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.	)	**TRIAL BY JURY OF 12 DEMANDED**
BP AMERICA INC., *et al.*,	)	
Defendants.	)	

PLAINTIFF'S ANSWERING BRIEF IN OPPOSITION TO DEFENDANTS MARATHON PETROLEUM CORPORATION, MARATHON PETROLEUM COMPANY LP, AND SPEEDWAY LLC'S MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM

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INTRODUCTION

The State of Delaware filed a 217-page Complaint with numerous, detailed allegations about corporate misconduct by Marathon Petroleum Corporation ("MPC"), Marathon Petroleum Company LP ("MPCLP"), Speedway LLC ("Speedway"),[1] and other defendants (collectively, "Defendants"). MPC, MPCLP, and Speedway filed a motion to dismiss under Superior Court Civil Rule 12(b)(6) ("Motion"), arguing primarily that the State fails to meet Rule 9(b)'s particularity standard because it makes allegations applicable to all defendants, references each entity by name "only a few times in its Complaint," and does not allege "specific misrepresentations" by MPCLP and Speedway, or many against MPC. *See State ex rel. Jennings v. Purdue Pharma L.P*, 2019 WL 446382, at *8 (Del. Super. Feb. 4, 2019) ("*Purdue*"). But as the State explained in its Answering Brief in Opposition to Defendants' Joint Motion to Dismiss for Failure to State a Claim ("Joint Opposition"),[2] Rule 9(b) does not even apply to most of the State's claims. Joint Opp'n at Part V.A–B. Regardless, this Court already considered and rightly rejected

[1] For purposes of the Complaint, "Marathon" includes MPC, MPCLP, Speedway, Marathon Oil Corporation, and Marathon Oil Company, along with their predecessors, successors, parents, subsidiaries, affiliates, and divisions. Compl. ¶ 26(j).

[2] The State incorporates by reference all arguments it asserts in its Joint Opposition as if fully set forth herein.

analogous Rule 9(b) arguments in *Purdue*, denying a motion to dismiss where, as here, the complaint grouped defendants together for purposes of some allegations because they engaged in the same wrongful conduct. *Purdue*, 2019 WL 446382, at *8. Because the Complaint puts MPC, MPCLP, and Speedway on sufficient notice of the claims against them, the Court should not dismiss under Rule 9(b).

Although the Court need not reach this issue in light of the robust allegations of direct liability on the part of MPC, MPCLP, and Speedway, the allegations against the American Petroleum Institute ("API") are also imputable to MPC, MPCLP, and Speedway because the Complaint plausibly alleges that API acted as these Defendants' agent in disseminating climate disinformation and misrepresenting the risks of fossil fuel products sold by MPC, MPCLP, and Speedway and other Defendants. Similarly, the actions of API and other Defendants are imputable to MPC, MPCLP, and Speedway because they engaged in a civil conspiracy with API and other Defendants.

QUESTIONS INVOLVED

1. Does the Complaint sufficiently notify MPC, MPCLP, and Speedway of the claims against them?
2. Are the Complaint's allegations against other Defendants imputable to MPC, MPCLP, and Speedway?

ARGUMENT

I. The Complaint's Allegations Sufficiently Notify MPC, MPCLP, and Speedway of the Claims Against Them

MPC, MPCLP, and Speedway primarily fault the State's use of collective allegations and the number of times that they are each named in the Complaint. But there is nothing improper in grouping MPC, MPCLP, and Speedway with other Defendants with respect to allegations of the same wrongful conduct. A significant portion of the conduct alleged in the Complaint was undertaken by Defendants as a whole and the allegations in the Complaint appropriately reflect that joint conduct.

Although MPC, MPCLP, and Speedway contend that Rule 9(b)'s heightened pleading standard applies to all claims against them, Rule 9(b) applies only to the State's negligent failure to warn claim, as explained in the Joint Opposition. *See* Joint Opp'n at Part V.A. Rule 9(b)'s purpose is to "provide defendants with enough notice to prepare a defense," along with "prevent[ing] plaintiffs from using complaints as fishing expeditions to unearth wrongs to which they had no prior knowledge" and protecting defendants "against baseless claims." *Purdue,* 2019 WL 446382, at *8.[3] Where the rule applies, "date, place and time allegations are not

[3] MPC, MPCLP, and Speedway's Motion focuses primarily on notice concerns and does not argue that the case is a fishing expedition or wholly baseless as reasons for dismissing pursuant to Rule 9(b). This Opposition thus likewise focuses on these Defendants' notice.

required to satisfy the particularity requirement." *Sammons v. Hartford Underwriters Ins. Co.*, 2010 WL 1267222, at *5 (Del. Super. Apr. 1, 2010) (citation omitted). Here, whether Rule 8(a) or Rule 9(b) applies, the Complaint sufficiently notifies MPC, MPCLP, and Speedway of the claims against them.

A. Delaware Law Allows Plaintiffs to Plead Conduct Allegations That Apply to All Defendants

MPC, MPCLP, and Speedway principally lament the number of times they are each referenced by name in the Complaint. *See* Mot. 1–5, 8. This Court rejected a similar argument in *Purdue*. 2019 WL 446382, at *8. Although "[a]t the pleading stage, *a defendant* in a group of similar defendants *may attempt to distinguish its behavior* from other defendants," it is not the plaintiff's burden to do so. *Id.* (emphasis added). "[T]hat there [a]re no allegations of specific misrepresentations" by certain defendants, or that a defendant is "only referenced . . . specifically a few times in [the] [c]omplaint," is not a basis to dismiss claims against that defendant under Rule 9(b). *Id.*; *see also Grant v. Turner*, 505 F. App'x 107, 112 (3d Cir. 2012) (vacating dismissal of fraud-based claims because "[a]lthough Plaintiffs d[id] not allege who, specifically, made misrepresentations to whom in all cases," the complaint sufficiently notified defendants of their charged misconduct); *Swartz v. KPMG LLP*, 476 F.3d 756, 764 (9th Cir. 2007) ("[T]here is no absolute requirement that where several defendants are sued in connection with an alleged fraudulent

scheme, the complaint must identify *false statements* made by each and every defendant.").

Instead, Delaware courts permit group pleading "so long as individual defendants are on notice of the claim against them." *River Valley Ingredients, LLC v. Am. Proteins, Inc.*, 2021 WL 598539, at *3 (Del. Super. Feb. 4, 2021). In fact, "nothing in Rule 9"—nor Rule 8, for that matter— "*per se* prohibits group pleading." *Id.* Because the cornerstone of Rule 9(b) is notice, a complaint that notifies defendants of the "precise misconduct with which they are charged" suffices even if it charges multiple defendants with the same conduct. *Grant*, 505 F. App'x at 111 (citation omitted); *see also River Valley Ingredients*, 2021 WL 598539, at *3.

Here, the collective allegations referencing "Fossil Fuel Defendants" are permissible because the State alleges that each Fossil Fuel Defendant engaged in the same wrongful conduct and fraudulent scheme. This provides MPC, MPCLP, and Speedway with ample notice. *See* Joint Opp'n at Part V.C. The Complaint alleges that MPC, MPCLP, Speedway, and others had a duty to warn consumers about the climatic harms of their fossil fuel products, which they researched and understood in depth, but failed to give adequate warnings thereof. Instead, these Defendants waged a sophisticated campaign of deception and disinformation about their products' contribution to climate change, knowing that the intended use of their products would cause the harms they predicted. *See* Compl. ¶¶ 20–36, 46(b), 100–

40, 160–97, 202–210, 226, 235–44, 246, 262. Fossil Fuel Defendants perpetuated this scheme through their own conduct and by relying on trade associations like API and other actors. *See id.* ¶ 135. MPC, MPCLP, and Speedway are charged with the same misconduct as the other Fossil Fuel Defendants, because they engaged in the same conduct, and are on notice of what is alleged.

Indeed, group pleading is particularly appropriate where, as here, defendants are alleged to have deliberately concealed facts regarding their misconduct, leaving the plaintiff unable to further specify a defendant's actions "absent discovery." *Grant*, 505 F. App'x at 112. Group allegations are likewise appropriate where "information that would permit greater particularity is exclusively within the possession of a defendant, and defendants are alleged to have acted together to facilitate a general scheme." *Hawk Mountain LLC v. Mirra*, 2016 WL 4541032, at *2 (D. Del. Aug. 31, 2016). Both factors are alleged here.

The State alleges that Fossil Fuel Defendants relied on third parties like API to conceal their participation in their campaigns of deception. *See, e.g.*, Compl. ¶¶ 37(b), 39–42, 134–35. Defendants "deliberately obscured" their efforts to conceal and misrepresent their fossil fuel products' known dangers, *id.* ¶ 134, including through nominally independent organizations like think tanks, citizen groups, and foundations advancing a skeptical view of climate change the Fossil Fuel Defendants knew to be misleading and false, *see id.* ¶ 135. These groups

provided climate disinformation "from a misleadingly objective source" on Fossil Fuel Defendants' behalf, *id.* ¶ 37(b), helping to deliberately conceal Fossil Fuel Defendants' misconduct, *see Grant*, 505 F. App'x at 112. The State's allegations to that effect against all Fossil Fuel Defendants are appropriate here.

Nor is there any flaw in grouping MPC, MPCLP, and Speedway with Marathon Oil Corporation and Marathon Oil Company as "Marathon." *See* Mot. 3 n.4. Delaware courts permit such grouping of defendants when entities are alleged to have "close-knit relationships," explaining that further delineation can often only occur after "the development of a factual record after discovery." *In re WeWork Litig.*, 2020 WL 7343021, at *11 (Del. Ch. Dec. 14, 2020); *see Manti Holdings, LLC v. Carlyle Grp. Inc.*, 2022 WL 1815759, at *8 (Del. Ch. Jun. 3, 2022); *Grant*, 505 F. App'x at 112.

Here, the Complaint adequately alleges a close relationship between the Marathon entities. The Complaint alleges that MPC "was spun off from the operations of Marathon Oil Corporation in 2011," that Speedway and MPCLP are wholly owned subsidiaries of MPC, and that Marathon Oil Company is a wholly owned subsidiary of Marathon Oil Corporation. Compl. ¶ 26(d)–(i). And it alleges that Marathon Oil Corporation and MPC tightly controlled their subsidiaries, including marketing, advertising, and communications strategies about the climate impacts of the subsidiaries' fossil fuel products. *See id.* ¶ 26(c), (f)–(g). The

Marathon entities have worked as one machine to further their joint deception campaigns. *See id.* ¶ 26(j).[4] Because "each case of successor liability must turn on its particular facts," *Sheppard v. A.C. & S. Co.*, 484 A.2d 521, 526 (Del. Super. 1984), determining whether MPC is liable as a successor to Marathon Oil Corporation or as a parent to Speedway and MPCLP is premature at the pleading stage. *Cf. State Farm Fire & Cas. Co. v. Ward Mfg., LLC*, 2017 WL 5665200, at *1 (Del. Super. Nov. 20, 2017) ("[T]he Court should not dismiss the Complaint until such time as Plaintiff has conducted at least limited discovery to determine whether there is some basis," including successor liability, "to hold Defendant responsible despite the fact that it was incorporated after the date of construction" of property); *Corp. Prop. Assocs. 8, L.P. v. Amersig Graphics, Inc.*, 1994 WL 148269, at *5 (Del. Ch. Mar. 31, 1994).

The cases MPC, MPCLP, and Speedway cite are distinguishable because they come from areas of law with claim-specific heightened pleading standards that do not apply to the State's claims here. One was a toxic tort case, and the court cabined its discussion to "the context of the[] [toxic] tort claims" at issue there. *Hupan v. All. One Int'l, Inc.*, 2015 WL 7776659, at *12 (Del. Super. Nov. 30, 2015), *aff'd sub nom. Aranda v. Philip Morris USA Inc.*, 183 A.3d 1245 (Del. 2018). That case relied

[4] To the extent the Court is inclined to credit MPC, MPCLP, and Speedway's unsupported assertion that they are "not affiliated with" the other Marathon entities, Mot. 3 n.4, the State requests leave to take discovery to support its allegations.

on the reasoning in *In re Benzene Litigation*, which expressly recognized the "unique difficulties presented in toxic tort litigation" that "may justify some departure from [typical] pleading standards." 2007 WL 625054, at *7 (Del. Super. Feb. 26, 2007). A toxic tort plaintiff's harm may manifest years after the initial exposure, increasing the difficulty in determining which products or manufacturers caused the injuries. *See id.* In that narrow context, "[p]laintiffs must plead with specificity which defendant caused the alleged harm, what products caused the harm, how the harm occurred, and when that harm occurred." *Hupan*, 2015 WL 7776659, at *12.

The Complaint here alleges that all of Fossil Fuel Defendants' fossil fuel products emit greenhouse gases that contribute to the State's injuries. *See* Compl. ¶¶ 4, 21–36. It specifies the injuries Defendants' deceptive conduct caused, and the mechanism of causation. *See, e.g.*, *id.* ¶¶ 5–12, 47–61, 226–33. Unlike a toxic torts case, where the timing of exposure may differentiate one defendant's products from another's, the Complaint alleges that all greenhouse gas emissions resulting from Defendants' deceptive promotion have contributed to the State's injuries.

The other case MPC, MPCLP, and Speedway cite is likewise distinguishable because it involved breach of fiduciary duty claims that are also subject to a heightened pleading standard. As a matter of substantive Delaware corporate law, "each director has a right to be considered individually when the directors face claims for damages in a suit challenging board action." *In re Cornerstone*

Therapeutics Inc, Stockholder Litig., 115 A.3d 1173, 1182 (Del. 2015). In that narrow context, "group pleading will not suffice" and specific allegations must be made as to each director or officer defendant at the pleading stage. *Genworth Fin., Inc. Consol. Derivative Litig.*, 2021 WL 4452338, at *22 (Del. Ch. Sept. 29, 2021) (cleaned up). In the cases MPC, MPCLP, and Speedway cite, the plaintiffs failed to allege that the individual director or executive defendants participated in the challenged conduct.[5] There is no such burden in pleading the State's public nuisance, trespass, negligent failure to warn, or Delaware Consumer Fraud Act ("CFA") claims.

In any event, as explained in the Joint Opposition, the Complaint exhaustively details the Fossil Fuel Defendants' wrongful conduct and how it has caused the State's injuries. *See* Joint Opp'n at Part V.C.

B. The Complaint Satisfies Rule 9(b)

In light of the Complaint's collective allegations, the Complaint adequately puts MPC, MPCLP, and Speedway on notice of the claims against them, whether Rule 8(a) or Rule 9(b) applies.

[5] *See Abhyanker Fam. Tr. ex rel. UpCounsel, Inc. v. Blake*, 2021 WL 2477025, at *4 (Del. Ch. June 17, 2021) (dismissing breach of fiduciary duty claim against a defendant because the complaint "fail[ed] . . . to allege a single fact related to [his] weeklong stint as CEO" and most of the allegations against the collective defendants occurred before or after his tenure).

Where Rule 9(b) applies, a complaint must simply plead the circumstances of fraud "sufficiently 'to place defendants on notice of the precise misconduct with which they are charged, and to safeguard defendants against spurious charges of immoral and fraudulent behavior.'" *Sammons*, 2010 WL 1267222, at *6 (quoting *Coleman Dupont Homsey v. Vigilant Ins. Co.*, 496 F. Supp. 2d 433, 439 (D. Del. 2007)). Here, the Complaint provides more than sufficient detail to put MPC, MPCLP, and Speedway—like other Defendants—on notice of the challenged conduct and enable them to mount an effective defense to the public nuisance, trespass, and CFA claims. *See* Joint Opp'n at Part V.C.

As to the State's negligent failure to warn claim, Rule 9(b) merely requires the State to "apprise[Defendants] of: (1) what duty, if any, was breached; (2) who breached it, (3) what act or failure to act breached the duty, and (4) the party upon whom the act was performed." *Purdue*, 2019 WL 446382, at *8 (quotation omitted). The Complaint does so by alleging that: Fossil Fuel Defendants—including MPC, MPCLP, and Speedway—had a duty to warn consumers about the climate-related injuries they knew or should have known would flow from using their fossil fuel products; Fossil Fuel Defendants failed to give adequate warnings, and instead waged disinformation campaigns that prevented the State and other consumers from gaining access to comparable knowledge; and the intended use of Fossil Fuel Defendants' products caused the harms they predicted. *See* Compl. ¶¶ 235–44; *see*

also Purdue, 2019 WL 446382, at *8 (finding sufficient to state a negligence claim under Rule 9(b) allegations that "repeatedly refer[red] to specific statutory and common law duties, identifie[d] defendant groups, point[ed] out the actions or inactions Defendants allegedly committed or omitted, and claim[ed] that Defendants' conduct caused injury to the State of Delaware").

As the allegations in the State's 217-page Complaint clearly show, the State is not using the Complaint "as [a] fishing expedition[] to unearth wrongs to which [it] had no prior knowledge." *See Purdue*, 2019 WL 446382, at *8. Nor are the State's claims baseless, as indicated by the detailed allegations and as described at length in the Joint Opposition. *See id.* In fact, similar claims brought by other public entities have survived motions to dismiss under Rule 12(b)(6). *See City & Cnty. of Honolulu v. Sunoco LP*, No. 20-380, Dkt. 618 (Haw. Cir. Ct. Mar. 29, 2022) (Attach. A) (denying motion to dismiss negligent failure to warn, trespass, and public nuisance claims); *Massachusetts v. Exxon Mobil Corp.*, 2021 WL 3493456, at *13 (Mass. Super. Ct. June 22, 2021) (same for statutory consumer protection claim).

Finally, MPC, MPCLP, and Speedway argue that the Complaint lacks particularized allegations of actual reliance. Mot. 8–9. But reliance is not an element of any of the State's causes of action, including its CFA claim. *See Stephenson v. Capano Dev., Inc.*, 462 A.2d 1069, 1074 (Del. 1983) (for a CFA claim based on omission or concealment, a plaintiff must plead that the defendant intended others

to rely on the omission or concealment but proof of actual, reasonable, or justifiable reliance is not required). As many courts have concluded, Rule 9(b) cannot "add substantive elements . . . to any claim." *In re Sanofi Sec. Litig.*, 87 F. Supp. 3d 510, 528 n.8 (S.D.N.Y. 2015); *In re McKesson HBOC, Inc. Sec. Litig.*, 126 F. Supp. 2d 1248, 1266 (N.D. Cal. 2000) (same); *In re Mun. Mortg. & Equity, LLC, Sec. & Derivative Litig.*, 876 F. Supp. 2d 616, 652–53 (D. Md. 2012). In any event, the Complaint pleads reliance with sufficient particularity by alleging that Defendants' campaigns caused consumers to purchase more fossil fuels than they otherwise would have and by identifying the types of misrepresentations that influenced consumers and how those misrepresentations were transmitted to consumers. *See* Compl. ¶¶ 9, 58, 104–41, 200, 211–18, 273.

At bottom, whether Rule 8(a) or Rule 9(b) applies, the Complaint sufficiently puts MPC, MPCLP, and Speedway on notice of the claims against them.

II. The Allegations Against Other Defendants Can Be Imputed to MPC, MPCLP, and Speedway

Even if the Complaint failed to adequately allege claims against MPC, MPCLP, and Speedway directly, the Complaint plausibly alleges that API's conduct and knowledge are imputable to MPC, MPCLP, and Speedway under either an agent-principal or a conspiracy theory.

An agent's conduct or knowledge can be imputed to a principal by establishing the existence of an agent-principal relationship between the two parties,

and that the agent's actions were within the scope of its authority. *Grand Ventures, Inc. v. Whaley*, 622 A.2d 655, 665 (Del. Super. 1992) ("[L]iability for an agent's culpable conduct imputes to the principal if the act falls within the scope of the agent's authority." (citing *Mechell v. Palmer*, 343 A.2d 620, 621 (Del. 1975)), *aff'd*, 632 A.2d 63 (Del. 1993); *In re Am. Int'l Grp., Inc.*, 965 A.2d 763, 806 (Del. Ch. 2009) ("[T]he knowledge of an agent is normally imputed to the agent's principal." (citing *E.I. du Pont de Nemours & Co. v. Admiral Ins. Co.*, 1996 WL 111133, at *2 (Del. Super. Feb. 22, 1996)). An agent-principal relationship exists when: (1) the agent has the power to act on behalf of the principal with respect to third parties; (2) the agent does something at the behest of the principal and for the principal's benefit; and (3) the principal has the right to control the agent's conduct. *See Fasciana v. Elec. Data Sys. Corp.*, 829 A.2d 160, 169 n.30 (Del. Ch. 2003). Agency may be express or implied. *J.E. Rhoads & Sons, Inc. v. Ammeraal, Inc.*, 1988 WL 32012, at *4 (Del. Super. Mar. 30, 1988). Finally, an agent may have multiple coprincipals. *See NAMA Holdings, LLC v. Related WMC LLC*, 2014 WL 6436647, at *18 (Del. Ch. Nov. 17, 2014) (citing Restatement (Third) of Agency § 3.16 cmt. b (2006)).

Here, the Complaint alleges that API acted as MPC's, MPCLP's, and Speedway's agent, which would impute the allegations of API's knowledge and conduct to MPC, MPCLP, and Speedway. The Complaint alleges that Fossil Fuel

Defendants, including MPC, MPCLP, and Speedway, "employed and financed" API and other "front groups to serve their climate change disinformation and denial mission," and that API acted on behalf of and under the control of MPC, MPCLP, Speedway, and other Fossil Fuel Defendants in implementing public relations campaigns, funding shoddy scientific research, denying the reality of climate change, and misrepresenting the link between fossil fuels and climate change. *See* Compl. ¶ 39. Additionally, the Complaint alleges that these "Defendants actively supervised, facilitated, consented to, and/or directly participated in the misleading messaging of these front groups" and profited from their activities. *Id.* And the Complaint details a wide range of examples of conduct API undertook on behalf of Fossil Fuel Defendants. *See, e.g.*, *id.* ¶¶ 37, 39, 62–64, 69–72, 78–80, 92, 122–28, 152, 198–201. In other words, API had the power to act on behalf of Fossil Fuel Defendants by marketing their fossil fuel products and promoting disinformation. API did so at the behest of Fossil Fuel Defendants and for their benefit. And Fossil Fuel Defendants had the right to—and did—supervise and control API's conduct. API's deceptive conduct, which was within the scope of the agency relationship and intended to advance Fossil Fuel Defendants' "climate change disinformation and denial mission," *id.* ¶ 39, is therefore imputable to Fossil Fuel Defendants, including MPC, MPCLP, and Speedway. At minimum, whether an agent-principal relationship existed between MPC, MPCLP, and Speedway, on one hand, and API,

on the other hand, is a question of fact that is premature for resolution at the pleading stage. *See Lang v. Morant*, 867 A.2d 182, 186 (Del. 2005) (holding that because the existence of an agency-principal relationship "depends on the presence of factual elements," it is "a question usually reserved to the factfinder"); *Knerr v. Gilpin, Van Trump & Montgomery, Inc.*, 1988 WL 40009, at *2 (Del. Super. Apr. 8, 1988) ("[W]hether an agency or other type of relationship exists is an intensely factual one."); *J.E. Rhoads & Sons*, 1988 WL 32012, at *21 (denying motion to dismiss because there was "a question of fact as to whether [one defendant] was the agent of [moving defendant]").

Conduct can also be imputed from one party to another where the parties participated in a tortious activity in concert, *Kuczynski v. McLaughlin*, 835 A.2d 150, 156–57 (Del. Super. 2003), or pursuant to a common scheme, Restatement (Second) of Torts § 876(a) (1979). "[C]o-conspirators are jointly and severally liable for the acts of their confederates committed in furtherance of the conspiracy." *Laventhol, Krekstein, Horwath & Horwath v. Tuckman*, 372 A.2d 168, 170 (Del. 1976); *see also Empire Fin. Servs., Inc. v. Bank of N.Y. (Del.)*, 900 A.2d 92, 97 n.16 (Del. 2006) (construing § 876(a) of the Restatement (Second) of Torts as applying to civil conspiracy under Delaware law). A civil conspiracy requires (1) a confederation of two or more persons; (2) an unlawful act done in furtherance of the conspiracy; and (3) actual damage. *Nicolet, Inc. v. Nutt*, 525 A.2d 146, 149–50 (Del. 1987). There

need not be an express agreement between co-conspirators to show a person's knowing participation in a conspiracy, as "tacit ratification is sufficient." *Id.* at 148 (quotation omitted). Membership in a trade association and knowledge of the association's wrongful conduct, when "coupled with a consistent later act," suffices to give rise to an inference of knowing participation in a conspiracy. *In re Asbestos Litig.*, 509 A.2d 1116, 1121 (Del. Super. 1986), *aff'd*, *Nicolet*, 525 A.2d 146.

Here, the Complaint sufficiently alleges that Fossil Fuel Defendants, including MPC, MPCLP, and Speedway, engaged in a civil conspiracy with API to impute API's conduct to MPC, MPCLP, and Speedway. In addition to alleging that Marathon was a "core API member[]" at relevant times, Compl. ¶ 37(e), the Complaint alleges that:

> All Fossil Fuel Defendants, by and through API and other organizations . . . conspired to conceal and misrepresent the known dangers of fossil fuels, to knowingly withhold information regarding the effects of using fossil fuel products, to discredit climate change science and create the appearance such science is uncertain, and to engage in massive campaigns to promote heavy use of their fossil fuel products, which they knew would result in injuries to the State. Through their own actions and through their membership and participation in organizations like API . . . , each Defendant was and is a member of that conspiracy.

Id. ¶ 46(b). Moreover, "Defendants committed substantial acts to further the conspiracy in Delaware by making misrepresentations and omissions to Delaware consumers and failing to warn them about the disastrous effects of fossil fuel use." *Id.*; *see also id.* ¶ 26(k) (describing Marathon entities' conduct in furtherance of the

deception and denial campaigns). And that conspiracy foreseeably resulted in damage in Delaware, including through the effects of sea level rise, flooding, erosion, loss of wetlands and beaches, and ocean acidification, about which Defendants like MPC, MPCLP, and Speedway knew or should have known. *Id.* ¶ 46(b).

To the extent some of the State's allegations about the relationship between Fossil Fuel Defendants and API group defendants together, that is understandable and permissible. "Delaware courts have recognized that the nature of conspiracies often makes it impossible to provide details at the pleading stage and that the pleader should be allowed to resort to the discovery process and not be subjected to dismissal." *Szczerba v. Am. Cigarette Outlet, Inc.*, 2016 WL 1424561, at *2 (Del. Super. Apr. 1, 2016) (cleaned up). Here, because API has been far from transparent, the State cannot be charged with knowledge of each defendant's precise role before engaging in discovery. Whether a conspiracy existed is a factual question best reserved for the jury after the record is developed. *Gannett Co. v. Irwin*, 1985 WL 189242, at *3 (Del. Super. 1985).

Thus, the Complaint's allegations against API can be imputed to MPC, MPCLP, and Speedway through either an agent-principal or conspiracy theory. And even if the Court determines that API's actions and knowledge are not imputable to MPC, MPCLP, and Speedway, the actions of these Defendants' other alleged co-

conspirators, including Exxon, BP, Shell, and Chevron, are imputable to MPC, MPCLP, and Speedway for the reasons described above. The Complaint contains ample allegations of specific misrepresentations by these Defendants, among others, *see, e.g.*, Compl. ¶¶ 172–95, further refuting MPC, MPCLP, and Speedway's arguments that the Complaint lacks allegations of specific misrepresentations attributable to them.

CONCLUSION

For the foregoing reasons, and those in the Joint Opposition, the Court should deny MPC, MPCLP, and Speedway's Motion.

Respectfully submitted,

DELAWARE DEPARTMENT OF JUSTICE

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