plaintiff has failed to allege the essential elements of its claims under state law. If the Court agrees on any or all of these grounds, then this case is over: The Court need only enter an order dismissing Plaintiff's claims against Defendants and proceed no further.

CNX files this memorandum, however, because Plaintiff has told federal

courts for over two years that it does *not* seek to hold Defendants liable for their production and sale of fossil-fuel products or the emissions resulting from their use, but rather seeks to hold Defendants liable only for their alleged *misrepresentations* about their products' contribution to global climate change and for *concealing* the risks of fossil-fuel use. The problem with that argument, however, is that it would only further underscore that the claims against CNX (and other defendants similarly situated to CITGO) must be dismissed. Specifically, as the CITGO Brief explains with respect to CITGO, Plaintiff's Complaint does not allege that CNX said *anything* about its products' connection to global climate change, much less that CNX made any *misrepresentation* that misled the public about the risks of climate change. Accordingly, the Complaint fails to state a claim against CNX based on alleged misstatements. And the same goes for Plaintiff's claim that CNX failed to warn consumers about alleged climate dangers that could result from the use of its products: the Complaint does not allege that CNX 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. Under Delaware law, therefore, CNX had no duty to warn.

In short, the Court should dismiss Plaintiff's claims on the grounds set out in the Joint Brief. But in all events, it should dismiss the claims against CNX for the reasons articulated here and in the CITGO Brief.

BACKGROUND

A. The Complaint and CNX.

The Complaint proclaims that

> Defendants have known for decades that climate change impacts could be catastrophic, and that only a narrow window existed to take action before the consequences would be irreversible. They have nevertheless engaged in a coordinated, multi-front effort to conceal and deny their own knowledge of those threats, to discredit the growing body of publicly available scientific evidence and persistently create doubt in the minds of consumers, regulators, the media, journalists, teachers, and the public about the reality and consequences of the impacts of their fossil fuel products. This campaign was intended to, and did, target and influence the public and consumers, including in Delaware.

Compl. ¶1. Although the Complaint spans more than 200 pages, however, it has precious little to say about CNX.

Only two paragraphs in the Complaint actually name CNX. *First*, Paragraph 34, subparagraph (a), describes CNX as an energy company incorporated in Delaware with its principal place of business in Pennsylvania. *Id.* ¶34(a). And subparagraphs (b) and (c) contain copy-and-paste allegations asserted against all Defendants, claiming that they "controlled companywide decisions" regarding "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(b), (c). The Complaint never identifies a single decision or communication CNX purportedly made on those topics. *Second*, in Paragraph 265,

the Complaint names CNX as one of the "CFA Defendants" under the Delaware Consumer Fraud Act claim who "have persistently misrepresented material facts, or suppressed, concealed, or omitted material facts" when marketing fossil fuels. *Id.* ¶265.

The Complaint also notes that CNX and Defendant CONSOL Energy Inc. formerly composed a single entity. *Id.* ¶34(a), (d).[1] The Complaint thus defines CNX and CONSOL Energy Inc. collectively as "CONSOL." *Id.* ¶34(g). The Complaint 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, here too, the Complaint does not identify a single statement or misrepresentation that either CNX or CONSOL Energy Inc. purportedly made. Instead, the Complaint lumps "CONSOL" together with other Defendants "collectively referred to as 'Fossil Fuel Defendants.'" *Id.* ¶36. And the remainder of the Complaint's generalized allegations are asserted against "Fossil Fuel Defendants."

[1] In 2017, CNX spun-off its coal-related business into a new entity, also called CONSOL Energy Inc. *Id.* ¶ 34(a).

With regard to associations, the Complaint states 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(b). As the context confirms, "CONSOL" in this instance refers to Defendant CONSOL Energy Inc.—not CNX, which is not a member of NMA and has no executive on the NMA board. 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.

Finally, the Complaint asserts four causes of action, each of which name CNX as a Defendant: (1) negligent failure to warn, on the theory that the Fossil Fuel Defendants had (but 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' operations "caused flood waters, extreme precipitation, saltwater, and other materials to enter the State's real property," *id.* ¶249; (3) nuisance, on the theory that the Fossil Fuel Defendants' operations created or contributed to a public nuisance, *id.* ¶257; and (4) fraud under the Delaware Consumer Fraud Act, on the theory that the CFA Defendants "marketed fossil fuels through misstatements and omissions of material facts," *id.* ¶266.

B. Removal Proceedings.

As catalogued by the CITGO brief, *see* CITGO Brief at 7–8, the parties litigated for over two years whether this case belongs in state or federal court. While the *merits* of that dispute are immaterial to this brief, Plaintiff's *litigating position* is material. Specifically, successfully thwarting removal to federal court, Plaintiff told every federal court—from the district court to the Supreme Court—that it was seeking to hold Defendants liable only for their alleged *misstatements and omissions*, not for interstate greenhouse-gas emissions. *See* Mot. to Remand at 33, *Delaware v. BP America Inc.*, No. 1:20-cv-04129-UNA (D. Del. Jan. 5, 2021), ECF 89 ("[T]he wrongful conduct that lies at the heart of this lawsuit [is] unlawfully concealing and misrepresenting the known dangers of fossil fuels, while simultaneously promoting their unrestrained use, sale, and production."); Ans. Br. at 1, *Delaware v. BP America Inc.*, No. 22-1096 (3d Cir. Apr. 14, 2022) (arguing that this lawsuit is based on Defendants' "decades-long *campaign of deception* regarding their fossil fuel products' relationship to climate change" (emphasis added)); Br. in Opp. at 1, *BP America Inc., v. State of Delaware*, No. 22-821 (U.S.) (contending that Plaintiff "brought this action in its own courts, under its own consumer protection statutes and common law, alleging that petitioners *misled consumers and the public* about their products within and outside Delaware, and that *those misrepresentations* will have severe consequences to the State and its citizens" (emphasis added)). Although

the Third Circuit disagreed with that characterization, *see City of Hoboken v. Chevron Corp.*, 45 F.4th 699, 712 (3d Cir. 2022), it nonetheless affirmed the district court's remand order, and the Supreme Court denied Defendants' petition for certiorari.

ARGUMENT

The Court should dismiss this case for the reasons set forth in the Joint Brief and proceed no further. But because Plaintiff has attempted to recast its Complaint as one about *misstatements and omissions*, not *emissions*, CNX joins CITGO in urging that, at a minimum, the Court dismiss the Complaint as to CNX, CITGO, and other similarly situated Defendants. That is because the Complaint does not allege that CNX made any misrepresentation that deceived Delaware consumers or the public about its products' connection to global climate change. Nor does it allege that CNX had any special knowledge that use of its products would likely contribute to climate change.

I. The Complaint Does Not Allege Any Actionable Misrepresentations About Climate Change Made by, or Attributable to, CNX.

Claims based on misstatements—*i.e.,* fraud—must be pleaded with particularity under Rule 9(b) of the Superior Court Civil Rules. *See, e.g.*, *Rinaldi v. Iomega Corp.*, No. 98C-09-064-RRC, 1999 WL 1442014, at *8–9 (Del. Super. Ct. Sept. 3, 1999); *Browne v. Robb*, 583 A.2d 949, 955 (Del. 1990); CITGO Brief at 9–10 (citing cases). But there are no such alleged misstatements here, both because

CNX is not alleged to have said *anything* about its products' alleged connection to global climate change and because there is no basis for attributing others' alleged misstatements to CNX.

A. The Complaint does not identify a single alleged misstatement made by CNX.

To begin, CNX is not alleged to have said *anything* about its products' alleged connection to global climate change. As discussed above, only two paragraphs in the Complaint expressly mention CNX—but neither identifies even a single alleged misstatement made by CNX.

Paragraph 34(c) simply says that CNX "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 misstatement. Similarly—after the Complaint lumps CNX and CONSOL Energy Inc. together as "CONSOL"—Paragraph 34(h) claims that CONSOL made unspecified statements "in furtherance of its campaign of deception and denial." *Id.* ¶ 34(h). But there, too, the Complaint does not identify a single alleged misstatement. These allegations thus plainly fail to specify "the time, place, and contents of the false representations" as required under Rule 9(b). *Browne*, 583 A.2d at 955 (internal quotation marks omitted).

As for Paragraph 265, the Complaint vaguely asserts that, in "marketing and selling fossil fuel products," CNX and other Defendants "persistently

misrepresented material facts, or suppressed, concealed, or omitted material facts, with the intent that consumers will rely thereon." Compl. ¶265. But that type of "group pleading will not suffice" to state a claim. *In re Swervepay Acquisition, LLC*, No. 2021-0447-KSJM, 2022 WL 3701723, at *9 (Del. Ch. Aug. 26, 2022); *accord Bank of Am., N.A. v. Knight*, 725 F.3d 815, 818 (7th Cir. 2013). And in all events, that vague allegation fails to specify what facts CNX supposedly misrepresented, when it did so, or where, as required by Rule 9(b).

Because the Complaint never alleges that CNX made *any* statements about its products' connection to global climate change—much less any *misrepresentations* that could have deceived consumers—the Complaint falls well short of Rule 9(b)'s requirement to specify the "time, place, and contents" of the alleged misrepresentations. Indeed, the Complaint fails even to satisfy Rule 8(a)'s basic requirement to put CNX on "notice of what [it] allegedly did wrong." *See Hupan v. Alliance One Int'l, Inc.*, No. CV N12C-02-171-VLM, 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 all these reasons—and the related reasons cited by CITGO, *see* CITGO Brief at 9–12—the Complaint does not state a cognizable claim against CNX under Plaintiff's misrepresentation theory.

B. No alleged misstatement by a Defendant or a non-party is attributable to CNX.

There also is no basis in the Complaint for attributing to CNX any alleged misstatements made by other Defendants and non-parties. The Complaint purports to allege statements by other defendants (*see, e.g.*, Compl. ¶¶114–21), but even if those statements were actionable (and they are not, for the reasons explained in the Joint Brief and the CITGO Brief), Plaintiff does not allege any basis for attributing those statements to CNX. Indeed, it is well established that "oblique references to false statements allegedly made by 'each defendant' will not serve to attribute misrepresentations to all defendants in an action." *Hupan*, 2015 WL 7776659, at *12 n.70 (citation and internal quotation marks omitted). This is because the "first element" of a fraud claim is that the defendant made "a false statement," and "only 'the speaker who makes a false representation is, of course, accountable for it.'" *In re Swervepay Acquisition, LLC*, No. 2021-0447-KSJM, 2022 WL 3701723, at *9 (cleaned up). As a result, no Defendant's alleged misstatements are attributable to CNX.

In addition, although the Complaint alleges that "CONSOL" (defined to include CNX) was a member of GCC for some unspecified period, Compl. ¶42, any attempt to hold CNX liable for GCC's speech would fail for at least two reasons.

For one thing, Plaintiff does not allege that GCC made any actionable misrepresentations about climate change, in Delaware or elsewhere. The closest the

Complaint comes is two paragraphs mentioning various statements by GCC. Compl. ¶¶129–30. But the Complaint itself states that these materials were policy papers—that is, they were published "with the specific purpose of preventing U.S. adoption of the Kyoto Protocol." *Id.* ¶129. As a result, even if they could be construed as "misleading," such statements are protected by the First Amendment and thus not actionable. *See* API Brief at 4–6.

More fundamentally, even if they were otherwise actionable, the Complaint does not allege any facts suggesting that CNX could be held liable for those statements. As the CITGO Brief explains, 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* CITGO Brief at 13–17. But none of those theories is alleged as to CNX.

First, Plaintiff does not claim that CNX "conspired" with GCC—and rightly so. The most the Complaint suggests is that CNX (which the Complaint calls "CONSOL") was a *member* of GCC for some unspecified period. But "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* CITGO

Brief at 14–15 (citing additional cases). Because no such proof exists as to CNX here, there is no viable conspiracy theory.

Second, Plaintiff also does not claim that CNX "aided and abetted" any alleged GCC misrepresentations—and again, rightly so. 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, of course, there are zero allegations that CNX knew of any alleged wrongdoing by GCC, let alone gave substantial assistance and encouragement in furtherance of it. Aiding and abetting is thus likewise a non-starter for Plaintiff. *See* CITGO Brief at 15–16 (citing cases).

Finally, Plaintiff cannot prevail on the third theory, which requires that CNX's *own* conduct breached a duty to a third party. *See id.* at 16–17 (citing cases). Indeed, for all the reasons explained above, CNX is not alleged to have made any specific misrepresentation or assisted GCC or anyone else in purportedly publishing specific misrepresentations. Accordingly, there is simply no basis in the Complaint to attribute to CNX alleged misstatements or omissions—and, as a result, Plaintiff has failed to state a claim against CNX based on alleged misstatements and omissions.

II. The Complaint Does Not Allege that CNX Had Any Special Knowledge about Climate Change That Could Give Rise to a Duty to Warn.

Plaintiff also claims that Defendants had superior knowledge about the risks of climate change but willfully concealed this information from the public. The Joint Brief shows how this theory of liability fails because the risks of climate change have been widely known for nearly half a century, *see* Joint Brief at 56–58—and that alone dooms Plaintiff's theory. But the failure-to-warn theory is especially deficient as to CNX because the Complaint does not allege that CNX had any knowledge about 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); CITGO Brief at 17–18 (citing authorities). 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*, 189 A.3d at 1152.

Here, the Complaint alleges no facts suggesting *that CNX* 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. Indeed, CNX is not alleged to have conducted research into climate change. *See, e.g.*, Compl. ¶¶66–103. And although the Complaint repeats blanket allegations that "Defendants 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 and/or from the international scientific community," *e.g.*, *id.* ¶¶46, 268–69, that is plainly insufficient: the Complaint does not allege that CNX or its affiliates ever had a "research division," and to the extent CNX is grouped with other Defendants and alleged to have learned about the risks of climate change from reports published by the "international scientific community," that allegation would show only that CNX had access to as much information as the public concerning the possible consequences of fossil-fuel usage.

In short, the Complaint does not allege that CNX had actual or constructive knowledge about any purported connection between its products and climate change before such information was widely available. Accordingly, Plaintiff has not adequately alleged that CNX had a duty to warn the public about the alleged risks of global climate change resulting from the use of its products. And because CNX did not have a duty to warn, Plaintiff's claims must be dismissed as to CNX to the extent they are based on alleged concealment. *See* CITGO Brief at 19–20 (citing cases).

CONCLUSION

For the foregoing reasons, Plaintiff's failure to warn, trespass, nuisance, and Delaware Consumer Fraud Act claims against CNX should be dismissed.

Respectfully submitted,

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