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 CITGO PETROLEUM CORPORATION AND MURPHY USA INC.'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 Citgo Petroleum Corporation ("Citgo"), Murphy U.S.A. Inc. ("MUSA") and its former parent company Murphy Oil Corporation ("Murphy Oil"),[1] and other defendants (with Citgo and MUSA, "Defendants"). Citgo and MUSA's motion to dismiss under Superior Court Civil Rule 12(b)(6) ("Motion") argues primarily that the State fails to meet Rule 9(b)'s particularity standard because it makes allegations applicable to all Defendants and references Citgo and MUSA by name "only a few times in its Complaint." *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 ("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 analogous Rule 9(b) arguments in *Purdue*, denying a motion to dismiss where, as here, the complaint grouped defendants

[1] For purposes of the Complaint, "Citgo" includes Citgo Petroleum Corporation and its predecessors, successors, parents, subsidiaries, affiliates, and divisions. *See* Compl. ¶ 29(d). Similarly, "Murphy" includes MUSA, Murphy Oil, and their predecessors, successors, parents, subsidiaries, affiliates, and divisions. *See id.* ¶ 27(e).

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

together for purposes of some allegations because they engaged in the same wrongful conduct. 2019 WL 446382, at *8.

Considering the extensive allegations regarding Fossil Fuel Defendants' knowledge of the climate-related harms of their fossil fuel products, the Court can easily discard Citgo and MUSA's argument that they lacked sufficient knowledge about the harms of their products to sustain a failure to warn claim.

Finally, given the robust allegations of direct liability on the part of Citgo and MUSA, the Court need not reach their arguments that the allegations against the American Petroleum Institute ("API") are not imputable to them. If the Court does reach the issue, API's knowledge and conduct may be imputed to Citgo and MUSA because the Complaint plausibly alleges that API acted as Citgo and MUSA's agent and that Citgo, MUSA, and others engaged in a civil conspiracy with API.

QUESTIONS INVOLVED

1. Does the Complaint sufficiently notify Citgo and MUSA of the claims against them?
2. Does the Complaint state a failure to warn claim against Citgo and MUSA?
3. Are the Complaint's allegations against API imputable to Citgo and MUSA?

ARGUMENT

Citgo and MUSA primarily take issue with the State's use of collective allegations and the number of times they are each named in the Complaint. *See*

Mot. 4–6, 9–11. But there is nothing improper in grouping Citgo and MUSA with other Defendants, or MUSA with Murphy Oil, 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 Citgo and MUSA 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. *See* Joint Opp'n at Part V.A–B. 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 required to satisfy the particularity requirement." *Sammons v. Hartford Underwriters Ins. Co.*, 2010 WL 1267222, at *5 (Del. Super. Apr. 1, 2010) (quotation omitted). Here, whether Rule 8(a) or Rule 9(b) applies, the Complaint sufficiently notifies Citgo and MUSA of the claims against them.

[3] Citgo and MUSA'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.

Additionally, the allegations against API are imputable to Citgo and MUSA because the Complaint plausibly alleges agent-principal and conspiracy theories of imputation.

I. The Complaint's Allegations Sufficiently Notify Citgo and MUSA of the Claims Against Them

Citgo and MUSA primarily lament the number of times they are each named in the Complaint. *See* Mot. 4–6, 9–11. 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," 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 Citgo and MUSA with ample notice. *See* Joint Opp'n at Part V.C. The Complaint alleges that Citgo, MUSA, and other Fossil Fuel Defendants 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, 202–10, 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. Citgo and MUSA 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.

Collective 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 disseminated climate disinformation "from a misleadingly objective source" on Fossil Fuel Defendants' behalf, *id.* ¶ 37(b), helping to deliberately conceal their

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 MUSA and its former parent company Murphy Oil as "Murphy." *See* Mot. 3 n.1. Delaware courts permit such grouping of defendants when entities are alleged to have "close-knit relationships," as 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 also 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 MUSA and Murphy Oil. The Complaint alleges that Murphy Oil was MUSA's former parent company and that MUSA holds Murphy Oil's former U.S. retail marketing business and other assets and liabilities. Compl. ¶ 27(d). And it alleges that Murphy Oil tightly controlled its subsidiaries, including marketing, advertising, and communications strategies about the climate impacts of the subsidiaries' fossil fuel products. *See id.* ¶ 37(c). These entities have worked as one machine to further their joint deception campaigns. *See id.* ¶ 37(f).[4] Because "each case of successor liability must turn on its particular facts," *Sheppard v. A.C. & S. Co.*, 484 A.2d 521,

[4] To the extent MUSA disputes the allegations regarding its relation to Murphy Oil and the Court is inclined to address this factual question, the State requests leave to take discovery to support its allegations.

526 (Del. Super. 1984), determining whether MUSA is liable as a successor to Murphy Oil 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 Citgo and MUSA cite are distinguishable. One was a toxic tort case, where claims are subject to a heightened pleading standard. 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 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 tort 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.

Another case Citgo and MUSA cite, *In re Swervepay Acquisition, LLC*, acknowledged that "Delaware law does not expressly forbid group pleading." 2022 WL 3701723, at *10 (Del. Ch. Aug. 26, 2022) (cleaned up). However, the plaintiffs "fail[ed] to explain why [it] should be permitted" there, providing no reason to impute a single challenged email to others. *Id.* The State, by contrast, clearly explains here why group pleading is permissible in the context of Defendants' coordinated, sophisticated, and *decades-long* campaigns of deception.

Bank of America, N.A. v. Knight is also distinguishable, as the court dismissed claims that three defendant entities' directors and managers engaged in corporate looting, finding the allegation "that 'the defendants looted the corporation'—without any details about who did what—[] inadequate." 725 F.3d 815, 818 (7th Cir. 2013).

Here, the Complaint contains far more detailed allegations about Fossil Fuel Defendants' multidecadal campaigns of deception and disinformation, alleging they all participated and providing specific examples of misrepresentations by various defendants. *See, e.g.*, Compl. ¶¶ 116–23, 172–73, 178–80, 182–86, 189–201.

The last case Citgo and MUSA cite did not involve allegations of a widespread campaign of deception by numerous defendants but rather a common-law fraud claim against a single defendant. *See Browne v. Robb*, 583 A.2d 949, 955 (Del. 1990). The complaint there "totally lack[ed] even a single particular or specific fact to support [the plaintiff's] fraud claim." *Id.* As explained in the Joint Opposition, that is far from the case here. *See* Joint Opp'n at Part V.C. As this Court has recognized, there is no fault in collective allegations without "allegations of specific misrepresentations" by individual defendants where multiple defendants have engaged in similar conduct. *Purdue*, 2019 WL 446382, at *8.

II. The Complaint States a Cognizable Failure to Warn Claim Against Citgo and MUSA

Citgo and MUSA contend that the State's failure to warn claim against them fails because they lacked specialized knowledge of the dangers of their fossil fuel products. *See* Mot. 16–19. Not so.

This argument merely rehashes Citgo and MUSA's objections to the collective allegations. The Complaint amply alleges that Fossil Fuel Defendants, including Citgo, MUSA, and Murphy Oil, knew or should have known about the

climate-related hazards posed by the intended use of their fossil fuel products. *See, e.g.*, Compl. ¶¶ 62–103. Despite this knowledge, Fossil Fuel Defendants misrepresented and concealed the harms of their products from consumers and the public. *See id.* ¶¶ 104–41. That the Complaint does not contain an allegation specific to Citgo's or MUSA's knowledge or funding of climate science is not a ground for dismissal, *see Purdue*, 2019 WL 446382, at *8, particularly given that even under Rule 9(b), "knowledge . . . may be averred generally," Super. Ct. Civ. R. 9(b).

And although Citgo and MUSA suggest the hazards of their products were open and obvious, despite arguing they lacked knowledge of those dangers, as detailed in the Joint Opposition, there is—at minimum—a factual dispute as to the open and obvious nature of Defendants' fossil fuel products, precluding dismissal on this basis. *See* Joint Opp'n at Part IV.C.2; *Jones v. Clyde Spinelli, LLC*, 2016 WL 3752409, at *2–3 (Del. Super. July 8, 2016); *Williamson v. Wilmington Hous. Auth.*, 208 A.2d 304, 306 (Del. 1965).

III. The Allegations Against API Are Imputable to Citgo and MUSA

Finally, Citgo and MUSA contend that the allegations against API cannot be imputed to them. *See* Mot. 12–15. The Court need not reach this issue, because it can deny Citgo and MUSA's Motion without imputing API's conduct or knowledge to them for the reasons described above. If the Court does reach the issue, API's

conduct and knowledge are imputable to Citgo and MUSA under either an agent-principal or 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. *See Grand Ventures, Inc. v. Whaley*, 622 A.2d 655, 665 (Del. Super. 1992) (citing *Mechell v. Palmer*, 343 A.2d 620, 621 (Del. 1975)) ("[L]iability for an agent's culpable conduct imputes to the principal if the act falls within the scope of the agent's authority."), *aff'd*, 632 A.2d 63 (Del. 1993); *In re Am. Int'l Grp., Inc.*, 965 A.2d 763, 806 (Del. Ch. 2006) ("[T]he knowledge of an agent is normally imputed to the agent's principal."). Such a 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. Ameraal, 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 Citgo's and MUSA's agent, which would impute the allegations of API's knowledge and conduct to Citgo and MUSA. The Complaint alleges that Fossil Fuel Defendants, including Citgo and MUSA, "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 Citgo, MUSA, and the 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. 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 Citgo and MUSA. *Cf. Acosta Orellana v. CropLife Int'l*, 711 F. Supp. 2d 81, 111 (D.D.C. 2010) (recognizing that if trade associations "were in fact acting at the behest of their members, they would be the *agents* of their members," but rejecting argument that associations were liable for members' conduct because plaintiffs alleged that agents, rather than principals, were liable). At minimum, whether an agent-principal relationship existed between Citgo and MUSA and API 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) (because the existence of an agent-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*, 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 [the moving defendant]").

Conduct can also be imputed from one party to another where the parties participated in a tortious activity in concert, *see Kuczynski v. McLaughlin*, 835 A.2d 150, 156–57 (Del. Super. 2003), or pursuant to a common scheme, *see* 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 Section 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. *See 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 sub nom. Nicolet*, 525 A.2d 146.

Here, the Complaint sufficiently alleges that Fossil Fuel Defendants, including Citgo and MUSA, engaged in a civil conspiracy with API to impute API's conduct to Citgo and MUSA. In addition to alleging that Citgo and Murphy were "core API members" 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.* ¶ 29(e) (describing Citgo's conduct in furtherance of the deception and denial campaigns); *id.* ¶ 27(f) (same for Murphy entities). 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 Citgo and MUSA knew or should have known. *See id.* ¶ 46(b).

The cases Citgo and MUSA cite for the unremarkable proposition that the actions of an industry association are not necessarily imputable to its members do not help them given the State's robust allegations that go beyond mere API membership. Delaware courts recognize that membership in a trade association, coupled with other conduct, can demonstrate a conspiracy. *See, e.g.*, *In re Asbestos Litig.*, 509 A.2d at 1120–22 (holding a jury could reasonably determine that company "both knew of the alleged harmful acts of [the association] and knowingly participated in the [association's] conspiracy" through letters from its executives downplaying dangers of asbestos). And other courts have recognized that a conspiracy "to knowingly promote and sell a potentially hazardous project" may

exist and suffice to support a nuisance claim. *See, e.g., City of Milwaukee v. NL Indus., Inc.*, 691 N.W.2d 888, 890, 896 (Wis. Ct. App. 2004).

Finally, MUSA's passing attempt to rebut the allegation of its API membership is improper. MUSA directs the Court to API's website—as of May 2023—that does not list MUSA as a current member. *See* Mot. 3 n.1. But the Complaint alleges that the Murphy entities, defined to include MUSA, "are and/or have been core API members at times relevant to this litigation." Compl. ¶ 37(e). On a Rule 12(b)(6) motion, the Court must accept these well-pleaded factual allegations as true. *See Savor, Inc. v. FMR Corp.*, 812 A.2d 894, 896 (Del. 2002). And it may not consider evidence extrinsic to that complaint unless that evidence is (1) "integral to a claim and incorporated into a complaint"; (2) "not being relied upon to prove the truths of [its] contents"; or (3) an "adjudicative fact subject to judicial notice." *Murray v. Mason*, 244 A.3d 187, 192 (Del. Super. 2020) (the complaint "defines the universe of facts that the trial court may consider in ruling on a Rule 12(b)(6) motion to dismiss"). Here, MUSA does not even attempt to argue that any of those three narrow exceptions apply here. Nor could it, as MUSA seeks to introduce API's website for the truth of its contents—that MUSA is not a current

API member. At this stage, the Court must take the Complaint's well-pleaded allegations of MUSA's API membership as true. *See Savor, Inc.*, 812 A.2d at 896.[5]

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. *See Gannett Co. v. Irwin*, 1985 WL 189242, at *3 (Del. Super. 1985).

Thus, the Complaint's allegations against API are imputable to Citgo and MUSA through either an agent-principal or conspiracy theory. Further, even if the Court determines that API's actions and knowledge are not imputable to Citgo and MUSA, the actions of their other alleged co-conspirators, including Exxon, BP, Shell, and Chevron, are imputable to Citgo and MUSA for the reasons described

[5] If the Court is inclined to credit MUSA's assertions about its API membership, the State requests leave to take discovery to support its allegation that the Murphy entities were "core API members at times relevant to this litigation." Compl. ¶ 37(e).

above. The Complaint contains ample allegations of specific misrepresentations by these Defendants, among others, *see, e.g.*, Compl. ¶¶ 172–95, further refuting Citgo and MUSA'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 Citgo and MUSA's Motion.

Respectfully submitted,

DELAWARE DEPARTMENT OF JUSTICE

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