IN THE CIRCUIT COURT FOR
BALTIMORE CITY

MAYOR AND CITY COUNCIL OF BALTIMORE,

Plaintiff

v. Civil Action NO. 24-18-004219

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

Defendants.

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

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INTRODUCTION

Plaintiff's Opposition ("Opp.") insists (at 4) that Defendants "engaged in a coordinated disinformation campaign" about climate change. Critically, however, Plaintiff never disputes that its Complaint does not allege that CNX said (or had special knowledge of) *anything* about its products' connection to climate change. That ends the case against CNX. Indeed, earlier this month, a Delaware court dismissed all misrepresentation claims against CNX precisely because plaintiff failed to allege any misstatements by CNX. *See Delaware v. BP Am. Inc.*, 2024 WL 98888, at *24 (Del. Sup. Ct. Jan. 9, 2024). This Court should do the same. For these reasons—and for the reasons set out in the Joint Merits Reply and the replies of CITGO, CONSOL, Marathon Petroleum Corporation, and Phillips 66—Plaintiff's claims against CNX should be dismissed.[1]

ARGUMENT

I. The Complaint Fails To State A Claim Against CNX.

A. The Complaint Does Not Allege *Any* Statements by or Attributable to CNX.

Plaintiff contends that, "[a]long with other Defendants, CNX deployed a sophisticated deception campaign that promoted unrestricted use of their fossil fuel products without warning of their risks, while spreading disinformation about the scientific consensus regarding climate change." Opp.9. But the Complaint comes nowhere close to meeting Rule 2-305's basic pleading requirements, much less Maryland's particularity requirement for fraud-based claims. CNX MTD 5.[2] Indeed, Plaintiff never disputes that the Complaint does not identify any statements by CNX.

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[1] This Reply is submitted subject to, and without waiver of, any defense, affirmative defense, or objection, including lack of personal jurisdiction.

[2] Plaintiff disputes whether its nominally non-fraud claims are subject to the particularity requirement. Opp.7–8. That argument is beside the point because Plaintiff has not met the basic Rule 2-305 standard. Joint Reply II.D; *see also Wells v. State*, 100 Md. App. 693, 703 (1994) (under Rule 2-305's pleading standard, complaints treating defendants as "fungible" must be dismissed without specific accusations against individual defendants). The argument is also meritless because *all* of Plaintiff's claims rest on a theory of fraud. *See Spangler v. Sprosty Bag*

Instead, Plaintiff tries to lump CNX together with other Defendants through strained imputation theories and a group-pleading strategy. These attempts fail.

1. Plaintiff does not state a valid imputation theory.

Plaintiff invokes various theories to justify imputing the alleged conduct of others to CNX. These include concert-of-action, agency, conspiracy, and aiding-and-abetting liability. But none of these theories applies.

1. Plaintiff starts with a "concert of action" theory, which concerns joint and several liability. *See* Opp.1–3. Before there can be *joint* liability, however, "there must be individual liability." *Williams v. Stone*, 923 F. Supp. 689, 692 (E.D. Pa. 1996). This theory thus has no application here.

Moreover, even if a concert-of-action theory could apply, the Complaint alleges virtually nothing specific about CNX except CNX's status as a named Defendant, CNX MTD 2–3, which is not nearly enough to establish knowing and substantial assistance to supposedly unlawful conduct, *see Consumer Prot. Div. v. Morgan*, 387 Md. 125, 186 (2005). Indeed, the Complaint does not allege *any* specific action by CNX to advance the allegedly wrongful acts of others.

Plaintiff tries to shore up this deficiency through its references to the Global Climate Coalition ("GCC"), an association that Plaintiff claims was created to misinform the public regarding climate change. *See* Opp.2–3. GCC is not a Defendant, so its conduct could not possibly generate concert-of-action liability for CNX. *See Morgan*, 387 Md. at 185 (using concert-of-action principle "to determine whether *parties* are jointly and severally liable" (emphasis added)).

Co., 183 Md. 166, 173 (1944) (particularity requirement applies where fraud is "[t]he basis of ... the relief sought"); CNX MTD 2; Marathon Petroleum Company Reply 1–2; CITGO Reply 2–3; ExxonMobil Reply 1–5. Having pushed that characterization of its claims, Plaintiff is estopped from asserting otherwise now. CITGO Reply 2 & n.2.

But even setting that aside, the Complaint does not allege that CNX was ever a member of GCC. *See* Opp.2 n.1; Compl. ¶31(g) (list of alleged GCC members does not include CNX). Plaintiff asks the Court to take judicial notice of extrinsic materials, Opp.2 n.1, but they cannot fill this gap in Plaintiff's complaint. It is fundamental that Plaintiff cannot amend its Complaint through its opposition brief. *See, e.g.*, *Johnson v. SecTek, Inc.*, 2014 WL 1464378, at *2 (D. Md. Apr. 14, 2014) ("[A] plaintiff cannot, through the use of motion briefs, amend the complaint." (citation and internal quotation marks omitted)); *D'Aoust v. Diamond*, 424 Md. 549, 572 (2012) (on a motion to dismiss, the "universe of 'facts' pertinent to the court's analysis" is "limited generally to the four corners of the complaint"); *Hrehorovich v. Harbor Hosp. Ctr., Inc.*, 93 Md. App. 772, 784 (1992) ("When the court considers the motion to dismiss, it should consider only the sufficiency of the pleading."); *Gerritsen v. Warner Bros. Ent. Inc.*, 112 F. Supp. 3d 1011, 1033 n.93 (C.D. Cal. 2015) ("It appears that [Plaintiff] relies on the facts contained in the various documents that are the subject of her judicial notice request to supplement the allegations in her complaint. This is improper . . . . Plaintiffs cannot utilize the documents to amend the complaint and defeat defendants' motions to dismiss.").[3] And, at most, the proffered materials suggest that an entity known as "Consolidation Coal Company" was a member of GCC as of 1991. *See* Opp. Ex. 2 at 4; Ex. 3 at 5. They do not, however, establish that that company was CNX's "predecessor," Opp.2, much less so in a manner that places the point beyond "reasonable dispute," as required for judicial notice, Md. Rule 5-201(b). In reality, the Consolidation Coal Company that was an alleged member of GCC was a former *subsidiary* of CNX. That is significant because neither the Complaint nor Plaintiff's extrinsic sources identify any basis for attributing the conduct of that

[3] This same principle forecloses Plaintiff's attempt to plead a new omission-based claim under Section 13-301(3) of the Maryland Consumer Protection Act, Opp.8 n.10, as such a claim is not alleged anywhere in the Complaint.

subsidiary to its former parent, CNX—and group pleading cannot compensate for this deficiency. *See Jien v. Perdue Farms, Inc.*, 2020 WL 5544183, at *4 (D. Md. Sept. 16, 2020) (a complaint cannot rely on "'indeterminate assertions against all defendants,'" even when they are affiliates, but must identify each specific defendant's involvement).

But even if Consolidation Coal's conduct could be imputed to CNX, the Complaint does not adequately allege that GCC's statements are attributable to Consolidation Coal. Plaintiff concedes that mere membership in an association is not a sufficient basis for imputation. *See* Opp.4; *see also NAACP v. Claiborne Hardware Co.*, 458 U.S 886, 918–19 (1982) ("The First Amendment [] restricts the ability of the State to impose liability on an individual solely because of his association with another."). It thus tries to bolster its argument with an exhibit purporting to show that GCC distributed a single draft publication to its unnamed "members." Opp.3 & n.2 (citing Opp. Ex. 4). But, contrary to Plaintiff's assertion, nothing in this exhibit—or the Complaint itself—suggests that *Consolidation Coal* received the publication, or that Consolidation Coal (or anyone else) "reviewed and approved" it, Opp.3. And, even if Consolidation Coal had *received* the draft, such passive receipt cannot possibly show that Consolidation Coal "substantially assisted or encouraged" supposedly unlawful conduct, *Morgan*, 387 Md. at 186, or that it held "a specific intent to further [any] illegal aims," *Claiborne Hardware Co.*, 458 U.S. at 920.

Nor are these the only problems with this strained theory. The alleged GCC statements are protected by the First Amendment, as the Complaint itself alleges that the statements were published "with the specific purpose of preventing U.S. adoption of the Kyoto Protocol," Compl. ¶161), conduct falling squarely within the *Noerr-Pennington* doctrine. *See N.C. Elec. Membership Corp. v. Carolina Power & Light Co.*, 666 F.2d 50, 52 (4th Cir. 1981) (explaining that the doctrine protects "any petitioning activity designed to influence legislative bodies or governmental

agencies").[4] In addition, these statements were allegedly published in 1996, *see* Compl. ¶161, yet Plaintiff's own extrinsic sources only suggest that Consolidation Coal was a member of GCC in 1991. Any statements in the report therefore cannot be attributed to Consolidation Coal.

For these reasons, Plaintiff's effort to attribute GCC's conduct to CNX under a concert-of-action theory fails multiple times over.

2. The same is true of Plaintiff's remaining imputation theories, which include agency, conspiracy, and aiding-and-abetting liability. As Plaintiff concedes, the concert-of-action theory is less stringent than these other theories of liability, Opp.3, which means they necessarily fail for the reasons described above. They also harbor fundamental defects of their own.

Quite literally the only mention of a conspiracy, aider-and-abettor, or principal-agent relationship is Paragraph 32 of the Complaint. That paragraph alleges that "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." Compl. ¶32. That is it. This allegation proceeds by dumping all Defendants into the same pot and says nothing about any particular Defendant, including CNX.

Plaintiff tries to obscure this fact with extensive string-cites to the Complaint and the suggestion that the cited paragraphs concern CNX. *See* Opp.2, 9–10. In reality, only one

[4] CNX incorporates by reference Chevron's Anti-SLAPP motion and supporting reply, which demonstrate that even if statements by other Defendants or third parties could be attributed to CNX, Plaintiff's claims are barred by Maryland's anti-SLAPP statute and the First Amendment, as they involve speech on matters of public concern.

paragraph of Plaintiff's 298-paragraph complaint refers to CNX. *See* Compl. ¶29. And that paragraph merely identifies CNX as a defendant and generally describes it is a fossil fuel producer, but does not include a single allegation that would support agency, aiding-and-abetting, or conspiracy liability. These theories thus run into the same group-pleading problem addressed below. *Infra*, at 7–8.

But even apart from that, these summary allegations do not remotely satisfy Maryland's pleading requirements. Again, the sole reference to agency, aiding and abetting, and conspiracy liability comes in Paragraph 32, which claims that "each of the Defendants" was the "agent," "aider and abettor," and/or "co-conspirator" of "each of the remaining Defendants." Compl. ¶32. But Plaintiff is required to allege facts establishing each element of these theories, which it plainly has not done. *See, e.g.*, *Sigler v. LeVan*, 485 F. Supp. 185, 196 (D. Md. 1980) ("A complaint alleging a conspiracy must do more than state mere legal conclusions regarding the existence of the conspiracy."); *Proctor v. Metro. Money Store Corp.*, 579 F. Supp. 2d 724, 735 (D. Md. 2008) ("Because the existence of an agency relationship is a factual matter under Maryland law, this Court evaluates . . . whether the factual allegations, if construed in the light most favorable to Plaintiffs, are legally sufficient to establish an agency relationship."); *Newcomb v. Babu*, 2020 WL 5106714, at *8 (D. Md. Aug. 30, 2020) ("When an agency relationship is allegedly part of the fraud," the Complaint must plead "the facts constituting the underlying fraud and the *facts* establishing the agency relationship" (cleaned up)). Thus, the threadbare, conclusory assertion that every Defendant conspired with, aided and abetted, or was the agent of, every other Defendant is insufficient to survive a motion to dismiss. *See, e.g.*, *Bobo v. State*, 346 Md. 706, 708–09 (1997) ("Bald assertions and conclusory statements by the pleader will not suffice."); *Margolis v. Sandy Spring Bank*, 221 Md. App. 703, 713 (2015) ("A court . . . need not accept the truth of pure legal

conclusions" in a complaint.); *Proctor v. Holden*, 75 Md. App. 1, 20 (1988) (granting motion to dismiss where homeowners failed to sufficiently allege that settlement agents were acting within scope of agency).

2. Plaintiff cannot use group pleading to cure its pleading deficiencies.

Plaintiff falls back on the Complaint's group-pleading strategy—that all Defendants committed all claimed legal violations through all alleged misstatements and omissions composing the so-called "campaign to disinform." As with its imputation theories, however, this strategy cannot save Plaintiff's claims either.

Plaintiff first claims that "no [] Maryland case law" prevents Plaintiff from using a shotgun approach to advance claims against CNX. Opp.5. But Plaintiff cannot distinguish *Heritage Harbour, L.L.C. v. John J. Reynolds, Inc.*, a Maryland decision squarely prohibiting this approach on materially similar facts. 143 Md. App. 698 (2002). There, the plaintiffs had asserted various common-law causes of action (as here) against approximately two dozen defendants (as here) and lumped them all together (as here). *Id.* at 703, 710–11. The court rejected that approach because the plaintiffs "never set forth any acts or omissions committed by [eight defendants as to which the complaint simply alleged their status as defendants] that would serve as a basis for an imposition of liability; rather, they 'dump ... all [appellees] into the same pot.'" *Id.* at 711; *see also Samuels v. Tschechtelin*, 135 Md. App. 483, 528–29 (2000) (dismissing allegations against defendants who were "simply listed by name in a preliminary paragraph" and thereafter "lumped under the general title of 'Defendants' and summarily included" in each count of the complaint). That is precisely the Complaint's deficiency as to CNX. Indeed, a Delaware state court recently dismissed nearly identical misrepresentation claims against CNX because, despite its group

allegations, the complaint failed to "specifically identify alleged misrepresentations" by CNX. *See Delaware*, 2024 WL 98888, at *24.[5]

Nor should the Court excuse this deficiency because Plaintiff "had only limited available information" due to Defendants' alleged "concealment of their deception." Opp.6. The thrust of Plaintiff's case is that Defendants' *public* marketing and *widely disseminated* statements were misleading or omitted adequate warnings. And Plaintiff's detailed 132-page complaint demonstrates that Plaintiff has already conducted a lengthy and in depth investigation into this matter. All of this makes the absence of *any* specific allegations about CNX more problematic, not less.

Finally, Plaintiff cannot avoid its group-pleading problem by relying on allegations about "CONSOL," which the Complaint defines to include CNX and two former subsidiaries, CONSOL Energy, Inc. and CONSOL Marine Terminals LLC. Opp.5; Compl. ¶29. As noted above, mere affiliation does not justify group pleading. *See Jien*, 2020 WL 5544183, at *4. And, in any event, Plaintiff has not plausibly alleged any misconduct by the two CONSOL entities, *see* CONSOL Merits MTD 4–6, 9; CONSOL Merits Reply 1–3, 7, nor has Plaintiff identified any basis for imputing their conduct to CNX, *see* CONSOL PJ MTD 7–8 (explaining how Plaintiff's allegations do not meet Maryland's high bar for piercing the corporate veil).

[5] Plaintiff's attempts, *see* Opp.6–7, to find more lenient approaches to group pleading in other jurisdictions, like the Eleventh and Ninth Circuits, are likewise unavailing. *See Weiland v. Palm Beach Cnty. Sheriff's Office*, 792 F.3d 1313, 1323 (11th Cir. 2015) (criticizing, as here, "the relatively rare sin of asserting multiple claims against multiple defendants without specifying which of the defendants are responsible for which acts or omissions"); *United States v. United Healthcare Ins. Co.*, 848 F.3d 1161, 1182 (9th Cir. 2016), cited at Opp.7 (dismissing complaint as to subset of defendants where, as here, the complaint contained "relatively detailed allegations" concerning some defendants but "only general allegations" as to the dismissed defendants).

B. The Complaint Does Not Plausibly Allege that CNX Had a Duty to Warn.

The same analysis applies to Plaintiff's claim that CNX had, but breached, a duty to warn. Plaintiff effectively admits that this claim depends on Plaintiff's "collective allegations" concerning what CNX and all other Defendants allegedly knew or should have known but did not disclose. Opp.10. But the Complaint never articulates any factual basis for inferring that *CNX* had any specialized knowledge. *See* CNX MTD 9–10. And while Plaintiff says that what is "generally known in the scientific or expert community" is imputable to CNX, Opp.10, Plaintiff fails to allege when any such consensus occurred and created a duty to warn. Any consensus, moreover, was equally available to Plaintiff and the public. Indeed, Plaintiff's own allegations establish that the alleged risks of fossil fuels have been well known for decades. Joint Reply 27–28. The Complaint itself therefore establishes that CNX lacked any *special* knowledge about climate change. These defects independently defeat any duty-to-warn theory.

II. The Court Should Deny Plaintiff's Request for Leave to Amend.

Plaintiff requests leave to amend its Complaint if the Court grants CNX's motion to dismiss. But the Court should deny this request because leave to amend would be futile. Indeed, despite the passage of over five years since filing the Complaint, Plaintiff still has not even identified a single allegation that would change the analysis for CNX. Dismissal with prejudice is therefore appropriate.

CONCLUSION

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

January 26, 2024

Respectfully submitted,

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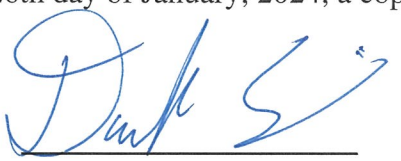
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 26th day of January, 2024, a copy of the foregoing was served by email on all parties.



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