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Case No. N20C-09-097 MMJ CCLD

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.	)	
BP AMERICA INC., *et al.*	)	
Defendants.	)	

CONSOL ENERGY INC.'S REPLY BRIEF IN SUPPORT OF MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM

Dated: August 17, 2023

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INTRODUCTION

Plaintiff does not dispute that its complaint lacks allegations about misrepresentations, knowledge of climate change, or any other conduct specifically attributable to CONSOL Energy. Instead, pointing to generalized allegations about other defendants and non-parties and relying on inapplicable law, plaintiff essentially asks the Court to kick the can down the road until it can take discovery of CONSOL Energy. The Court should reject plaintiff's request.

Under Delaware's pleading rules, CONSOL Energy is entitled to know at the outset of this case what it supposedly did or said to subject it to potential liability. It is not enough to lump CONSOL Energy, a coal producer, in with allegations about other defendants' purported conduct (which also lack particularity),[1] without any connection between the companies other than the production of fossil fuel products.

Plaintiff's reliance on agency and conspiracy theories to tie CONSOL Energy to the Global Climate Coalition ("GCC"), an industry group that disbanded 16 years before CONSOL Energy's formation, also fail. Plaintiff points to no allegations that CONSOL Energy supervised, directed, or otherwise controlled GCC's actions, had

[1] Plaintiff's claims against all defendants fail for the reasons in Defendants' Joint Opening Brief in Support of Motion to Dismiss Plaintiff's Complaint for Failure to State a Claim and in Defendants' Reply Brief in Support of Motion to Dismiss Plaintiff's Complaint for Failure to State a Claim ("Joint Reply").

knowledge of wrongful conduct by GCC, or took any later consistent act that allows an inference of knowing participation in a civil conspiracy.

Finally, plaintiff's admission that the complaint lacks any allegation of knowledge or funding of climate science "specific to CONSOL Energy" is fatal to its failure to warn claim. Pls.' Answering Brief in Opp. to Def. CONSOL Energy's Mot. to Dismiss for Failure to State a Claim ("Opp.") at 9.

ARGUMENT

I. THE DEARTH OF ALLEGATIONS DOOMS PLAINTIFF'S CLAIMS AGAINST CONSOL ENERGY.

Superior Court Civil Rules 8(a) and 9(b) operate to ensure a defendant has fair notice of the claims against it. *Yu v. GSM Nation, LLC*, 2018 WL 2272708, at *4 (Del. Super. Ct. Apr. 24, 2018). Although a plaintiff may utilize group pleading, it is "generally disfavored." *In re Swervepay Acq., LLC*, 2022 WL 3701723, at *9 (Del. Ch. Aug. 26, 2022) (citation omitted). Even then, a complaint must still plead the facts with enough specificity to put *each* defendant on notice of the claims against it; the complaint cannot just group multiple defendants together and say they made "misrepresentations." *See Hupan v. All. One Intl., Inc.*, 2015 WL 7776659, at *11–12 (Del. Super. Ct. Nov. 30, 2015); *Swervepay*, 2022 WL 3701723, at *9; *Raj*

& Sonal Abhyanker Fam. Tr. on behalf of UpCounsel, Inc. v. Blake, 2021 WL 2477025, at *4 (Del. Ch. June 17, 2021) ("*Abhyanker*").[2]

Plaintiff argues the complaint puts CONSOL Energy on notice of the claims against it, pointing to generalized allegations against more than two dozen "Fossil Fuel Defendants," loosely defined to include CONSOL Energy, because "each Fossil Fuel Defendant engaged in the same wrongful conduct and fraudulent scheme." Opp. at 5.[3] In fact, throughout the complaint, plaintiff alternates between referring to "Defendants," "Fossil Fuel Defendants," and "CONSOL" (collectively referring to both CNX Resources Corporation and CONSOL Energy). *See*, *e.g.*, Compl. ¶¶ 34, 36, 59, 60, 104–06, 122, 124–25. This multi-layered grouping, in combination with the complaint's conclusory and vague allegations, leaves

[2] Plaintiff's attempt to distinguish *Hupan* as a "toxic tort case" fails. Opp. at 7–8. Regardless of the type of case in which it arose, the logic underlying the decision holds true. In *Hupan*, the court recognized that general references to products that were defective and wrongfully marketed did not satisfy Delaware's pleading standard because it made it "impossible for [a defendant] to evaluate which allegations are actually directed at them." 2015 WL 7776659, at *12. The same is true here—without any specific allegations about its conduct, it is impossible for CONSOL Energy to determine which of the dozens of allegations in the complaint are actually directed at it.

[3] Tellingly, Plaintiff's Answering Brief in Opposition to Defendants' Joint Motion to Dismiss for Failure to State a Claim describes defendants as "some of the world's largest *oil-and-gas companies and their primary trade association*" (Joint Opp. at 1) (emphasis added), and does not mention CONSOL Energy or the word "coal" a single time. *See also id.* at 3 (alleging that defendants have known for more than half a century that their "*oil and gas products* create greenhouse gas pollution that changes the planet's climate") (emphasis added).

CONSOL Energy to guess for which "misrepresentations" or other conduct it may be liable. *Cf. Abhyanker*, 2021 WL 2477025, at *4 (dismissing claims where there was no factual allegation as to defendant and finding general references to defendants "constitute[d] impermissible group pleading").

Moreover, the complaint paragraphs plaintiff points to either say nothing about CONSOL Energy and therefore do not apply to it (*see*, *e.g.*, Compl. ¶¶ 20–36 ("Parties" section of complaint)), or merely set forth generalized conclusory allegations that "Fossil Fuel Defendants" or "Defendants" made unspecified misrepresentations. *See id.* ¶ 46(b) ("Fossil Fuel Defendants . . . conspired to conceal and misrepresent the known dangers of fossil fuels . . . ."); *id.* ¶ 109 ("Defendants' campaign, which focused on concealing, discrediting, and/or misrepresenting information . . . .").

By contrast, those complaint paragraphs that do attempt to allege specific misrepresentations do not attribute them to CONSOL Energy.[4] *See*, *e.g.*, *id.* ¶¶ 111–14, 124, 152(g)–(k), 155–57, and 172–97.[5] Misrepresentations that plaintiff alleges other companies made say nothing about CONSOL Energy. *Metro Commun. Corp.*

[4] These alleged statements cannot be imputed to CONSOL Energy for the reasons explained in Section II.

[5] While the complaint associates API with "the Fossil Fuel Defendants," it does not allege that CONSOL Energy was ever associated with or a member of API, "the country's largest oil trade association." Compl. ¶ 37(a).

BVI v. Adv. Mobilecomm Techs. Inc., 854 A.2d 121, 146 n.48 (Del. Ch. 2004) ("[u]nder Rule 9(b) oblique references to false statements allegedly made by 'each defendant' will not serve to attribute misrepresentations to all defendants in an action"). This is especially true because the only alleged connection between CONSOL Energy and the other defendants is that they produce fossil fuels.

For this reason, plaintiff's reliance on *State ex rel. Jennings v. Purdue Pharma L.P.*, 2019 WL 446382, at *8 (Del. Super. Ct. Feb. 4, 2019) ("*Purdue*"), is misplaced. *See* Opp. at 1. There, Anda, one of six opioid distributor defendants operating in the same industry, moved separately to dismiss negligence claims, pointing out that the complaint lumped all defendants together in a conclusory fashion and did not allege specific misrepresentations by Anda. The court allowed the claims against Anda to proceed, finding there was "no meaningful or substantive distinction between Anda and other Distributor defendants at this stage of the proceedings." *Purdue*, 2019 WL 446382, at *8.

The same cannot be said here. CONSOL Energy is unquestionably distinct from the other defendants because it is the sole defendant that only produces coal.[6] And it is not enough for plaintiff to argue that "a significant portion of the conduct alleged in the Complaint was undertaken by Defendants as a whole" (Opp. at 3)—

[6] Plaintiff tacitly acknowledged that CONSOL Energy is different than other defendants by failing to assert its Consumer Fraud Act claim against CONSOL Energy.

plaintiff must point to allegations showing what specific conduct was undertaken "as a whole" by which defendants, when, and how.[7]

Plaintiff also asserts that collective pleading is appropriate here because it cannot "further specify" CONSOL Energy's actions "absent discovery." Opp. at 6. Plaintiff's theory of liability is that CONSOL Energy, along with the other defendants, made public statements to misinform and confuse consumers about the role of its products in causing global warming and its impacts. *See*, *e.g.*, Compl. ¶ 9. Any such misrepresentations by CONSOL Energy would be in the public domain and do not require discovery to ascertain.[8] As plaintiff's own case warns, "courts

[7] Plaintiff fares no better with the other cases it cites for the proposition that group pleading is permitted in Delaware as long as the "complaint . . . notifies defendants of the 'precise misconduct with which they are charged.'" Opp. at 5. In *River Valley Ingredients, LLC v. Am. Proteins, Inc.*, 2021 WL 598539, at *3 (Del. Super. Ct. Feb. 4, 2021), the court found allegations of false representations in a contract by a company and its executives (who were not signatories) were sufficiently particularized, because the complaint contained extensive and "specific allegations of *each* . . . [e]xecutive's alleged wrongful actions." 2021 WL 598539, at *4 (emphasis added). Here, plaintiff makes no specific allegations about CONSOL Energy's conduct. In *Grant v. Turner*, 505 Fed. Appx. 107, 112 (3d Cir. 2012), the Third Circuit found that Rule 9(b) was satisfied despite plaintiffs' failure to allege who made certain misrepresentations to whom, but only because plaintiffs "include[d] many other details to 'inject precision or some measure of substantiation into [their allegations of fraud].'" (citation omitted).

[8] Plaintiff is wrong in assuming that CONSOL Energy does not argue that the case is a fishing expedition as to CONSOL Energy. *See* Opp. at 3 n.3. CONSOL Energy does indeed make this argument, which is borne out by the number of times plaintiff says it needs discovery in order to make specific allegations against CONSOL Energy. *See* Opp. at 6, 10 n.4, and 17.

must resist invitations to avoid early scrutiny of pleadings amidst promises that discovery will put flesh on the bare bones of a complaint." *In re Benzene Litig.*, 2007 WL 625054, at *8 (Del. Super. Ct. Feb. 26, 2007).

Finally, plaintiff's argument that group pleading is permissible here due to "Fossil Fuel Defendants'" "reli[ance] on third parties like the [API] and GCC to conceal their participation" in alleged deception campaigns also fails. Opp. at 6. Plaintiff does not allege any connection between CONSOL Energy, "an energy company involved in coal mining" (Compl. ¶ 34(d)), and API, which represents "the American petroleum industry as a whole." *Id*. ¶ 37. Plaintiff also admits that the CONSOL Energy company it sued was formed 16 years after GCC disbanded. *Id.* ¶¶ 34(a), 42. Finally, while plaintiff repeatedly references unnamed trade associations, it does not allege any connection between CONSOL Energy and any of these unnamed entities. *See*, *e.g.*, *id.* ¶¶ 34, 128, 134.

Given the complaint's dearth of allegations about what CONSOL Energy purportedly did or said that supports the claims against it, the Court should dismiss those claims.

II. THE LAW DOES NOT SUPPORT IMPUTING OTHERS' ACTIONS TO CONSOL ENERGY.

As a fallback, plaintiff argues that its allegations against CONSOL Energy are sufficient because GCC's actions can be imputed to CONSOL Energy under an agency-principal theory or because CONSOL Energy conspired with GCC and/or

other defendants. All of these theories fail.

A. Plaintiff's Allegations Do Not Support An Agency-Principal Theory.

As a threshold matter, because CONSOL Energy did not come into existence until 16 years after GCC disbanded, plaintiff's agency-principal theory is dependent on CONSOL Energy being the successor to CONSOL Mining Corporation, CNX Resources Corporation, and/or Consolidation Coal Company. Opp., at 10; *see also In re Swervepay*, 2022 WL 3701723, at *9 (declining to impute statements made in email by others to defendants where defendants "were not in existence at the time of the [ ] email "). But plaintiff's conclusory allegations referring to CONSOL Energy as the "successor" to other entities does not make it so—the Court is not required to accept such threadbare allegations without any factual basis to do so. *Yu*, 2018 WL 2272708, at *12.

Plaintiff's cases do not hold otherwise.[9] *See*, *e.g.*, *State Farm Fire & Cas. Co. v. Ward Mfg., LLC,* 2017 WL 5665200, at *1 (Del. Super. Ct. Nov. 20, 2017) (allegations tying defendant representative to cause of action pre-incorporation of defendant); *Corp. Prop. Assocs. 8, L.P. v. Amersig Graphics, Inc.*, 1994 WL 148269 (Del. Ch. Mar. 31, 1994) (denying motion to dismiss in light of allegations that successor merely continued predecessor's business); *Sheppard v. A.C. & S. Co.*, 484

[9] Because plaintiff has not alleged any factual basis for successor liability, this Court should decline plaintiff's request to take discovery on this issue. *See* Opp. at 10 n.4.

A.2d 521 (Del. Super. Ct. 1984) (denying summary judgment where fact issue existed regarding successor corporation's continuation of predecessor's business).

Even if plaintiff's allegations established successor liability, plaintiff's agency argument still fails. The only allegation tying CONSOL Energy's purported predecessors to GCC is that "CONSOL (as Consolidation Coal Company)" was a member of GCC. Compl. ¶ 42.[10]

While plaintiff argues that it alleges "GCC acted as CONSOL Energy's agent, which would impute the allegations of GCC's conduct to CONSOL Energy" (Opp. at 12), most of plaintiff's cites to support this argument simply recite the elements of an agency-principal relationship without any factual substantiation. Not a single paragraph cited mentions CONSOL Energy, let alone explains how and when CONSOL Energy directed GCC's actions. *See*, *e.g.*, Compl. ¶ 39 (alleging unnamed "industry associations" and "industry-created front groups" acted "on behalf of and under the supervision and control of Fossil Fuel Defendants" who "actively supervised, facilitated, consented to, and/or directly participated"); *id.* ¶¶ 129–30 (asserting that alleged actions by GCC were taken "on behalf of Defendants and other fossil fuel companies"). "Conclusions 'will not be accepted as true without

[10] There is no allegation that Consolidation Coal Company was in existence when CONSOL Energy was formed. In fact, this is the 279-paragraph complaint's sole mention of Consolidation Coal Company.

specific allegations of fact to support them.'" *Iotex Commc'ns, Inc. v. Defries*, 1998 WL 914265, at *2 (Del. Ch. Dec. 21, 1998) (citation omitted).[11]

B. There Are No Facts To Support A Civil Conspiracy Theory.

Plaintiff argues GCC's purported conduct can be imputed to CONSOL Energy through a civil conspiracy theory, because membership in a trade association, knowledge of that association's wrongful conduct, and a later consistent act can give rise to an inference of knowing participation in a civil conspiracy. Opp. at 15 (citing *In re Asbestos Litig.*, 509 A.2d 1116, 1121 (Del Super. Ct. 1986)). But the allegations plaintiff relies on to support this argument either allege nothing more than membership in GCC at some unspecified point in time by "CONSOL (as Consolidation Coal Company)" (Compl. ¶ 42), or generalized allegations about "[a]ll Fossil Fuel Defendants" acting through various trade associations and "making misrepresentations and omissions to Delaware consumers" (*id.* ¶ 46(b)). *See* Opp. at 15–16.

Again, there are no allegations about what CONSOL Energy (versus "Fossil Fuel Defendants") did or said, at any point in time. This absence of facts contrasts

[11] *Acosta Orellana v. Croplife Int'l*, 711 F. Supp. 2d 81, 111 (D.D.C. 2020), does not say otherwise. There, the court rejected plaintiffs' agency theory because "plaintiffs fail[ed] to adequately plead the element of control," but explained that even if they had, the association would be the agent of its members—not the principal to its members. As in *Orellana*, there are no allegations in this case suggesting that CONSOL Energy's predecessor exercised any control over GCC.

with the wealth of facts in *In re Asbestos Litig.*, where the defendant asbestos manufacturer's president attended a trade association meeting where the dangers of asbestos and delay in the development of safe practices for its use were discussed, and engaged in other conduct to downplay the health effects of asbestos. *See* 509 A.2d at 1121–22.

Plaintiff also argues that other defendants' actions can be imputed to CONSOL Energy "for the reasons described above." Opp. at 17. To the extent plaintiff means to argue that CONSOL Energy participated in a conspiracy with some or all of the other defendants, plaintiff does not cite a single fact to support this theory. Instead, plaintiff cites the section of the complaint titled "Misleading and Deceptive Greenwashing Campaigns" that makes allegations about various other defendants. *See* Opp. at 17–18 (citing Compl. ¶¶ 172–95). Other than the arbitrary grouping of CONSOL Energy with these defendants as "Fossil Fuel Defendants" and membership at unspecified times in GCC, there are no facts to tie CONSOL Energy to these defendants.

III. PLAINTIFF ALLEGES NO FACTS SHOWING CONSOL ENERGY HAD SPECIAL KNOWLEDGE ABOUT ANY CONNECTION BETWEEN ITS PRODUCTS AND CLIMATE CHANGE.

Plaintiff on the one hand admits "the Complaint does not contain an allegation specific to CONSOL Energy's knowledge or its funding of climate science," while on the other arguing its complaint "amply alleges" CONSOL Energy had this

knowledge. *Id.* at 8–9 (citing Compl. ¶¶ 62–103). But most of the complaint paragraphs plaintiff points to discuss the purported knowledge of other defendants.[12] *See*, *e.g.*, Compl. ¶¶ 62–65, 67, 69, 70–101; 111–13; 117–25, 127.[13] And not a single one of these paragraphs specifically alleges that *CONSOL Energy* (versus other defendants or non-parties) had actual or constructive knowledge about any purported connection between its products and climate change before such information was widely available or funded climate science.

Without facts alleging CONSOL Energy had such knowledge, plaintiff cannot state a failure to warn claim against CONSOL Energy.[14]

CONCLUSION

For these reasons and those set forth in the Joint Reply, CONSOL Energy respectfully asks the Court to dismiss the claims against it.

[12] Allegations that rely on "group pleading" for knowledge fail for the reasons discussed in Section I.

[13] To the extent plaintiff's negligent failure to warn claim against CONSOL Energy relies on its imputation theory, that theory fails for the reasons set forth in Section II, and because "[t]here is no such thing as a conspiracy to commit negligence. . . ." *Anderson v. Airco, Inc.*, 2004 WL 2827887, at *4 (Del. Super. Ct. Nov. 30, 2004) (citation omitted).

[14] CONSOL Energy refers the Court to Section IV.C of the Joint Reply to address plaintiff's argument on the "open and obvious" nature of the alleged hazards.

Dated: August 17, 2023

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