IN THE CIRCUIT COURT FOR BALTIMORE CITY

MAYOR AND CITY COUNCIL OF BALTIMORE

Plaintiff

v. **Civil Action No. 24-C-18-004219**

BP P.L.C., *et al.*,

Defendants.

CNX RESOURCES CORPORATION'S INDIVIDUAL MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM AND REQUEST FOR HEARING

Defendant CNX Resources Corporation ("CNX"), by its undersigned attorneys and pursuant to Maryland Rules 2-311 and 2-322(b)(2), respectfully moves this Court to dismiss Plaintiff's Complaint with prejudice for failure to state a claim upon which relief can be granted.

CNX has joined Defendants' Joint Motion to Dismiss for Failure to State a Claim Upon Which Relief Can Be Granted, filed on October 16, 2023. This Individual Motion and attached Memorandum of Law addresses additional reasons why Plaintiff fails to state any claim for relief against CNX specifically. The grounds and authorities in support of this Motion are set forth more fully in the accompanying Memorandum of Law. A Proposed Order is attached.[1]

REQUEST FOR HEARING

Pursuant to Maryland Rule 2-311(f), CNX respectfully requests a hearing on all issues raised in this Motion and the accompanying Memorandum of Law.

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[1] CNX is separately filing an individual motion to dismiss for lack of personal jurisdiction. CNX also joins in Certain Defendants' Joint Memorandum in Support of Motion to Dismiss for Lack of Personal Jurisdiction. CNX submits the instant motion subject to, and without waiver of, any jurisdictional objections.

October 16, 2023

Respectfully submitted,

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Attorneys for Defendant CNX Resources Corp.

Pursuant to Maryland Rule 1-313, I HEREBY CERTIFY that I am an attorney duly admitted to practice law in Maryland.

Daniella A. Einik

IN THE CIRCUIT COURT FOR BALTIMORE CITY

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

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

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CASES

Defendant CNX Resources Corporation ("CNX") joins and incorporates by reference the arguments set forth in Defendants' Joint Memorandum in Support of Motion to Dismiss for Failure to State a Claim (the "Joint Merits Brief").[1] In addition, CNX submits this memorandum in support of its individual motion to dismiss for failure to state a claim. For the reasons set forth below, in the Joint Merits Brief, and in briefs filed by CITGO Petroleum Corporation and Chevron Corporation in support of their individual motions to dismiss for failure to state a claim, all claims against CNX should be dismissed with prejudice.

INTRODUCTION

Plaintiff filed this lawsuit—and Plaintiff's counsel have filed other virtually identical lawsuits on behalf of other plaintiffs across the country—to remedy alleged injuries from a century's worth of worldwide greenhouse-gas emissions by billions of individuals, companies, and government entities. Rather than sue billions of greenhouse-gas emitters, however, Plaintiff seeks to saddle 26 companies—which play various roles in the production of fossil fuels—with liability under Maryland law for global climate change.

This brazen tactic is outrageous and unfair—but more important for present purposes, it is legally unsustainable. As the Joint Merits Brief explains, federal law categorically prohibits state law from regulating out-of-state emissions, Plaintiff's claims present non-justiciable political questions, and, in all events, Plaintiff has failed to allege the essential elements of its claims under Maryland law. If the Court agrees on any or all of these points, then this case is over: The Court need only enter an order dismissing Plaintiff's claims against Defendants and proceed no further.

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[1] As expressed in CNX's separately filed memorandum in support of its individual motion to dismiss for lack of personal jurisdiction, CNX also joins in Certain Defendants' Joint Memorandum in Support of Motion to Dismiss for Lack of Personal Jurisdiction. CNX submits the instant motion subject to, and without waiver of, any jurisdictional objections.

But even if the Complaint could survive the foregoing arguments (it cannot), the claims against CNX must still be dismissed. The Complaint and Plaintiff's representations to federal courts in removal proceedings suggest that Plaintiff seeks to hold Defendants liable for their alleged *misrepresentations* about their products' contribution to global climate change and for *concealing* the risks of fossil-fuel use. The problem for Plaintiff is that the Complaint does not allege that CNX said *anything* about its products' connection to global climate change, much less that CNX made any *misrepresentation* that misled Plaintiff or the public about the risks of climate change or *concealed* the risks of fossil-fuel use. Accordingly, the Complaint fails to state a claim against CNX based on alleged misstatements. And the same goes for Plaintiff's claim that CNX concealed information, or failed to warn, about climate dangers that could allegedly result from the use of its products: the Complaint does not allege that CNX ever studied climate change, obtained special information about the risks of climate change, or concealed any information about climate change from Plaintiff, customers, or the public. Under Maryland law, therefore, any claim premised on concealment or a failure to warn fails.

The Court should dismiss Plaintiff's claims on the grounds set out in the Joint Merits Brief. But in all events, it should dismiss the claims against CNX for the reasons articulated herein.

BACKGROUND

The Complaint proclaims that

> Defendants, major corporate members of the fossil fuel industry, have known for nearly a half century that unrestricted production and use of fossil fuel products create greenhouse gas pollution that warms the planet and changes our climate. They have known for decades that those impacts could be catastrophic and that only a narrow window existed to take action before the consequences would be irreversible. They have nevertheless engaged in a coordinated, multi-front effort to conceal and deny their own knowledge of those threats, discredit the growing body of publicly available scientific evidence, and persistently create doubt in the minds of customers, consumers, regulators, the media, journalists, teachers, and the public about the reality and consequences of the impacts of their fossil fuel pollution.

Compl. ¶1. Although the Complaint spans 130 pages, however, it has precious little to say about CNX.

Indeed, only *one* paragraph in the Complaint even names CNX. Paragraph 29, subparagraph (a), describes CNX as an energy company incorporated in Delaware with its principal place of business in Pennsylvania. *Id.* ¶29(a). Subparagraphs (c) and (d) then contain identical copy-and-paste allegations asserted against all Defendants, claiming that CNX "controlled [] companywide decisions" regarding "the quantity and extent of fossil fuel production and sales, including those of [its] subsidiaries." *Id.* ¶29(c), (d). But the Complaint never identifies a single decision or communication CNX purportedly made, let alone one relating to those topics.

The Complaint also notes that CNX and Defendant CONSOL Energy Inc. composed a single entity until 2017, when CNX spun-off its coal-related business into a new entity, CONSOL Energy Inc. *Id.* ¶29(a), (b). The Complaint thus defines CNX and CONSOL Energy Inc.—and Defendant CONSOL Marine Terminals LLC, a subsidiary of CONSOL Energy Inc.—collectively as "CONSOL." *Id.* ¶29(e). In another copy-and-paste allegation also asserted against other Defendants, the Complaint then claims that "[a] substantial portion of CONSOL's fossil fuel products are or have been extracted, refined, transported, traded, distributed, promoted, marketed, manufactured, sold, and/or consumed in Maryland, from which CONSOL derives and has derived substantial revenue." *Id.* ¶29(f). But again, the Complaint does not identify any decision or communication by either CNX specifically or "CONSOL" more generally.

Finally, the Complaint alleges that various "industry associations" named in the Complaint acted "on behalf of the Defendants" and "engaged in a long-term course of conduct to misrepresent, omit, and conceal the dangers of Defendants' fossil fuel products." *Id.* ¶31. Although the Complaint alleges that certain other Defendants were members of the named industry

associations, the Complaint does not allege that CNX (or even "CONSOL") was a member of any listed association.

In a similar vein, the Complaint makes the blunderbuss allegation that

> [a]t all times herein mentioned, each of the Defendants was the agent, servant, partner, aider and abettor, co-conspirator, and/or joint venturer of each of the remaining Defendants herein and was at all times operating and acting within the purpose and scope of said agency, service, employment, partnership, conspiracy, and joint venture and rendered substantial assistance and encouragement to the other Defendants, knowing that their conduct was wrongful and/or constituted a breach of duty.

Id. ¶32. Once again, however, the Complaint does not contain a single allegation regarding how CNX (or CONSOL or any other Defendant) entered into any of these supposed relationships.

The Complaint asserts eight causes of action against all Defendants without ever mentioning CNX specifically: (1) public nuisance, *id.* ¶219; (2) private nuisance, *id.* ¶231; (3) strict liability failure to warn, *id.* ¶241; (4) strict liability for design defect, *id.* ¶250; (5) negligent design defect, *id.* ¶263; (6) negligent failure to warn, *id.* ¶271; (7) trespass, *id.* ¶284; and (8) fraud under the Maryland Consumer Protection Act, *id.* ¶295. While Plaintiff affixes different labels to its claims, Plaintiff has represented in related removal proceedings that this suit seeks to hold Defendants liable for their alleged misstatements and omissions, not for interstate greenhouse-gas emissions. *See* Br. for Resp. at 15, *BP P.L.C. v. Mayor & City Council of Balt.*, No. 22-361 (U.S. Dec. 19, 2022) ("Baltimore 'clearly seeks to challenge the promotion and sale of fossil-fuel products without warning and abetted by a sophisticated disinformation campaign,' and the tortious conduct is petitioners' alleged 'concealment and misrepresentation of the products' known dangers'"); *id.* at 29 ("Baltimore's claims hinge on petitioners' alleged misrepresentations to consumers and the public"); *see also id.* at 7 ("[T]he complaint does 'not seek to impose liability on Defendants for their direct emissions of greenhouse gases [or] to restrain Defendants from engaging in their business operations[.]").

ARGUMENT

The Court should dismiss this case for the reasons set forth in the Joint Merits Brief (and the Joint Personal Jurisdiction Brief) and proceed no further. To the extent Plaintiff's Complaint is about *misstatements and omissions* rather than *emissions*, however, CNX urges that, at a minimum, the Court should dismiss the Complaint as to CNX. That is because the Complaint does not allege that CNX made any misrepresentations or had any special knowledge that it concealed or that gave rise to a duty to warn, which is fatal to Plaintiff's Complaint.

I. The Complaint Does Not Allege Any Actionable Misrepresentations About Climate Change Made by, or Attributable to, CNX.

Claims based on misstatements—*i.e.*, fraud—must be pleaded with particularity. *See, e.g.*, *McCormick v. Medtronic, Inc.*, 219 Md. App. 485, 527 (2014) ("Maryland courts have long required parties to plead fraud with particularity."). "The requirement of particularity ordinarily means," among other things, "that a plaintiff must identify who made what false statement, when, and in what manner (*i.e.*, orally, in writing, etc.)." *Id.* at 528; *see also id.* ("[V]ague allegations fail to meet the standard of particularity[.]"). And even besides that particularity requirement, "Rule 2-305 generally requires that a complaint contain [] 'a clear statement of the facts necessary to constitute a cause of action.'" *Id.* at 527.

Here, the Complaint flunks both pleading standards, because there are no alleged misstatements by CNX. Indeed, CNX is not alleged to have said *anything* about its products or their alleged connection to global climate change, nor is there any basis for attributing others' alleged misstatements to CNX. Thus, the Complaint comes nowhere close to satisfying the particularity standard, or even the basic requirement that Plaintiff supply a clear statement of the facts necessary to constitute a cause of action. Regardless of the pleading standard, therefore, the Complaint does not get off the ground against CNX.

A. The Complaint does not identify a single alleged misstatement made by CNX.

To begin, CNX is not alleged to have said *anything* about its products or their alleged connection to global climate change. As discussed above, only one paragraph in the entire Complaint even mentions CNX—but it says nothing about any supposed misstatements by CNX. Subparagraphs 29(c) and (d) simply claim that CNX (like the other Defendants) "controlled [] companywide decisions" regarding "the quantity and extent of fossil fuel production and sales, including those of their subsidiaries." Compl. ¶29(c), (d). Not only does that allegation fail to identify any alleged misstatement—it does not identify any statement at all.

Other paragraphs in the Complaint vaguely claim that all Defendants engaged in a campaign of deception and misrepresentation. *See, e.g.*, *id.* ¶31 ("Acting on behalf of the Defendants, the industry associations engaged in a long-term course of conduct to misrepresent, omit, and conceal the dangers of Defendants' fossil fuel products."); *id.* ¶297 (referring to "Defendants' foregoing deception, misrepresentations, and omissions of material fact"). But such a shotgun-pleading strategy is improper and fails to meet Maryland's particularity requirement. *See, e.g.*, *Heritage Harbour, L.L.C. v. John J. Reynolds, Inc.*, 143 Md. App. 698, 711 (2002) (affirming dismissal for failure to state a claim for relief where plaintiff "'dump[ed] ... all [appellees] into the same pot'"); *Haley v. Corcoran*, 659 F. Supp. 2d 714, 721 (D. Md. 2009) ("When a complaint alleges fraud against multiple defendants, [the heightened pleading requirement for fraud] requires that the plaintiff identify *each defendant's* participation in the alleged fraud." (emphasis added)); *Wells v. State*, 100 Md. App. 693, 703 (1994) ("[T]he defendants are not fungible; we must examine what each is charged with doing or failing to do."). Moreover, even within those shotgun allegations, the Complaint does not identify a misstatement, or any statement at all.

Because the Complaint never alleges that CNX made any statements about its products' alleged connection to global climate change—much less any *misrepresentations* that could have deceived Plaintiff or the public—the Complaint falls well short of the requirement that Plaintiff allege "who made what false statement, when, and in what manner." *McCormick*, 219 Md. App. at 528. Indeed, the Complaint fails even to meet Rule 2-305's basic requirement to give CNX "notice ... of the nature of [the] claims, state the facts upon which the claims exist, establish the boundaries of the litigation, and afford the speedy resolution of frivolous claims." *Heritage Harbour, L.L.C.*, 143 Md. App. at 710. For these reasons, the Complaint does not state a cognizable claim against CNX under Plaintiff's misrepresentation theory.

B. No alleged misstatement by a Defendant or a non-party is attributable to CNX.

There also is no basis in the Complaint for attributing to CNX any alleged misstatements made by other Defendants and non-parties. The Complaint appears to try to accomplish as much by summarily claiming—without any factual basis whatsoever—that "[a]t all times herein mentioned, each of the Defendants was the agent, servant, partner, aider and abettor, co-conspirator, and/or joint venturer of each of the remaining Defendants herein." Compl. ¶32. These are bare legal conclusions, however, which are insufficient to survive a motion to dismiss. *See, e.g.*, *Matter of Jacobson*, 256 Md. App. 369, 392 (2022) ("[B]ald assertions and conclusory statements by the pleader will not suffice and the court 'need not accept the truth of pure legal conclusions.'"); *Sibley v. Doe*, 227 Md. App. 645, 653 (2016) ("A court ... need not accept the truth of pure legal conclusions," and "mere conclusory charges that are not factual allegations need not be considered." (cleaned up)). Indeed, the critical question here is whether "the facts alleged in the [] complaint[] are legally insufficient on their face to aver an agency relationship," *see Faya v. Almaraz*, 329 Md. 435, 460 (1993), a conspiracy, which requires "a confederation of two or more persons by agreement or understanding," *Lloyd v. Gen. Motors Corp.*, 397 Md. 108, 154

(2007), or aiding and abetting liability, which requires "'knowingly and substantially assist[ing] the principal violation,'" *Sutton v. FedFirst Fin. Corp.*, 226 Md. App. 46, 91 (2015). Because Paragraph 32 identifies quite literally zero facts in support of Plaintiff's agency, conspiracy, or aiding-and-abetting allegations, the Complaint does not adequately plead any sort of relationship through which other Defendants' statements and conduct may be imputed to CNX.

The same goes for any suggestion in the Complaint that *non-parties*' knowledge and conduct may be imputed to CNX. For example, Paragraph 31 claims that, "[a]cting on behalf of the Defendants, [certain listed] industry associations engaged in a long-term course of conduct to misrepresent, omit, and conceal the dangers of Defendants' fossil fuel products." Compl. ¶31. But the Complaint does not allege that CNX was a member of any of the listed associations or any factual basis for inferring that CNX somehow entered into an agency or co-conspirator relationship with any particular association. Moreover, even if the Complaint had alleged CNX's membership in these associations, it is black-letter law that "mere membership in a trade association, including attendance at meetings, is not sufficient to give rise to an inference of conspiracy, absent proof of 'knowing participation' in the wrongful conduct." *See, e.g.*, *In re Asbestos Litig.*, 509 A.2d 1116, 1120 (Del Super. Ct. 1986), *aff'd sub nom. Nocolet, Inc. v. Nutt*, 525 A.2d 146 (Del. 1987); *see also Bank of Am., N.A. v. Knight*, 725 F.3d 815, 818 (7th Cir. 2013) ("Although every conspirator is responsible for others' acts within the scope of the agreement, it remains essential to show that a particular defendant joined the conspiracy and knew of its scope."); *Rojas v. Delta Airlines, Inc.*, 425 F. Supp. 3d 524, 543 (D. Md. 2019) ("Defendants' membership in [a trade association] does not raise an inference of conspiracy on its own."). Because there is no allegation in the Complaint that CNX knowingly participated in illegal conduct, any attempt to impute a particular association's knowledge and conduct to CNX necessarily fails.

In short, insofar as Plaintiff's claims depend on CNX's alleged misstatements or omissions, those claims are non-starters because the Complaint does not identify a single alleged misstatement or omission by CNX. That is fatal to all of Plaintiff's claims.

II. The Complaint Does Not Allege that CNX Concealed Any Special Knowledge about Climate Change.

Plaintiff also claims that Defendants had superior knowledge about the risks of climate change but failed to warn, or willfully concealed this information from, the public. The Joint Brief shows how this theory of liability fails because the risks of climate change have been widely known for nearly half a century. *See* Joint Merits Br. at 42–43. That alone dooms Plaintiff's theory. But insofar as CNX in particular is concerned, this theory is doubly deficient because the Complaint does not allege that CNX had any knowledge about the potential dangers of climate change.

A fraudulent-concealment claim requires, among other things, allegations that a defendant both "owed a duty to the plaintiff to disclose a material fact" and "failed to disclose that fact"—conditions that necessarily require the defendant's knowledge of the concealed fact. *Lloyd v. Gen. Motors Corp.*, 397 Md. 108, 138 (2007) (citation omitted). Likewise, in the failure-to-warn context, a supplier's duty to warn turns on whether it "knows or should know [that the hazard] could be a substantial factor in causing injury." *Virgil v. Kash N' Karry Serv. Corp.*, 61 Md. App. 23, 33 (1984); *see also Mack Trucks, Inc. v. Coates*, No. 2709, Sept. Term, 2016, 2018 WL 2175932, at *7 (Md. Ct. Spec. App. May 11, 2018) ("Knowledge of the danger of the product is a component of both [negligent and strict liability failure to warn] claims."). A supplier who lacks such knowledge thus has no duty to warn. *See Virgil*, 61 Md. App. at 33 (affirming directed verdict for defendants on failure-to-warn claim because "there was no evidence that either of the appellees knew or should have known that the thermos bottle presented a danger").

Here, the Complaint alleges no facts suggesting that CNX had actual or constructive knowledge about the alleged dangers of climate change or the role its products allegedly played in contributing to climate change before such knowledge became readily available to the public. Indeed, CNX is not alleged to have conducted research into climate change. *See, e.g.*, Compl. ¶¶109, 111, 113. And although the Complaint repeats blanket allegations that "Defendants 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," *e.g.*, *id.* ¶240, that is plainly insufficient: the Complaint does not allege that CNX or its affiliates ever even had a "research division." And to the extent CNX is alleged to have learned about the risks of climate change from reports published by the "international scientific community," that allegation would show only that CNX had access to the same information as the public concerning the possible consequences of fossil-fuel usage.

In short, the Complaint does not allege that CNX had actual or constructive knowledge about any purported connection between its products and climate change before such information was widely available. Accordingly, Plaintiff has not adequately alleged that CNX had special knowledge about the risks of global climate change allegedly resulting from the use of its products but failed to warn or concealed that knowledge from the public. And because there are no allegations that CNX had such knowledge, Plaintiff's claims must be dismissed as to CNX to the extent they are based on alleged concealment or failure-to-warn theories of liability.

CONCLUSION

For these reasons, all of Plaintiff's claims against CNX should be dismissed with prejudice.

Dated: October 16, 2023

Respectfully submitted,

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Plaintiff

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BP P.L.C., *et al.*,

Defendants.

[PROPOSED] ORDER GRANTING DEFENDANT CNX RESOURCES CORPORATION'S INDIVIDUAL MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED

Upon review and consideration of CNX Resources Corporation's ("CNX") Individual Motion to Dismiss for Failure to State a Claim Upon Which Relief Can Be Granted, and Request for Hearing, Plaintiff's Opposition thereto, and any further Reply(ies), it is on this __ day of _____ , ____, by the Circuit Court for Baltimore, hereby

ORDERED, that CNX's Individual Motion to Dismiss for Failure to State a Claim Upon Which Relief Can Be Granted is **GRANTED**; and it is further

ORDERED, that the Plaintiff's July 20, 2018 Complaint is **DISMISSED WITH PREJUDICE** as to CNX; and it is further

ORDERED that the Clerk of the Court shall deliver copies of this Order to all parties of record.

_____

Judge Videtta A. Brown

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 16th day of October, 2023, a copy of the foregoing was served by email on all parties.

Daniella A. Einik
(AIS No. 1012140232)