IN THE CIRCUIT COURT FOR BALTIMORE CITY

MAYOR AND CITY COUNCIL OF BALTIMORE, *Plaintiff*, vs. BP P.L.C., *et al.*, *Defendants*.	Case No. 24-C-18-004219

CONSOL ENERGY INC.'S AND CONSOL MARINE TERMINALS LLC'S MEMORANDUM OF LAW IN SUPPORT OF THEIR SUPPLEMENTAL MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM

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CONSOL Energy Inc. ("CONSOL Energy") and CONSOL Marine Terminals LLC ("CONSOL Marine") incorporate by reference the arguments in Defendants' Memorandum of Law in Support of Defendants' Motion to Dismiss for Failure to State a Claim upon Which Relief Can Be Granted (the "Joint Brief") and submit this memorandum of law in support of their supplemental motion to dismiss for failure to state a claim.

INTRODUCTION

Plaintiff the Mayor and City Council of Baltimore seeks to hold two dozen energy companies liable under Maryland law for the effects of global climate change in Maryland, alleging a decades-long campaign of misrepresentations about the effects of fossil fuel production and emissions on climate change. *See, e.g.*, Complaint ("Compl.") ¶¶ 1-2.

Despite the fact that plaintiff purports to base its claims on misrepresentations, plaintiff fails to specifically allege a single misrepresentation by CONSOL Energy (which mines and produces coal) or CONSOL Marine (which owns and operates a coal export terminal in the Port of Baltimore). Instead, the complaint makes allegations against "Defendants" generally, relying solely on conclusory and boilerplate recitations, in an effort to attribute the alleged acts of others to CONSOL Marine and/or CONSOL Energy. These paltry allegations fall short because they do not put CONSOL Energy or CONSOL Marine on notice of their supposed wrongdoing.

The complaint also fails to state a claim that CONSOL Energy or CONSOL Marine failed to warn consumers about alleged climate dangers that could result from the use of coal products because it does not allege that either CONSOL Energy or CONSOL Marine had knowledge of the alleged danger of their products.

STATEMENT OF FACTS[1]

I. Plaintiff's Allegations

The complaint's only specific references to CONSOL Energy or CONSOL Marine go to their corporate structure or are boilerplate, conclusory assertions of law.

In the "Parties" section, the complaint defines defendants CNX Resources Corporation, CONSOL Energy Inc., and CONSOL Marine Terminals LLC collectively as "CONSOL," *id.* ¶ 29(e), but sets forth separate allegations as to each company.

Plaintiff alleges that in 2017 CNX Resources Corporation ("CNX") spun off its coal mining operations into a new entity called CONSOL Energy Inc., and that this new entity is the successor in liability to CNX. *Id.* ¶¶ 29(a)-(b). Plaintiff alleges that CONSOL Marine "is a subsidiary of CONSOL Energy Inc. that acts on CONSOL Energy Inc.'s behalf and subject to CONSOL Energy Inc.'s control." *Id.* ¶ 29(e). Plaintiff alleges CONSOL Energy "control[s] and ha[s] controlled [its] companywide decisions about quantity and the extent of fossil fuel production and sales, including those of [its] subsidiaries," *id.* ¶¶ 29(c)-(d), but fails to identify a single decision or communication CONSOL Energy made on those topics. In fact, plaintiff includes this same boilerplate allegation about nearly every defendant. *See, e.g.*, *id.* ¶¶ 20(b), 22(c), 23(b), 24(b), 25(b), 26(b), 27(d), 28(c). There are no similar allegations about CONSOL Marine, or any allegation of fact demonstrating CONSOL Energy's alleged control over CONSOL Marine. Plaintiff does not allege that CONSOL Energy or CONSOL Marine were members of any industry associations referenced in the complaint.

[1] CONSOL Energy and CONSOL Marine incorporate by reference the "Background" section in the Joint Brief.

II. Plaintiff's Claims

The complaint asserts eight causes of action against CONSOL Energy and CONSOL Marine: (a) public nuisance and private nuisance, on the theory that defendants' operations created or contributed to a public nuisance, and "substantially and unreasonably interfere[d] with Plaintiff's use and enjoyment of such property for the public benefit and welfare," *id.* ¶¶ 221, 231; (b) strict liability and negligent failure to warn, on the theory that defendants had and breached a duty to warn the City, the public, consumers, and public officials of the "climate effects that inevitably flow[ed] from the intended [or foreseeable] use of their fossil fuel products," *id.* ¶¶ 238, 241, 271, 274; (c) strict liability and negligent design defect, on the theory that defendants extracted, processed, and marketed fossil fuel products that were "unreasonably dangerous for their intended, foreseeable, and ordinary use," *id.* ¶¶ 250, 253, and had and breached a "duty to use due care in developing, designing, testing, inspecting, and distributing their fossil fuel products," *id.* ¶ 263; (d) trespass, on the theory that defendants "caused flood waters, extreme precipitation, saltwater, and other materials to enter the City's real property," *id.* ¶ 284; and (e) violation of Maryland's Consumer Protection Act, on the theory that defendants deceptively marketed and promoted their products. *Id.* ¶ 295.

LEGAL STANDARD

A court must dismiss a complaint for failure to state a claim under Maryland Rule 2-322(b)(2) where the "complaint does not disclose on its face a legally sufficient cause of action." *Heritage Harbour, L.L.C. v. John J. Reynolds, Inc.*, 143 Md. App. 698, 710 (2002). A plaintiff must allege facts in its complaint "sufficient to support each and every element of the asserted claim[s]." *Horridge v. St. Mary's Cnty. Dept. of Soc. Servs.*, 382 Md. 170, 181 (2004) (internal quotation marks and citation omitted).

The primary purpose of a pleading is to "provide[] notice to the parties as to the nature of the claim[s]." *Ledvinka v. Ledvinka*, 154 Md. App. 240, 429 (2003). Thus, "[t]he well-pleaded facts setting forth the cause of action must be pleaded with sufficient specificity; bald assertions and conclusory statements by the pleader will not suffice." *RRC N.E., LLC v. BAA Md., Inc.*, 413 Md. 638, 644 (2010). "[W]hen a pleading is doubtful and ambiguous, it will be construed most strongly against the pleader in determining its sufficiency." *Bobo v. State*, 346 Md. 706, 709 (1997). When the allegations and permissible inferences, if true, would "nonetheless fail to afford relief to the plaintiff," "[d]ismissal is proper." *Id.* at 709.

ARGUMENT

The claims against CONSOL Energy and CONSOL Marine should be dismissed because the complaint does not allege that CONSOL Energy or CONSOL Marine made any misrepresentations that deceived Maryland consumers or the public about their products' connection to global climate change or that CONSOL Energy or CONSOL Marine had any special knowledge that use of their products would likely contribute to climate change.[2]

I. The Complaint Does Not Cite Any Alleged Misrepresentations About Climate Change Made By Or Attributable To CONSOL Energy Or CONSOL Marine.

"Maryland courts have long required parties to plead fraud with particularity." *McCormick v. Medtronic, Inc.*, 219 Md. App. 485, 527 (2014); *Manoogian v. Coppin State Univ.*, No. 2091,

[2] This Court should reject any effort by plaintiff to now argue this case is not about misrepresentations and omissions. To keep this case in state court, plaintiff told the District of Maryland, the Fourth Circuit, and the Supreme Court that it seeks to hold defendants liable for their allegedly "wrongful marketing and promotion of fossil fuels products," not for interstate greenhouse-gas emissions. *See, e.g.*, Pl.'s Reply Brief in Support of Motion to Remand at 27, 28, *Mayor and City Council of Baltimore v. BP P.L.C., et al.*, No. 1:18-cv-02357-SAG (D. Md. Oct. 25, 2018), D.I. 133; Ans. Br. at 20, 27 n.4, *Mayor and City Council of Baltimore v. BP P.L.C., et al.*, No. 19-1644 (4th Cir. Aug. 27, 2019), D.I. 86; Br. in Opp. at 6, *BP P.L.C., et al. v. Mayor and City Council of Baltimore*, No. 19-1189 (U.S.).

Sept. Term, 2021, 2022 WL 17486761, at *6 (Md. Ct. Spec. App. Dec. 7, 2022). This requirement means that a plaintiff must identify "*who* made *what* false statement, *when*, and in *what* manner (*i.e.*, orally, in writing, etc.)." *McCormick*, 219 Md. App. at 528 (emphasis added).

Plaintiff's complaint falls far short of this well-settled pleading requirement: plaintiff alleges no statements—let alone misrepresentations—by CONSOL Energy or CONSOL Marine whatsoever. Plaintiff does not allege that CONSOL Energy or CONSOL Marine said anything about the connection between coal products and global climate change, and the complaint offers no basis for attributing other defendants' alleged misrepresentations to CONSOL Energy or CONSOL Marine.

A. The complaint does not identify a single alleged misrepresentation or omission made by CONSOL Energy or CONSOL Marine.

The complaint does not identify a single statement, let alone misrepresentation or omission, made by CONSOL Energy or CONSOL Marine. This is not surprising given that CONSOL Energy was formed only a year before plaintiff filed its complaint. *See* Compl. ¶ 29(a).[3]

Most of the paragraphs referencing CONSOL Energy do nothing more than describe its business and corporate structure. *See, e.g.*, *id.* ¶ 29(a), (e). The paragraphs that focus on climate change do not identify any alleged misrepresentations CONSOL Energy made about fossil fuel emissions or climate change. For example, paragraph 29(c)-(d) in the "Parties" section—the most substantive allegation about CONSOL Energy—alleges that CONSOL Energy controlled decisions related to "the quantity and extent of fossil fuel production and sales."

The allegations about CONSOL Marine are even more lacking—in fact, there is only one paragraph that contains a remotely substantive allegation about CONSOL Marine (again, in the

[3] Given this short time period, it would not have been difficult or burdensome for plaintiff to study CONSOL Energy's history of public statements before filing its complaint.

"Parties" section). *See id.* ¶ 29(e)-(f) (describing CONSOL Marine's business in Maryland and alleging it acts as an agent for CONSOL Energy).

The remaining allegations in the complaint are either about other defendants, which obviously say nothing about CONSOL Energy or CONSOL Marine, or are conclusory allegations about what "Defendants" purportedly did or did not do. *See, e.g., id.* ¶ 147 (describing a "concerted public relations campaign" by "Defendants"). These vague allegations do not provide sufficient facts against CONSOL Energy and CONSOL Marine to survive a motion to dismiss. *See Heritage Harbour, L.L.C.*, 143 Md. App. at 711 (affirming dismissal of complaint where plaintiff "never set forth any acts or omissions committed by [certain defendants]" and instead "dump[ed]" all defendants "into the same pot") (internal quotation marks and citation omitted in second and third quotations); *Adams v. NVR Homes, Inc*, 193 F.R.D. 243, 250 (D. Md. 2000) ("A complaint fails to meet the particularity requirements [for a fraud claim] when a plaintiff asserts merely conclusory allegations of fraud against multiple defendants without identifying each individual defendant's participation in the alleged fraud."); *Proctor v. Metro. Money Store Corp.*, 579 F. Supp. 2d 724, 744 (D. Md. 2008) (dismissing complaint where plaintiff did not differentiate who was involved in each specific act underlying claims).

Because the complaint never identifies any specific statements, let alone misrepresentations, about fossil fuel emissions and global climate change by CONSOL Energy or CONSOL Marine, the complaint fails Maryland's heightened pleading requirement to identify the "who, what, where, and when" for alleged misrepresentations. *McCormick*, 219 Md. App. at 528. In fact, the complaint does not even satisfy the basic pleading requirement to put CONSOL Energy or CONSOL Marine on notice of what they said or did to form the basis of plaintiff's claims. *Heritage Harbour, L.L.C.*, 143 Md. App. at 710 ("Pleadings must provide notice to the parties of

the nature of claims, state the facts upon which the claims exist, [and] establish the boundaries of the litigation") (internal citation omitted).

For these reasons, the complaint does not state a viable claim against CONSOL Energy or CONSOL Marine under plaintiff's misrepresentation or omission theory, which is the basis for all its claims.[4]

B. No alleged statements by other defendants are attributable to CONSOL Energy or CONSOL Marine.

While the complaint purports to allege statements made by others,[5] *see, e.g.*, Compl. ¶¶ 148-159, even if those statements were actionable (which they are not), plaintiff does not allege any factual basis for attributing them to CONSOL Energy or CONSOL Marine.

1. There is no basis to impute other defendants' alleged statements to CONSOL Energy or CONSOL Marine.

Plaintiff's sole attempt to draw a connection between CONSOL Energy and CONSOL Marine and the other defendants is a single boilerplate allegation seemingly taken from a law school hornbook. *See* Compl. ¶ 32 (alleging each defendant was the "agent, servant, partner, aider and abettor, co-conspirator, and/or joint venturer of each of the remaining Defendants herein"). This conclusory allegation is insufficient to attribute the purported conduct of any other defendant to CONSOL Energy or CONSOL Marine.

Under Maryland law, a principal is only liable for the actions of an agent when the agent is acting within the scope of its agency. *See Jones v. Sherwood Distilling Co.*, 150 Md. 24, 132 A.

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[4] Without a misrepresentation attributable to CONSOL Energy or CONSOL Marine, plaintiff is also unable to allege reliance on anything either company purportedly said, as its Maryland Consumer Protection Act claim requires. *Green v. Wells Fargo Bank, N.A.*, 927 F. Supp. 2d 244, 253-54 (D. Md. 2013), *aff'd*, 582 F. App'x 246 (4th Cir. 2014) (dismissing Consumer Protection Act claim where plaintiffs were unable to show reliance on misrepresentations).

[5] These supposed statements are not actionable for all of the reasons explained in the Joint Brief.

278, 280 (1926) (employer liable "for the willful tort of an agent acting within the general scope of his employment without previous express authority or subsequent ratification") (internal quotation marks and citation omitted); *Faith v. Keefer*, 127 Md. App. 706, 739 (1999) (factors considered when determining agency relationship "include the agent's power to alter the legal relations of the principal, the agent's duty to act primarily for the benefit of the principal, and the principal's right to control the agent").

Here, the complaint does not allege any facts to support the theory that defendants (many of whom are either competitors in the same industry or operate in completely different industries) are all agents of one another. *Best v. Newrez LLC*, No. 19-2331, 2020 WL 5513433, at *32 (D. Md. Sept. 11, 2020) (no basis for agency relationship where "vague claim that [one party] acted as the agent [of the other party]" was "conclusory and insufficient" and without "grounds, factual or legal, to support that proposition") (internal quotation marks and citation omitted in first quotation). This is especially true in this case, where CONSOL Energy and CONSOL Marine are the only coal companies sued.

Plaintiff's conclusory allegation is also insufficient to support a civil conspiracy or aiding and abetting theory. A civil conspiracy requires allegations demonstrating "a confederation of two or more persons by agreement or understanding," *Eichen v. Jackson & Tull Chartered Eng'rs*, No. 1235, Sept. Term, 2017, 2019 WL 3968330, at *8 (Md. Ct. Spec. App. Aug. 22, 2019), while aiding and abetting liability requires facts alleging "that the aider and abettor knowingly and substantially assist[ed] the principal violation." *Sutton v. FedFirst Fin. Corp.*, 226 Md. App. 46, 91 (2015) (internal quotation marks and citation omitted). Plaintiff's single conclusory paragraph purporting to link together the defendants (many of whom are either competitors in the same

industry or operate in completely different industries) does not even attempt to allege these elements.

2. CONSOL Energy is not liable for CONSOL Marine's alleged actions.

The only defendants the complaint specifically alleges had or have any relation to CONSOL Energy are CONSOL Marine and CNX. Even if plaintiff had alleged misstatements by CONSOL Marine (which it has not), plaintiff's conclusory allegation that CONSOL Marine is a subsidiary of CONSOL Energy acting on its behalf would be insufficient to hold CONSOL Energy liable for any purported misrepresentation by CONSOL Marine. *See Johnson v. Univ. of Md. Med. Sys. Corp.*, No. 396, Sept. Term, 2015, 2017 WL 1057447, at *5 (Md. Ct. Spec. App. Mar. 21, 2017) ("[A] parent corporation is generally insulated from the debts, obligations, and torts of its subsidiaries, absent the piercing of the corporate veil 'to prevent fraud or enforce a paramount equity.'") (citation omitted).

Similarly, there are no allegations supporting a successor liability theory between CONSOL Energy and CNX. *See Nissen Corp. v. Miller*, 323 Md. 613, 617 (1991). The only allegation describing the relationship between CNX and CONSOL Energy is that "CONSOL Energy Inc. was formerly known as, did or does business as, and/or is the successor in liability to CONSOL Mining Corporation and/or CNX Resources Corporation." Compl. ¶ 29(b). This allegation is insufficient for this court to disregard the "general rule" of "successor nonliability." *Nissen Corp.*, 323 Md. at 617.

II. The Complaint Does Not Allege That CONSOL Energy Or CONSOL Marine Had Special Knowledge About Climate Change Giving Rise To A Duty To Warn.

Plaintiff also claims all defendants are liable for negligent and strict liability failure to warn because they supposedly had superior knowledge about the risks of climate change but concealed this knowledge from the public. In addition to the reasons in the Joint Brief, the failure-to-warn

theory is deficient as to CONSOL Energy and CONSOL Marine because plaintiff alleges no facts about their knowledge of the potential dangers of climate change during the relevant time.

"Knowledge of the danger of the product is a component of both [negligent and strict liability failure to warn] claims." *Mack Trucks, Inc. v. Coates*, No. 2709, Sept. Term, 2016, 2018 WL 2175932, at *7 (Md. Ct. Spec. App. May 11, 2018). Plaintiff's vague and impermissible collective allegations that "[d]efendants knew or should have known" that fossil-fuel products cause climate change "based on information passed to them from their internal research divisions and affiliates and/or from the international scientific community" do not suffice (Compl. ¶¶ 239–40, 272–73), as the complaint does not allege that CONSOL Energy or CONSOL Marine ever had a "research division." To the extent CONSOL Energy and CONSOL Marine are lumped with other defendants and alleged to have learned about the risks of climate change from reports published by the "international scientific community," that allegation establishes only that CONSOL Energy and CONSOL Marine had access to the same information as the public concerning the possible consequences of the use of fossil fuels.

Without facts suggesting CONSOL Energy or CONSOL Marine had actual or constructive knowledge about any purported connection between their products and climate change before such information was widely available, plaintiff cannot state a failure to warn claim. Because CONSOL Energy and CONSOL Marine did not have a duty to warn, plaintiff's claims should be dismissed as to CONSOL Energy and CONSOL Marine.

CONCLUSION

For these reasons, plaintiff's claims against CONSOL Energy and CONSOL Marine should be dismissed with prejudice.

Dated: October 16, 2023

Jerome A. Murphy
(CPF No. 9212160248)
CROWELL & MORING LLP
1001 Pennsylvania Avenue NW
Washington, DC 20004
Email: jmurphy@crowell.com
Tel: (202) 624-2500
Fax: (202) 628-5116

Tracy A. Roman (admitted *pro hac vice*)
CROWELL & MORING LLP
1001 Pennsylvania Avenue NW
Washington, DC 20004
Email: troman@crowell.com
Tel: (202) 624-2500
Fax: (202) 628-5116

Honor R. Costello (admitted *pro hac vice*)
Mara R. Lieber (*pro hac vice* forthcoming)
CROWELL & MORING LLP
590 Madison Avenue, 20th Fl.
New York, NY 10022
Tel: (212) 233-4000
Fax: (212) 233-4134

Counsel for Defendants CONSOL Energy Inc. and CONSOL Marine Terminals LLC

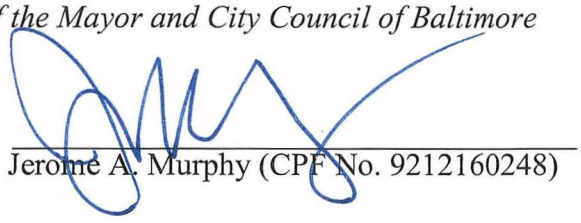
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 16th day of October, 2023, a copy of CONSOL Energy Inc.'s and CONSOL Marine Terminals LLC's Supplemental Motion to Dismiss for Failure to State a Claim was served via electronic mail on the following:

Victor Sher
Matthew Edling
Katie Jones
Martin Quiñones
Quentin Karpilow
SHER EDLING LLP
100 Montgomery St., Ste. 1410
San Francisco, CA 94104
vic@sheredling.com
matt@sheredling.com
katie@sheredling.com
marty@sheredling.com
quentin@sheredling.com

Sara Gross
BALTIMORE COUNTY LAW DEPARTMENT
100 N. Holliday Street, Suite 109
Baltimore, MD 21202
Sara.Gross@baltimorecity.gov

Attorneys for Plaintiff the Mayor and City Council of Baltimore



Jerome A. Murphy (CPF No. 9212160248)