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

REPLY OF CONSOL ENERGY INC. AND CONSOL MARINE TERMINALS LLC IN SUPPORT OF SUPPLEMENTAL MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM

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Plaintiff does not dispute that it fails to allege any facts about statements or omissions by CONSOL Energy Inc. ("CONSOL Energy") or CONSOL Marine Terminals LLC ("CONSOL Marine"), arguing instead that generalized allegations against "Defendants" suffice because CONSOL Energy and CONSOL Marine have "ample notice" about the nature of its claims. But Maryland is not a notice pleading state.

Plaintiff's joint and several liability theories (concert-of-action, aiding and abetting, conspiracy, and/or principal/agency) fail to save its claims. Plaintiff admits "active participation" or "substantial encouragement" are central to those theories. Even if their purported predecessors had the opportunity to comment on Global Climate Coalition ("GCC") publications, that is not enough to hold CONSOL Energy and CONSOL Marine liable for statements made by others.

Finally, plaintiff's failure to warn claims cannot succeed because it has not sufficiently alleged that the dangers of fossil fuel were known to the industry as a whole.

ARGUMENT

I. PLAINTIFF CONCEDES IT ALLEGES NO FACTS SHOWING STATEMENTS BY CONSOL ENERGY AND CONSOL MARINE.

By arguing there is no prohibition on collective allegations in Maryland (Pl.'s Opp. to CONSOL Energy and CONSOL Marine Mot. ("Opp.") at 1-3), plaintiff *concedes* it has not alleged any specific actions taken, or misrepresentations made, by CONSOL Energy and CONSOL Marine. Plaintiff essentially contends factual allegations are not necessary as long as each defendant has notice of the *theory* of recovery. *See* Opp. at 3-4. But Maryland law is clear that a plaintiff must plead *facts* to show it is entitled to relief. Md. R. Civ. P. Cir. Ct. 2-305; *Anderson v. Meadowcroft*, 339 Md. 218, 230 (1995) ("Moreover, the mere presence of the word 'coerce' in the complaint does not save it; such a conclusory allegation, without supporting facts, is insufficient to state a cause of action."); *Nigido v. First Nat'l Bank*, 264 Md. 702, 708-11 (1972) (plaintiff must

allege facts, not merely conclusions, to state cause of action). The supposed "details" plaintiff points to are merely conclusory allegations that recite theories of recovery without any specific facts explaining what CONSOL Energy or CONSOL Marine said or did. *See* Opp. at 2. The lack of any facts as to CONSOL Energy or CONSOL Marine leaves them in the dark as to the alleged conduct underlying plaintiff's claims. *See* CONSOL Energy Inc.'s and CONSOL Marine Terminals LLC's Supplemental Motion to Dismiss for Failure to State a Claim ("CONSOL Br.") at 4-7.

Plaintiff's federal cases on collective pleading miss the mark. Opp. at 3 & n.2. Given the facts of those cases, it was logical to assume that each defendant took the same action. *See, e.g.*, *Lackey v. MWR Investigations, Inc.*, 2015 WL 132613, at *2 (D. Md. Jan. 8, 2015) (collective allegations sufficient for employment claim against employer company and individual who managed, owned, and operated company); *Chevron U.S.A. Inc. v. Apex Oil Co.*, 113 F. Supp. 3d 807, 812 (D. Md. 2015) (collective allegations against alleged co-owners of pipeline); *State v. Exxon Mobil Corp.*, 406 F. Supp. 3d 420, 441 (D. Md. 2019) (defendants all sold fungible product "commingled" and supplied via common pipeline).

Nothing about the facts of this case makes collective allegations appropriate. Plaintiff sues unaffiliated fossil fuel companies that market and sell their own oil, gas, and coal products.[1] It cannot plausibly be inferred that each defendant made the same statements or took the same actions over multiple decades. *See Jien v. Perdue Farms, Inc.*, 2020 WL 5544183, at *4 (D. Md. Sept. 16, 2020) (noting "Fourth Circuit case law holds that a complaint cannot rely on 'indeterminate

[1] CONSOL Marine (a coal export terminal) does not even market or sell any fossil fuel products. *See* Compl. ¶ 29(e) & (f).

assertions against all defendants,'" even when they are in the same corporate family, and must identify each specific defendant's involvement).

Plaintiff's argument that its claims (other than a subset of its Maryland Consumer Protection Act claim) are not subject to a heightened pleading requirement[2] does not save them from dismissal. Plaintiff fails to meet the pleading standard regardless of whether a heightened standard applies. In addition to that failure, all of plaintiff's claims are based on alleged misstatements, and thus sound in fraud. *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"). In a substantially similar lawsuit, a Delaware court recently dismissed all misrepresentation-based tort claims against CONSOL Energy precisely because plaintiff failed to allege any misstatements by CONSOL Energy. *See Delaware v. BP Am. Inc.*, 2024 WL 98888, at *24 (Del. Super. Ct. Jan. 9, 2024).

Plaintiff's claims fail because it identifies no statements or conduct by CONSOL Energy and CONSOL Marine, and cannot rely on statements or conduct by others as discussed below.

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[2] Plaintiff fails to plead its MCPA claim with particularity. *See* Consol Br. at 5-6. Contrary to plaintiff's assertion, the allegations here are not equal to or "more robust" than those in *Lloyd v. General Motors Corp.*, 397 Md. 108, 154 (2007). Opp. at 7-8. In *Lloyd*, the court explicitly acknowledged plaintiff provided "facts that support[ed] [plaintiff's] assertion." *Lloyd*, 397 Md. at 153-54 & n.21 (noting dozens of paragraphs providing facts supporting assertions about all defendants, including, as an example, specific allegations about GM's conduct). Also, the Court should disregard plaintiff's improper attempt to add a new omission-based claim under MCPA Section 13-301(3). Opp. at 8 n. 9; *cf. State Farm Mut. Auto. Ins. Co.* v. *Slade Healthcare, Inc.*, 381 F. Supp. 3d 536, 573 (D. Md. 2019) ("It is axiomatic that the complaint may not be amended by the briefs in opposition to a motion to dismiss.").

II. PLAINTIFF FAILS TO SHOW CONSOL ENERGY AND CONSOL MARINE CAN BE LIABLE FOR OTHERS' STATEMENTS OR CONDUCT.

Having conceded no facts on statements or conduct by CONSOL Energy or CONSOL Marine, plaintiff argues that they are liable for statements or conduct by GCC or other defendants under a theory of concerted action liability, conspiracy, aiding and abetting, and/or principal/agent liability. Opp. at 4-7. Plaintiff cannot point to factual allegations to support any of these theories.[3]

At the threshold, plaintiff argues CONSOL Energy and CONSOL Marine are liable for statements by other defendants (Opp. at 4, 6-7), and bases this argument on "CONSOL Defendants" purported involvement in GCC. Opp. at 4-7. But plaintiff does not allege that CONSOL Energy or CONSOL Marine were members of or otherwise involved in GCC. Compl. ¶ 31(g) (CONSOL Energy and CONSOL Marine not included in list of alleged GCC members).

Despite this, plaintiff argues that CONSOL Energy and/or CONSOL Marine are liable for GCC's statements as successors to CNX Resources Corporation ("CNX") and/or Consolidation Coal Company ("Consolidation"). Opp. at 4-5. But plaintiff also does not allege that CNX was a member of GCC (Compl. ¶ 31(g)), and alleges nothing at all about Consolidation. Even if plaintiff had alleged that CNX or Consolidation were members of GCC, its argument that CONSOL Energy or CONSOL Marine were successors to CNX or Consolidation is not enough to set aside the "general rule" of "successor nonliability." *Nissen Corp. v. Miller*, 323 Md. 613, 617 (1991). Merely being spun off from CNX is not enough to make CONSOL Energy liable for actions and statements of CNX or Consolidation, and does not meet the four limited circumstances where successor liability is appropriate.[4] *Nissen*, 323 Md. at 617 (acquiring corporation does not acquire

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[3] CONSOL Marine is a coal export terminal (*see* Compl. ¶ 29(e) & (f)), not a producer or seller of fossil fuel products, thus refuting its argument that CONSOL Energy closely controls the sale or marketing of fossil fuel products by CONSOL Marine. Opp. at 4 n.4.

[4] Plaintiff does not plausibly allege any misconduct by CNX, *see* CNX MTD § I.A; CNX Reply § I.A.2, or Consolidation, which is not even mentioned in the complaint. But even if "successor liability is a mixed question of

liabilities and debts unless (1) there is an express or implied agreement to assume the liabilities; (2) the transaction amounts to a consolidation or merger; (3) the successor is a mere continuation or reincarnation of the predecessor; (4) the transaction was fraudulent or not made in good faith).

Plaintiff's argument that CONSOL Energy "took over entire business lines from CNX" (Opp. at 5 n.5) does not trigger any of the four exceptions. The continuation of entity exception looks at whether there is "continuation of directors and management, shareholder interest and, in some cases, inadequate consideration," not whether there is merely "continuation of the business operation." *Nissen*, 323 Md. at 620 (internal quotation marks and citation omitted). Plaintiff has not alleged any facts to make this or any of the exceptions applicable.[5]

Even if the Court accepts that CONSOL Energy and CONSOL Marine could be the successors to CNX and/or Consolidation, plaintiff's argument that Consolidation "acted in concert with other Defendants and front groups" still fails to save its claims. *See* Opp. at 5. Plaintiff must allege Consolidation took affirmative steps to support GCC's alleged misconduct. *In re Asbestos Sch. Litig.*, 46 F.3d 1284, 1290 (3d Cir. 1994); *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."). The sole "fact" plaintiff points to is a GCC member's ability to comment on one GCC publication and an indication that it will be

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law and fact" (Opp. at 3), plaintiff's authority says nothing about whether bare allegations that a defendant is a successor are enough to survive a motion to dismiss. *See, e.g.*, *Playmark, Inc. v. Perret*, 253 Md. App. 593, 612-16 (2022) (where predecessor company divided assets and no longer existed, successor companies liable for employment contract they ratified).

[5] Because the general rule is successor nonliability, plaintiff's exhibits purportedly showing Consolidation is CNX's predecessor do not establish that CONSOL Energy is the successor in liability to Consolidation, or that it could be liable for Consolidation's purported participation in GCC. *See* Opp. at 5. n.5. Thus, the Court should deny plaintiff's requests for judicial notice and leave to amend its complaint to add these allegations. *See id*; *see also 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."); Md. Rule 2-322(c) (consideration of "matters outside the pleading" converts a motion to dismiss into a motion for summary judgment, with "all parties [to] be given reasonable opportunity to present all material made pertinent to such a motion").

discussed at the next meeting. Opp. at 5 n.6. Putting aside that plaintiff does not allege that Consolidation either attended that meeting or commented on the document, an opportunity to comment on a document before another party publishes it does not create a reasonable inference of "common design or understanding" or constitute "substantial assistance or encouragement." Plaintiff's cases do not hold otherwise. *See Consumer Prot. Div. v. Morgan*, 387 Md. 125, 177-78, 184-85 (2005) (internal quotation marks and citation omitted) (finding appraiser, investor, and companies controlled by each of them jointly and severally liable under concert of action theory, where parties acted together to obtain mortgages based on artificially inflated prices); *Purdum v. Edwards*, 155 Md. 178, 551-52 (1928) (developer, real estate corporation, and president of real estate corporation held liable for misrepresentations that property was "high and dry" even though it was under water).[6]

Plaintiff's principal/agent, conspiracy, and aiding and abetting theories (which plaintiff concedes apply more narrowly (Opp. at 6)) fail for the same reasons. Plaintiff's supposed "mosaic of facts" (*id.*) are entirely conclusory and do not support the inference that CONSOL Energy or CONSOL Marine, or any purported predecessors, ever intended to enter into an agency relationship with GCC or other companies.[7] *See* Compl. ¶ 32 (alleging without any factual support 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"). Many of the other paragraphs plaintiff

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[6] Plaintiff's tenuous theory of liability based on GCC statements in 1996 (Opp. at 5 n.6 & Ex. 4) has several other problems. First, the alleged GCC statements are protected by the First Amendment, as the complaint alleges that the statements were published "with the specific purpose of preventing U.S. adoption of the Kyoto Protocol." *See* Compl. ¶ 161. Second, plaintiff's extrinsic evidence only purports to show that Consolidation was a member of GCC in 1991. Opp. Ex. 3.

[7] Contrary to plaintiff's argument (Opp. at 6), courts dismiss claims dependent on an agency relationship at the motion to dismiss stage when a complaint's allegations about such relationship are deficient. *See, e.g.*, *Haley v. Corcoran*, 659 F. Supp. 2d 714, 725 (D. Md. 2009); *Proctor v. Metro. Money Store Corp.*, 579 F. Supp. 2d 724, 737 (D. Md. 2008) ("Because the existence of an agency relationship is a factual matter under Maryland law, this Court evaluates . . . whether the factual allegations . . . are legally sufficient to establish an agency relationship.").

cites are about trade associations with no alleged connection to CONSOL Energy and CONSOL Marine.[8] *See, e.g.*, Compl., ¶¶ 31(a)-(f) (allegations about The American Petroleum Institute ("API"); The Western States Petroleum Association; U.S. Oil and Gas Association; Western Oil & Gas Association; and The Information Council for the Environment ("ICE")); 150-52 (allegations about ICE); 162 (allegations about API).

Plaintiff's arguments on conspiracy and aiding-and-abetting merely cite allegations reciting the elements of conspiracy without any supporting facts specific to CONSOL Energy or CONSOL Marine. Plaintiff's failure to allege that CONSOL Energy or CONSOL Marine knowingly participated or gave substantial assistance to any illegal conduct dooms its joint liability theories. *See 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."). Any GCC participation by alleged predecessors is insufficient for the reasons stated above.

III. PLAINTIFF'S DEFICIENT AND INCONSISTENT ALLEGATIONS CANNOT SUSTAIN ITS FAILURE TO WARN CLAIM.

Plaintiff argues it alleges that "CONSOL Defendants" "knew or should have known of their products' climatic hazards based on information shared by the international scientific community and by Defendants' internal research divisions, trade associations, and industry groups" (Opp. at 10), but the allegations it cites say nothing about when, how, or why CONSOL Energy and CONSOL Marine should have known anything. *See, e.g.*, Compl. ¶¶ 111 (allegations about reports API members received); 115 (allegations about a task force convened by API); 137 (allegations about a competitor's internal report). Plaintiff fails to connect the alleged

[8] Plaintiff cannot allege any relationship between CONSOL Energy, a coal producer, or CONSOL Marine, a coal transportation company, and associations of oil producers.

knowledge of climate change to CONSOL Energy or CONSOL Marine, let alone the broader industry. Even if "the industry" were on notice at an unspecified point in time, plaintiff alleges that the link between fossil fuel use and climate change have been widely known for nearly half a century and reported on by reputable U.S. and international authorities. *See* Joint Brief § III.D.2; Joint Reply § I.D.2.

CONCLUSION

For these reasons and those in the Joint Reply, CONSOL Energy and CONSOL Marine respectfully ask the Court to dismiss the claims against them.[9]

[9] Plaintiff's request to amend its complaint should be rejected as futile, as demonstrated by its inability to cite any facts specific to CONSOL Energy or CONSOL Marine in its 130-page, 298 paragraph complaint.

Dated: January 26, 2024

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 26th day of January, 2024, a copy of CONSOL Energy Inc.'s and CONSOL Marine Terminals LLC's Reply in Support of Supplemental Motion to Dismiss was served on all counsel of record via electronic mail (by agreement of the parties).

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