IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

STATE OF DELAWARE,	:	
	:	
Plaintiff,	:	
	:	
v.	:	C.A. No. N20C-09-097 MMJ-CCLD
	:	
BP AMERICA INC., *et al.*,	:	
	:	
Defendants.	:	

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

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INTRODUCTION

Plaintiff's Opposition ("Opp.") insists that Defendants engaged in a "campaign of deception" and misrepresentation about climate change. Yet Plaintiff never disputes that its Complaint does not allege that CNX said anything about its products' connection to climate change, much less made any misrepresentation to the public. That alone should end the case against CNX.

Plaintiff tries to paper over its deficiencies by assuring the Court that none of this matters given Plaintiff's blunderbuss allegation that every Defendant did everything charged. But Plaintiff's group-pleading strategy is squarely foreclosed by decades of case law, including the cases Plaintiff cites. Moreover, Plaintiff has no viable agency or imputation theory that can rescue Plaintiff's misrepresentation claims. That leaves only the failure to warn claim, which likewise fails because Plaintiff does not allege that CNX had any non-public knowledge that it withheld from the public. For these reasons—and for the reasons set out in the CITGO Reply, the API Reply, and the Joint Reply—Plaintiff's claims against CNX should be dismissed.

ARGUMENT

I. THE COMPLAINT DOES NOT ALLEGE ANY ACTIONABLE MISREPRESENTATION ABOUT CLIMATE CHANGE MADE BY, OR ATTRIBUTABLE TO, CNX

Plaintiff doubles down on its allegation that "Defendants waged a sophisticated campaign of deception and disinformation about their products' contribution to climate change." Opp.5. Yet the Complaint comes nowhere close to meeting Rule 8(a)'s basic requirement to put CNX on "notice of what [it] allegedly did wrong," *Hupan v. Alliance One Int'l, Inc.*, 2015 WL 7776659, at *12 (Del. Super. Nov. 30, 2015)—much less Rule 9(b)'s requirement that Plaintiff specify "the time, place, and contents of the false representations," *Browne v. Robb*, 583 A.2d 949, 955 (Del. 1990).[1] Indeed, it is well settled that a plaintiff "cannot satisfy Rules 8 or 9(b) by engaging in [] group pleading … without providing [defendants] notice of what they allegedly did wrong." *Hupan*, 2015 WL 7776659, at *12 & n.70.[2]

[1] Plaintiff disputes Rule 9(b)'s applicability, CNX Opp.3–4, but that argument is meritless given the nature of Plaintiff's misrepresentation argument and beside the point given that Plaintiff has not even met the basic Rule 8 standard. Joint Reply 42–44; CITGO Reply 3.

[2] Plaintiff oddly attempts to distinguish *Hupan* on the ground that it arose in the toxic-tort context. Opp.7. But CNX only cited *Hupan* (*see* CNX MTD 10) for its recitation of black-letter law on Rules 8 and 9(b), which *Hupan* never suggested was confined to the toxic-tort context.

Acknowledging that it has not alleged a single misrepresentation by CNX, Plaintiff tries two work-around arguments: (1) lumping CNX together with all other Defendants in a group pleading is sufficient; and (2) statements by a non-party may be imputed to CNX. Neither argument works.

A. Plaintiff's Group-Pleading Tactic is Improper

Plaintiff's Opposition reads as if group pleading is generally accepted in Delaware. *E.g.*, Opp.3 ("nothing improper" about it). Quite the opposite: group pleading "is generally *disfavored*." *In re Swervepay Acquisition, LLC*, 2022 WL 3701723, at *9 (Del. Ch. Aug. 26, 2022) (emphasis added) (citation omitted). And Plaintiff bears the burden of "explain[ing] why group pleading should be permitted here." *Id.* Plaintiff has failed to carry that burden.

First, Plaintiff tries to justify its group-pleading strategy on the ground that "each Fossil Fuel Defendant engaged in the same wrongful conduct and fraudulent scheme," which supposedly "provides CNX with ample notice." Opp.5. None of the cases Plaintiff cited in support of that proposition, however, actually help Plaintiff.

Plaintiff characterizes *Grant v. Turner*, 505 F. App'x 107 (3d Cir. 2012), as "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." Opp.4. But

Plaintiff omits the balance of the quoted sentence, which renders the sentence inapposite here—as to those defendants, the plaintiffs in that case "include[d] many other details to 'inject precision or some measure of substantiation into [their allegations of fraud]." *Grant*, 505 F. App'x at 112. Plaintiff also omits that *Grant affirmed* the dismissal of fraud allegations against other defendants because the plaintiffs failed to "specifically allege[] how either party played a role in committing the predicate acts of fraud." *Id.* That is precisely the deficiency in Plaintiff's allegations against CNX.

Similarly, Plaintiff splices a paragraph from *Swartz v. KPMG LLP*, 476 F.3d 756 (9th Cir. 2007), to suggest that "'there 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.'" Opp.4–5 (alteration and emphasis omitted). But Plaintiff once again ignores the rest of the quoted paragraph: "On the other hand, Rule 9(b) does not allow a complaint to merely lump multiple defendants together but 'require[s] plaintiffs to differentiate their allegations when suing more than one defendant … and inform each defendant separately of the allegations surrounding his alleged participation in the fraud.'" *Swartz*, 476 F.3d at 764–65. Indeed, "[i]n the context of a fraud suit involving multiple defendants, *a plaintiff must, at a minimum, 'identif[y] the role of [each] defendant[] in the alleged fraudulent scheme*." *Id.* at 765 (emphasis added). That

is precisely what Plaintiff did not do here—Plaintiff says nothing about CNX's role in the broad-based scheme alleged in the complaint.

River Valley Ingredients, LLC v. American Proteins, Inc., 2021 WL 598539 (Del. Ch. Feb. 4, 2021) (cited at Opp.5) is even further afield. True, the court noted that "group pleading may be permitted so long as individual defendants are on notice of the claim against them." *Id.* at *3. But the court permitted group pleading in that case because the alleged misrepresentations were "contained in a written contract"; Rule 9(b)'s particularity standard was thus satisfied because it was "clear" the signatory company and (allegedly) its executives "made the statements when and where the contract was signed." *Id.* at *4. Here, of course, Plaintiff's Complaint does not identify a single alleged misrepresentation by CNX, when and where it occurred, or its role in the alleged scheme.

Finally, Plaintiff relies extensively on this Court's decision in *State ex rel. Jennings v. Purdue Pharma L.P.*, 2019 WL 446382 (Del. Super. Feb. 4, 2019). Plaintiff casts this decision as "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." Opp.2. The relevant allegations against the distributors, however, principally turned on specific "common law, statutory, and regulatory duties to act reasonably as distributors of opioids." *Purdue*, 2019 WL 446382 at *4. The State claimed that the distributors violated those duties

by "negligently or recklessly allow[ing] diversion"—the transfer of legally prescribed controlled substances to others for illicit use. *Id.* at *5. As the Court summed up the State's allegations, "the Distributors had duties to prevent opioid diversion, acknowledged and understood those duties, and violated those duties, resulting in injury to the State." *Id.* Against that backdrop, the Court rejected one distributor's complaint about group pleading, reasoning that the complaint gave the distributor fair notice: "In its Complaint, the State repeatedly refers to specific statutory and common law duties, identifies defendant groups, points out the actions or inactions Defendants allegedly committed or omitted, and claims that Defendants' conduct caused injury to the State of Delaware." *Id.* at *8.

In this case, by contrast, the claims against Defendants are not based on any statutory or regulatory duties. Rather, as Plaintiff emphasizes, they are based on Defendants' supposed misrepresentations to the public about climate change risks. But as to CNX, Plaintiff does not identify *any* specific misrepresentation whatsoever. The upshot is that, unlike in *Purdue*, Defendants like CNX have no way of determining the legal and factual basis (if any) for the misrepresentation claims against them. That is fatal for pleading purposes, because only "the speaker who makes a false representation is, of course, accountable for it." *Swervepay*, 2022 WL 3701723, at *9 (quoting *Prairie Cap. III, L.P. v. Double E Hldg. Corp.*, 132 A.3d 35, 59 (Del. Ch. 2015)). Indeed, although the Complaint purports to allege

statements by other Defendants, even if those statements were actionable, there is no basis to attribute those statements to CNX, who is merely name-checked without any particular allegations of statements by it.

Second, Plaintiff claims it needs discovery to determine whether CNX and the other Defendants actually committed the fraud Plaintiff claims they committed. Opp.6. That turns Rule 9(b) on its head, because one of Rule 9(b)'s purposes is to "prevent plaintiffs from using complaints as fishing expeditions to unearth wrongs to which they had no prior knowledge." *Purdue*, 2019 WL 446382, at *8. Plaintiff's cases do not say otherwise.

For example, Plaintiff claims that "[g]roup 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 scheme.'" Opp.6 (quoting *Hawk Mountain LLC v. Mirra*, 2016 WL 4541032, at *2 (D. Del. Aug. 31, 2016)). This assertion is irrelevant because any supposed misrepresentations *to the public* would be, by definition, *public*. It bears noting, moreover, that Plaintiff is quoting *a party's* argument in *Hawk Mountain*, not *the court's* holding. And the court rejected that argument, reiterating that a fraud plaintiff is required "to plead the date, time, and place of the alleged fraud, or otherwise inject precision into the allegations by some alternative means." *Hawk Mountain LLC*, 2016 WL 4541032, at *2.

Plaintiff also asserts that "[c]ollective 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.'" Opp.6 (quoting *Grant*, 505 F. App'x at 112). Again, this reasoning is misguided because any supposed misrepresentations—if they actually existed—would be public, not in Defendants' exclusive possession. Moreover, Plaintiff strips *Grant*'s "absent discovery" point from its context. There, the plaintiffs alleged that "Defendants deliberately concealed the identities of salespeople and agents, [and thus] Plaintiffs simply cannot allege *who*, in particular, made the misrepresentation absent discovery." *Grant*, 505 F. App'x at 112. Here, by contrast, the only conceivable reason Plaintiff "cannot allege" any misrepresentation CNX supposedly made is that CNX made no misrepresentations in the first place.

In sum, no amount of string-cites to paragraphs in the Complaint makes up for the fact that not one of them identifies an alleged misrepresentation by CNX. *E.g.*, Opp.5–6 (string-citing over 100 paragraphs). Indeed, Plaintiff "totally lacks even a single particular or specific fact to support [its] fraud claim" against CNX. *Browne v. Robb*, 583 A.2d 949, 955 (Del. 1990). Plaintiff tries to distinguish *Brown* on the ground that it involved "a common-law fraud claim against a single defendant," rather than multiple defendants. Opp.9. But *Browne* is on point for its

discussion of basic Rule 9(b) principles: "In cases of fraud[,] the particularity required by Rule 9(b) includes the time, place and contents of the false representations …." 583 A.2d at 955 (quotation marks omitted). And *Grant* makes clear that this "heightened pleading standard" does not magically disappear the moment a plaintiff tries group pleading. 505 F. App'x at 112. Indeed, if Plaintiff's view of the law were correct, then nothing would prevent Plaintiff from bypassing Rule 9(b) simply by naming multiple defendants, where almost anyone in the world would be a plausible second defendant. That cannot be right. If Rule 9(b) requires specific allegations where a single defendant is named, the burden does not diminish simply because others are added to the mix. Plaintiff's group-pleading strategy fails to state a claim against CNX.

B. No Alleged Misstatement by a Defendant or a Non-Party is Attributable to CNX

Perhaps realizing as much, Plaintiff spends more time trying to find a way to impute the conduct and knowledge of the now-disbanded Global Climate Coalition ("GCC") to CNX. Opp.10–17. That ploy is no more valid than Plaintiff's group-pleading strategy.

First, Plaintiff's primary argument is that GCC—of which CNX's predecessor is alleged to have been a member—somehow "acted as CNX's agent." *Id.* at 10–13. But that argument does not work. CNX MTD 10–12. The Complaint contains only two paragraphs mentioning statements by GCC. *See* CNX MTD 11

(citing Compl. ¶¶129–30). But those are non-actionable statements from policy papers plainly protected by the First Amendment. *See* CNX MTD 10-11; API MTD 4–6; API Reply 6-13.

More fundamentally, Plaintiff has no plausible agency theory to begin with. "An agency relationship is created when one party consents to have another act on its behalf, with the principal controlling and directing the acts of the agent." *Fisher v. Townsends, Inc.*, 695 A.2d 53, 57 (Del. 1997); Restatement (Third) of Agency § 3.16, cmt. b (2006). Although Plaintiff represents that "the Complaint alleges that GCC acted as CNX's agent," Plaintiff cites no such allegations. Opp.11. All Plaintiff can muster is that the Complaint vaguely claims that GCC acted "on behalf of *Defendants*" and that "*Defendants* actively supervised, facilitated, consented to, and/or directly participated in the misleading messaging of these front groups." *Id.* at 12 (emphasis added). But those allegations suffer from the group-pleading problems identified above, *see supra* Section I.A, and in any event, none of them plausibly alleges in *non*-conclusory fashion the elements of an agency relationship between CNX and GCC.

Plaintiff's only real hook for tying CNX and GCC together is that CNX's predecessor was allegedly a member of GCC. But membership in a trade association does not create an agency relationship between the association and its members. Indeed, Plaintiff's own cited case (Opp.13) proves the point. In *Acosta Orellana v.*

CropLife Int'l, 711 F. Supp. 2d 81 (D.D.C. 2010), the court observed that a trade association would be the agent of its members only if the association was "*in fact* acting *at the behest* of its members." *Id.* at 111 (emphasis added). And indeed, the court rejected related agency allegations because the plaintiffs "fail[ed] to adequately plead the element of control." *Id*. "[T]here can be no principal-agent relationship absent some indication that the position of one of the entities was taken at the direction of the other"—"[a]nd to show that such action was taken at the direction of another requires more than just the conclusion that that is what occurred." *Id.* at 112. Plaintiff's agency theory fails here for the same reasons.

Apparently acknowledging its deficiencies, Plaintiff (again) claims that it needs discovery—this time to figure out whether its bald agency claims are correct. Opp.13. But the often fact-dependent nature of agency allegations is not a get-to-discovery-for-free card. *See, e.g.*, *Otto Candies, LLC v. KPMG, LLP*, 2020 WL 4917596 (Del. Ch. Aug. 21, 2020) (granting motion to dismiss because "Plaintiffs fail[ed] to plead vicarious liability through any theory of agency"). Instead, a plaintiff still must "sufficiently" plead agency liability and control. *See id.* at *16 & n.157; *see also, e.g.*, *Baccellieri v. HDM Furniture Indus., Inc.*, 2013 WL 1088338, at *3 (Del. Super. Feb. 28, 2013) (granting motion to dismiss because agency theory was conclusory); *cf. JE Rhoads & Sons, Inc. v. Ammeraal, Inc.*, 1988 WL 32012, at *5–6 (Del. Super. Mar. 30, 1998), *cited at* Opp.13 (denying motion to dismiss

because the complaint alleged "some" specific ways in which control existed). Plaintiff has not done so.

Second, Plaintiff alternatively claims that GCC's conduct and knowledge are imputable to CNX through an alleged conspiracy between GCC and the Fossil Fuel Defendants. Opp.14–17. As Plaintiff admits, this theory depends on CNX's "membership in GCC," *id.* at 16—but, as Plaintiff also admits (at 14), "mere membership in a trade association … is not sufficient to give rise to an inference of conspiracy, absent proof of 'knowing participation' in the wrongful conduct." *In re Asbestos Litig.*, 509 A.2d 1116, 1120 (Del Super. 1986). Indeed, "it [is] essential to show that a *particular defendant* joined the conspiracy and knew of its scope." *Bank of Am., N.A. v. Knight*, 725 F.3d 815, 818 (7th Cir. 2013) (emphasis added).

Those are the fatal flaws here: there is no well-pleaded allegation that *CNX in particular* joined a conspiracy, knew of its scope, and actually participated in it. And Plaintiff's passing cry (at 17) for a jury determination on this issue ignores the legions of cases dismissing conspiracy claims for failure to state a claim. *See, e.g.*, *Purdue*, 2019 WL 446382, at *14.

II. THE COMPLAINT'S FAILURE TO WARN CLAIM AGAINST CNX FAILS

All that remains is Plaintiff's claim that Defendants had superior knowledge about the risks of climate change but willfully concealed this information from the public. *See* CNX MTD 13–14. Plaintiff admits that "the Complaint does not contain

an allegation specific to CNX's knowledge or its funding of climate science"—Plaintiff simply says it does not matter. Opp.9. In Plaintiff's view, it is enough that the Complaint alleges that *all Defendants* knew of climate change risks. *Id.* But that requires crediting Plaintiff's group-pleading allegations, which, as explained, are improper. Plaintiff also claims that it is enough that the Complaint "generally" alleges CNX's knowledge of any such risks. *Id.* at 10. But that would swallow the pleading rules in failure-to-warn cases: any plaintiff could state a claim against a company whose products affect the climate simply by asserting—without any allegation that the company had non-public information—that the company should have known of certain risks. That is not the law.

CONCLUSION

For the foregoing reasons—and for the reasons set forth in the CITGO Reply, the API Reply, and the Joint Reply—Plaintiff's failure to warn, trespass, nuisance, and Delaware Consumer Fraud Act claims against CNX should be dismissed.

Dated: August 17, 2023

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