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 DEFENDANT APACHE CORPORATION'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 Apache Corporation ("Apache")[1] and other defendants (with Apache, "Defendants"). Apache'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 Apache 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 the Defendants' Joint Motion to Dismiss for Failure to State a Claim ("Joint Opposition"),[2] although Rule 9(b) does not apply to most of the State's claims, the Complaint satisfies Rule 9(b) for all claims. Joint Opp'n at Part V.A–C. 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 together for purposes of some allegations because they engaged in the same wrongful conduct. *Purdue*, 2019 WL 446382, at *8.

[1] For purposes of the Complaint, "Apache" includes Apache Corporation and its predecessors, successors, parents, subsidiaries, affiliates, and divisions. Compl. ¶ 33(d).

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

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

QUESTIONS INVOLVED

1. Does the Complaint sufficiently notify Apache of the claims against it?
2. Are the Complaint's allegations against API imputable to Apache?

ARGUMENT

I. The Complaint Sufficiently Notifies Apache of the Claims Against It

Apache primarily takes issue with the State's use of collective allegations and the number of times Apache is named in the Complaint. But there is nothing improper in grouping Apache with other Defendants as 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 Apache contends Rule 9(b)'s pleading standard applies to all claims against it, 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) (citation omitted). Here, whether Rule 8(a) or Rule 9(b) applies, the Complaint sufficiently notifies Apache of the claims against it.

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

Apache says the Complaint impermissibly relies on so-called "group pleading." Mot. 8–12. Apache is incorrect because the Complaint alleges that Apache and the other "Fossil Fuel Defendants" engaged in the same fraudulent conduct.

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

[3] Apache'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 Apache's notice.

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 v. Turner*, 505 F. App'x 107, 111 (3d Cir. 2012) (citation omitted).

Here, the collective allegations referencing Fossil Fuel Defendants are permissible because the State alleges each Fossil Fuel Defendant engaged in the same wrongful conduct and fraudulent scheme. This provides Apache with ample notice. *See* Joint Opp'n at Part V.C. The Complaint alleges that Apache 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 and, rather than provide adequate warning to the public, waged a sophisticated campaign of deception and disinformation about their products' contribution to climate change, while 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. Apache is charged with the same misconduct as the other Fossil Fuel Defendants, because they engaged in the same conduct, and is on notice of what is alleged.

Collective pleading is particularly appropriate where, as here, a complaint alleges that defendants 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 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.

Although Apache laments the number of times it is named in the Complaint, this Court rejected a similar argument in *Purdue*. 2019 WL 446382, at *8. While "[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*, 505 F. App'x at 112 (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).

The cases Apache cites are distinguishable because they all come from areas of law with claim-specific heightened pleading standards that do not apply to the State's claims here. Two were toxic tort cases, in which the courts expressly recognized the "unique difficulties presented in toxic tort litigation" that "may justify some departure from [typical] pleading standards." *In re Benzene Litig.*, 2007 WL 625054, at *7 (Del. Super. Feb. 26, 2007); *see also Hupan v. All. One Int'l, Inc.*, 2015 WL 7776659, at *12 (Del. Super. Nov. 30, 2015) (relying on reasoning from *In re Benzene* and cabining its discussion to "the context of these [toxic] tort claims"), *aff'd sub nom. Aranda v. Philip Morris USA Inc.*, 183 A.3d 1245 (Del. 2018). 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 In re Benzene*, 2007 WL 625054, at *7. 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 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.

Two other cases Apache cites are likewise distinguishable because they 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 context, "group pleading will not suffice," and specific allegations must be made as to each director or officer defendant. *Genworth Fin., Inc. Consol. Derivative Litig.*, 2021 WL 4452338, at *22 (Del. Ch. Sept. 29, 2021) (cleaned up). In the cases Apache cites, plaintiffs failed to allege individual defendants participated in the challenged

conduct.[4] There is no such burden in pleading the State's public nuisance, trespass, or negligent failure to warn claims. Regardless, 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.

The plaintiffs in the last case Apache cites failed to allege any misrepresentations by any defendant or identify any "false documents or false statements" upon which the plaintiff relied. *Steinman v. Levine*, 2002 WL 31761252, at *15 (Del. Ch. Nov. 27, 2002). The Complaint here, meanwhile, identifies numerous types of misrepresentations made by Fossil Fuel Defendants, including dozens of exemplary statements. *See, e.g.*, Compl. ¶¶ 116–23, 172–73, 178–80, 182–201.

B. The Complaint States a Public Nuisance Claim Against Apache

Apache contends the State's public nuisance claim fails because the Complaint does not allege Apache controlled the instrumentality of the nuisance. Mot. 16–17. The Delaware Supreme Court recently held, however, that "whether there is control of [a] product once sold" is "not [an] element[] of an environmental-

[4] *See Genworth Fin.*, 2021 WL 4452338, at *22 (noting that plaintiffs grouped officers as "Executive Defendants" but directed no allegations against that group and "barely mention[ed]" group at all); *In re Pattern Energy Grp. Inc. Stockholders Litig.*, 2021 WL 1812674, at *70 (Del. Ch. May 6, 2021) (dismissing claims against group of officers where complaint was "devoid of any allegations that the officer [defendants] had any role in drafting or disseminating the [challenged p]roxy").

based public nuisance . . . claim" against a manufacturer. *State ex rel. Jennings v. Monsanto Co.*, __ A.3d __, 2023 WL 4139127, at *2 (Del. June 22, 2023) ("*Monsanto*"). Instead, a defendant is liable for public nuisance if it "substantially contributed to a public nuisance by misleading the public and selling a product it knew would eventually cause a safety hazard and end up contaminating the environment for generations when used by industry and consumers." *Id.* at *8. Here, the Complaint adequately pleads that Apache substantially contributed to the nuisance, like other Fossil Fuel Defendants. *See* Joint Opp'n at Part IV.A.2.

As alleged, "Fossil Fuel Defendants controlled the instrumentality of the nuisance . . . by flooding the marketplace with disinformation concerning their products, and by controlling every step of the fossil fuel product supply chain from extraction, to marketing, to consumer sales." Compl. ¶ 261. While Apache protests it does not market or sell fossil fuels to consumers, Mot. 16, the Complaint alleges that Apache "controls and has controlled companywide decisions about the quantity and extent of its fossil fuel production and sales" and those "related to marketing, advertising, climate change and greenhouse gas emissions from its fossil fuel products, and communications strategies concerning climate change and the link between fossil fuel use and climate-related impacts." *Id.* ¶ 33(b)–(c). Apache's misleading statements, along with "its chronic failure to warn consumers" of the hazards of its fossil fuel products, contributed to the State's injuries. *Id.* ¶ 33(e).

The Complaint includes Apache among the Fossil Fuel Defendants, which executed the alleged campaigns of deception and disinformation. *Id.* ¶ 36, The Court must take these well-pleaded allegations as true. *Savor, Inc. v. FMR Corp.*, 812 A.2d 894, 896 (Del. 2002).

C. The Complaint States a Trespass Claim Against Apache

Apache says the State's trespass claim is deficient because the Complaint does not specify "which of Apache's products" caused the State's injuries "or when or where [those] products were combusted." Mot. 19. This argument fails because the Complaint plausibly states a claim for trespass caused by Apache and other Defendants.

The Complaint alleges that *all* of Fossil Fuel Defendants' fossil fuel products—including Apache's oil and gas products—create greenhouse gas emissions that contribute to the State's injuries. *See* Compl. ¶¶ 4, 21–36. Apache's "chronic failure to warn" and its "campaign of deception and denial" about the link between its products and climate change "result[ed] in the State's injuries." *Id.* ¶ 33(e). A large proportion of global greenhouse gas emissions has occurred since the late 1980s, *id.* ¶ 6, when Defendants' campaigns of deception began in full swing, *see id.* ¶¶ 104–31. The Complaint plausibly alleges that Defendants knew to a substantial certainty that their intentional campaigns of deception and disinformation would cause foreign matter including saltwater to invade State

property, causing damage. *See* Joint Opp'n at IV.B.2. As the Supreme Court recently held, such allegations suffice to state a claim for trespass under Delaware law. *See Monsanto*, 2023 WL 4139127, at *12 (it is enough that a defendant "substantially contributed to the entry [of foreign matter] onto the State's land by supplying [its products] to Delaware manufacturers and consumers, knowing that their use would eventually trespass onto other lands").

Apache provides no support for its argument that trespass allegations must specify which particular products led to which invasion. The first case Apache cites, *Hupan*, did not involve a trespass claim at all. *See* 2015 WL 7776659, at *2. The second case alleged trespass, but was dismissed because the alleged injury was entirely speculative. *See Sussex Cnty. Env't Concerns Ass'n, Inc. v. Rehoboth Mall Ltd. P'ship*, 1985 WL 165734, at *6 (Del. Ch. Mar. 20, 1985). That case challenged construction of a shopping mall, which the plaintiffs alleged would result in flooding due to inadequate drainage. *See id.* at *1. Because the mall was unbuilt, "there [wa]s no way [for the court] to accurately determine . . . whether plaintiffs w[ould] suffer any injury." *Id.* at *6. The State here has already suffered invasions of its property and will continue to suffer invasions, and resulting damages, from the "'locked in'" climate change effects caused by "greenhouse gas emissions already emitted" due to Defendants' tortious conduct. *See* Compl. ¶¶ 228(a), 249–52; Joint Opp'n at Part IV.B.3.

D. The Complaint States a Failure to Warn Claim Against Apache

Apache insists the State's failure to warn claim fails because Apache did not market or sell products to consumers and because Apache lacked knowledge of the dangers of its fossil fuel products. Mot. 17–19. Not so.

The Complaint alleges that Apache controls companywide decisions about fossil fuel sales, marketing, and advertising, including "communications strategies concerning climate change and the link between fossil fuel use and climate-related impacts," and "chronic[ally] fail[ed] to warn consumers" about its products' known risks. Compl. ¶ 33(b)–(c), (e). Again, the Court must take these allegations—which plausibly allege that Apache marketed and sold fossil fuel products to consumers—as true. *Savor, Inc.*, 812 A.2d at 896.

Apache's cited cases are inapposite, as they involved claims by workers exposed to a manufacturer's asbestos products on the job, *Money v. Manville Corp. Asbestos Disease Comp. Tr. Fund*, 596 A.2d 1372 (Del. 1991), or the spouses of such workers exposed when laundering the workers' clothing, *In re Asbestos Litig.*, 2007 WL 4571196 (Del. Super. Dec. 21, 2007). *Money* is also distinguishable because it involved affirmance of a directed verdict for insufficient evidence of causation between defendants' products and plaintiffs' injuries. 596 A.2d at 1377–78. Here, the State need not present *any* evidence to survive a motion to dismiss. The Complaint plausibly alleges that the State is within the zone of foreseeable

persons endangered by use of Fossil Fuel Defendants' products, and Apache and others accordingly had a duty to warn the State. *See* Joint Opp'n at Part IV.C.1.

Next, Apache contends it cannot be liable for its failures to warn because the Complaint does not allege Apache knew the hazards of its own products. Mot. 18–19. This argument merely rehashes Apache's objections to the collective allegations. The Complaint amply alleges that Fossil Fuel Defendants, including Apache, knew or should have known about the climatic hazards posed by the intended use of their fossil fuel products. *See, e.g.*, Compl. ¶¶ 62–103. Yet Fossil Fuel Defendants misrepresented and concealed the harms of their products from consumers and the public. *Id.* ¶¶ 104–41. That the Complaint does not contain an allegation specific to Apache's knowledge 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). Although Apache suggests the hazards of its products were open and obvious, despite arguing it lacked knowledge of those dangers, there is—at minimum—a factual dispute as to the open and obvious nature of the hazards of Defendants' 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).

Finally, the case Apache cites is inapposite, as the court there was unable to accept the plaintiffs' allegations that their injuries were caused by off-label promotion of a drug, given that "[p]laintiffs themselves admit[ted] that" the drug was prescribed for both a medically appropriate and "an off-label purpose." *Pope v. AstraZeneca AB*, 2021 WL 1263044, at *3 (Del. Super. Apr. 5, 2021). Apache points to no such contradictory allegations here, because there are none.

II. The Allegations Against API Are Imputable to Apache

Apache also contends the allegations against API cannot be imputed to Apache. Mot. 12–15. The Court need not reach this issue, because it can deny Apache's Motion without imputing API's conduct or knowledge to Apache for the reasons described above. If the Court does reach the issue, API's conduct and knowledge are imputable to Apache under either agent-principal or conspiracy theories.

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); *In re Am. Int'l Grp., Inc.*, 965 A.2d 763, 806 (Del. Ch. 2009). 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. Ammeraal, Inc.*, 1988 WL 32012, at *4 (Del. Super. Mar. 30, 1988). 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 Apache's agent. The Complaint alleges that Fossil Fuel Defendants, including Apache, "employed and financed" API and other "industry associations . . . to serve their climate change disinformation and denial mission," and that API acted on behalf of and under the control of Apache 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. 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, 62–80, 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. 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 Apache. At minimum, whether an agent-principal relationship existed between API and Apache 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); *Knerr v. Gilpin, Van Trump & Montgomery, Inc.*, 1988 WL 40009, at *2 (Del. Super. Apr. 8, 1988); *J.E. Rhoads & Sons, Inc.*, 1988 WL 32012, at *21.

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) (citation omitted); *see 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).

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

> 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.* ¶ 33(e) (describing Apache's conduct in furtherance of the deception and denial campaigns). 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 Apache knew or should have known. *Id.* ¶ 46(b).[5]

The cases Apache cites for the unremarkable proposition that the actions of an industry association are not necessarily imputable to its members do not help it 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 1116, 1120–22 (Del. Super. 1986) (holding jury could reasonably determine that company "both knew of the alleged harmful acts of [the association] and knowingly participated in [association's] conspiracy" through letters from its executives downplaying dangers of asbestos), *aff'd sub nom. Nicolet*, 525 A.2d at 147.

To the extent some 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 a dismissal." *Szczerba v. Am. Cigarette Outlet, Inc.*, 2016 WL 1424561, at *2 (Del.

[5] The actions of Apache's other alleged co-conspirators, including Exxon, BP, Shell, and Chevron, are likewise imputable to Apache. The Complaint contains ample allegations of specific misrepresentations by these Defendants, among others, *see, e.g.*, Compl. ¶¶ 172–95, further refuting Apache's arguments that the Complaint lacks allegations of misrepresentations attributable to Apache.

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. *Gannett Co. v. Irwin*, 1985 WL 189242, at *3 (Del. Super. Aug. 9, 1985).

Finally, Apache protests that the Complaint does not specify the dates of its membership or mention Apache by name when referring to certain acts by API. Mot. 12–13. Apache is of course in the best position to know when it was a member of API, and has not attempted to show its periods of membership were outside relevant periods in the Complaint. Regardless, Apache does not show that specifying dates of membership is required to impute allegations, and Apache's complaints about group pleading are unpersuasive.

CONCLUSION

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

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