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 CONSOL ENERGY INC.'S MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM

OF COUNSEL:

Victor M. Sher
Matthew K. Edling
Stephanie D. Biehl
SHER EDLING LLP
100 Montgomery Street
Suite 1410
San Francisco, CA 94104
(628) 231-2500

STATE OF DELAWARE
DEPARTMENT OF JUSTICE
Christian Douglas Wright (#3554)
Director of Impact Litigation
Jameson A.L. Tweedie (#4927)
Ralph K. Durstein III (#912)
Sawyer M. Traver (#6473)
Deputy Attorneys General
820 N. French Street
Wilmington, DE 19801
(302) 683-8899

Attorneys for Plaintiff

Dated: July 3, 2023

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Rules

Other Authorities

INTRODUCTION

The State of Delaware filed a 217-page Complaint with numerous detailed allegations about corporate misconduct by CONSOL Energy Inc. ("CONSOL Energy"), its predecessor CNX Resources Corporation (together, "CONSOL"),[1] and other defendants (with CONSOL, "Defendants"). CONSOL Energy 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 that apply to all defendants and references CONSOL Energy 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 together for purposes of some allegations because they engaged in the same wrongful conduct. *Purdue*, 2019 WL 446382, at

[1] For purposes of the Complaint, "CONSOL" includes CONSOL Energy, CNX Resources Corporation, and their predecessors, successors, parents, subsidiaries, affiliates, and divisions. Compl. ¶ 34(g).

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

*8. Because the Complaint puts CONSOL Energy on sufficient notice of the claims against it, the Court should not dismiss under Rule 9(b).

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

Finally, given the robust allegations of direct liability on the part of CONSOL Energy, the Court need not reach its arguments that the allegations against the Global Climate Coalition ("GCC") are not imputable to CONSOL Energy. But if the Court does reach the issue, GCC's knowledge and conduct may be imputed to CONSOL Energy because the Complaint plausibly alleges that GCC acted as CONSOL Energy's agent in disseminating climate disinformation and misrepresenting the risks of fossil fuel products sold by it and other Defendants, and because CONSOL Energy and others engaged in a civil conspiracy with GCC.

QUESTIONS INVOLVED

1. Does the Complaint sufficiently notify CONSOL Energy of the claims against it?
2. Does the Complaint state a failure to warn claim against CONSOL Energy?
3. Are the Complaint's allegations against GCC imputable to CONSOL Energy?

ARGUMENT

CONSOL Energy primarily takes issue with the State's use of collective allegations and the number of times that it is referenced by name in the Complaint. Mot. 8–9. But there is nothing improper in grouping CONSOL Energy 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 CONSOL Energy contends that Rule 9(b)'s heightened pleading standard applies to all claims against it, Rule 9(b) applies only to the State's negligent failure to warn claim, as explained in the Joint Opposition. 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

[3] CONSOL Energy'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 CONSOL Energy's notice.

Rule 8(a) or Rule 9(b) applies, the Complaint sufficiently notifies CONSOL Energy of the claims against it.

Additionally, the allegations against GCC are imputable to CONSOL Energy because the Complaint plausibly alleges agent-principal and conspiracy theories of imputation.

I. The Complaint's Allegations Sufficiently Notify CONSOL Energy of the Claims Against It

CONSOL Energy principally laments the number of times it is referenced by name in the Complaint. *See* Mot. 1–4, 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," 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 CONSOL Energy with ample notice. *See* Joint Opp'n at Part V.C. The Complaint alleges that CONSOL Energy 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, 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, GCC, and other actors. *See id.* ¶ 135. CONSOL Energy 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, 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 the American Petroleum Institute ("API") and GCC 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 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.

The cases CONSOL Energy cites 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.

The second case CONSOL Energy cites did not involve allegations of a widespread campaign of deception by numerous defendants, but rather a common-law fraud claim brought 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 CONSOL Energy

CONSOL Energy contends that the State's failure to warn claim fails because CONSOL Energy lacked specialized knowledge of the dangers of its fossil fuel products. Mot. 13–15. Not so.

This argument merely rehashes CONSOL Energy's objections to the collective allegations. The Complaint amply alleges that Fossil Fuel Defendants,

including CONSOL Energy and its predecessors, 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. *Id.* ¶¶ 104–41. That the Complaint does not contain an allegation specific to CONSOL Energy's knowledge or its 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 CONSOL Energy suggests the hazards of its products were open and obvious, despite arguing it 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 GCC Are Imputable to CONSOL Energy

Finally, CONSOL Energy contends that the allegations against GCC cannot be imputed to CONSOL Energy. Mot. 9–13. The Court need not reach this issue, because it can deny CONSOL Energy's Motion without imputing GCC's conduct or knowledge to CONSOL Energy for the reasons described above. If the Court does

reach the issue, GCC's conduct and knowledge are imputable to CONSOL Energy under either an agent-principal or conspiracy theory.

First, CONSOL Energy argues that GCC's statements cannot be imputed to it because CONSOL Energy was formed in 2017, several years after GCC disbanded. Mot. 10. But the Complaint refers collectively to CONSOL Energy, CNX Resources Corporation, and their predecessors, subsidiaries, and other related entities as "CONSOL." Compl. ¶ 34(g). As CONSOL Energy acknowledges, Mot. 3, the Complaint alleges that it is the successor in liability to CONSOL Mining Corporation and/or CNX Resources Corporation. Compl. ¶ 34(d). And the Complaint further alleges that CONSOL was a member of GCC as Consolidation Coal Company ("Consolidation"). *Id.* ¶ 42. These allegations plausibly allege that CONSOL Energy is liable as a successor to Consolidation, including based on Consolidation's relationship with GCC. At minimum, 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), whether CONSOL Energy is in fact a successor of Consolidation, and by extension liable for GCC's actions, is premature at the pleading stage.[4] *Cf. State Farm Fire & Cas. Co. v. Ward Mfg., LLC*, 2017 WL

[4] To the extent CONSOL Energy disputes the allegations regarding its relation to CNX Resources Corporation or Consolidation and the Court is inclined to address this factual question, the State requests leave to take discovery to support its allegations.

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) (declining to dismiss claims that defendants were liable as successors because "upon plaintiffs' showing of a certain set of facts, a theory exists upon which plaintiffs may be able to hold defendants liable under the [relevant] leases," which "is all that is required to withstand a Rule 12(b)(6) motion to dismiss").

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. 2006) ("[T]he knowledge of an agent is normally imputed to the agent's principal." (footnote omitted)). 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). 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 GCC acted as CONSOL Energy's agent, which would impute the allegations of GCC's conduct to CONSOL Energy. The Complaint alleges that GCC acted "on behalf of Defendants" and under their control in "fund[ing] deceptive advertising campaigns and distribut[ing] misleading material to generate public uncertainty around the climate debate." Compl. ¶ 129; *see also id.* ¶ 130.[5] The Complaint also alleges that Defendants (which includes CONSOL Energy) acted through "front groups," including GCC, to carry out their

[5] CONSOL Energy argues that the specific alleged misrepresentations by GCC are not actionable because they are protected by the First Amendment. Mot. 10. The State incorporates by reference the arguments in its Answering Brief in Opposition to the American Petroleum Institute's Motion to Dismiss for Failure to State a Claim, which explains in detail why such statements are not protected by the First Amendment. And CONSOL Energy's conclusory argument suggesting that these statements were not misleading is not entitled to any weight. In any event, even if these statements were not misleading or were protected by the First Amendment, the Complaint alleges that GCC engaged in widespread climate disinformation and deception, not merely through these exemplary statements. *See, e.g.*, Compl. ¶ 110.

"widespread campaign of denial and disinformation about the existence of climate change and their products' contribution to it." *Id.* ¶ 110. The Complaint further alleges that Fossil Fuel Defendants, including CONSOL, "employed and financed" such "front groups to serve their climate change disinformation and denial mission," *id.* ¶ 39, and that these organizations acted on behalf of and under the control of CONSOL Energy 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 id.* ¶¶ 39, 46(b), 110, 129–30. 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.* ¶ 39. And the Complaint details a wide range of examples of conduct GCC undertook on behalf of Fossil Fuel Defendants. *See, e.g.*, *id.* ¶¶ 42, 129–30. In other words, GCC had the power to act on behalf of Fossil Fuel Defendants by marketing their fossil fuel products and promoting disinformation. GCC 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 GCC's conduct. GCC'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 CONSOL, and thus CONSOL

Energy. *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 CONSOL Energy and GCC 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 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 [inquiry]."); *J.E. Rhoads & Sons, Inc.*, 1988 WL 32012, at *20–21 (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) (citation omitted); *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," suffice 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 at 147.

Here, the Complaint sufficiently alleges that Fossil Fuel Defendants, including CONSOL, engaged in a civil conspiracy with GCC to impute GCC's conduct to CONSOL. The Complaint alleges that:

> All Fossil Fuel Defendants, by and through . . . organizations like . . . GCC, 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 [such]

> organizations . . . , 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.* ¶ 34(h) (describing CONSOL's 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 CONSOL knew or should have known. *Id.* ¶ 46(b).

The cases CONSOL Energy 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 GCC 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, 895 (Wis. Ct. App. 2004).

To the extent some of the State's allegations about the relationship between Defendants and GCC 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. Super. Apr. 1, 2016) (cleaned up). Here, because GCC was 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. Aug. 9, 1985).

Thus, the Complaint's allegations against GCC can be imputed to CONSOL Energy through either an agent-principal or conspiracy theory. And even if the Court determines that GCC's actions and knowledge are not imputable to CONSOL Energy, the actions of CONSOL Energy's other alleged co-conspirators, including Exxon, BP, Shell, and Chevron, are imputable to CONSOL Energy 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 CONSOL Energy's arguments that the Complaint lacks allegations of specific misrepresentations attributable to CONSOL Energy.

CONCLUSION

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

Respectfully submitted,

DELAWARE DEPARTMENT OF JUSTICE

/s/ Christian Douglas Wright
Christian Douglas Wright (#3554)
Director of Impact Litigation
Jameson A.L. Tweedie (#4927)
Ralph K. Durstein III (#912)
Sawyer M. Traver (#6473)
Deputy Attorneys General
820 N. French Street
Wilmington, DE 19801
(302) 683-8899

Attorneys for Plaintiff State of Delaware, ex rel. *Kathleen Jennings, Attorney General of the State of Delaware*

WORDS: 4,185

OF COUNSEL:

Victor M. Sher
Matthew K. Edling
Stephanie D. Biehl
Katie H. Jones
Martin D. Quiñones
Quentin C. Karpilow
Naomi D. Wheeler
Anthony M. Tohmé
SHER EDLING LLP
100 Montgomery Street
Suite 1410
San Francisco, CA 94104
(628) 231-2500

Dated: July 3, 2023