



IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

STATE OF DELAWARE, *ex rel.*  
KATHLEEN JENNINGS, Attorney General of the  
State of Delaware,

Plaintiff,

v.

BP AMERICA INC., BP P.L.C., CHEVRON  
CORPORATION, CHEVRON U.S.A. INC.,  
CONOCOPHILLIPS, CONOCOPHILLIPS  
COMPANY, PHILLIPS 66, PHILLIPS 66  
COMPANY, EXXON MOBIL CORPORATION,  
EXXONMOBIL OIL CORPORATION, XTO  
ENERGY INC., HESS CORPORATION,  
MARATHON OIL CORPORATION, MARATHON  
OIL COMPANY, MARATHON PETROLEUM  
CORPORATION, MARATHON PETROLEUM  
COMPANY LP, SPEEDWAY LLC, MURPHY OIL  
CORPORATION, MURPHY USA INC.,  
ROYAL DUTCH SHELL PLC, SHELL OIL  
COMPANY, CITGO PETROLEUM  
CORPORATION, TOTAL S.A., TOTAL  
SPECIALTIES USA INC., OCCIDENTAL  
PETROLEUM CORPORATION, DEVON ENERGY  
CORPORATION, APACHE CORPORATION, CNX  
RESOURCES CORPORATION, CONSOL  
ENERGY INC., OVINTIV, INC., and AMERICAN  
PETROLEUM INSTITUTE,

Defendants.

C.A. No. N20C-09-097-MMJ CCLD

**DEFENDANT HESS'S MEMORANDUM IN SUPPORT OF ITS  
SUPPLEMENTAL MOTION TO PARTIALLY DISMISS PLAINTIFF'S  
COMPLAINT FOR FAILURE TO STATE A CLAIM ON STATUTE OF  
LIMITATIONS GROUNDS**

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## **STATEMENT OF THE QUESTION INVOLVED**

Whether the five-year statute of limitations applies to bar Plaintiff State of Delaware's, *ex rel.* Kathleen Jennings, Attorney General of the State of Delaware ("Plaintiff") Delaware Consumer Fraud Act ("DCFA") cause of action against Defendant Hess Corporation ("Hess").

## **STATEMENT OF THE CASE**

Pursuant to Delaware Superior Court Civil Rule 12(b)(6), Hess, by and through its undersigned attorneys, having joined in Defendants' Joint Opening Brief in Support of Defendants' Joint Motion to Dismiss Plaintiff's Complaint for Failure to State a Claim ("Joint 12(b)(6) Memo" and "Joint 12(b)(6) Motion" respectively) for the reasons stated therein, respectfully submits this Memorandum in Support of its Supplemental Motion to Partially Dismiss Plaintiff's Complaint for Failure to State a Claim on Statute of Limitations Grounds to address additional statute of limitations arguments specific to Hess. Plaintiff's Fourth Cause of Action against Hess, based on the DCFA, is barred because Plaintiff does not, and cannot, allege any covered actions taken by Hess within the statute of limitations period, and therefore must be dismissed with prejudice.

On September 10, 2020, Plaintiff filed a Complaint against numerous energy companies, including Hess, for alleged damages arising from the alleged effects of climate change. The Complaint includes causes of action for negligent failure to

warn, trespass, nuisance, and violations of the DCFA. Plaintiff's Fourth Cause of Action, alleged violations of the DCFA, is subject to a five-year statute of limitations, under which Plaintiff must allege acts by Hess that violate the DCFA that occurred on or after September 10, 2015. 6 *Del. C.* § 2506. Yet, Plaintiff's Complaint is devoid of *any* specific allegations regarding Hess, let alone conduct within the five years preceding the filing of the Complaint. *See, e.g.*, Compl. ¶¶ 25, 36, 37, 265.

Further, Plaintiff cannot allege any such conduct. Even if Plaintiff is correct that any alleged advertising, marketing, or sale of oil and gas products in Delaware could form the basis of a DCFA claim against Hess, Hess has not sold, advertised, or marketed oil and gas products to consumers in Delaware since the date of its divestiture of all retail marketing assets in Delaware: September 30, 2014. *See* Declaration of Jason Wiley ¶¶ 3-6 ("Exhibit A"). Thus, Hess ceased any activity ostensibly directed towards consumers in Delaware almost a full year before the relevant limitations period. *See* Exhibit A ¶ 6.

### **LEGAL STANDARD**

In considering a 12(b)(6) Motion to Dismiss, this Court must accept all well-pled allegations as true. *Spence v. Funk*, 396 A.2d 967, 968 (Del. 1978). However, it "need not 'accept conclusory allegations unsupported by specific facts or . . . draw unreasonable inferences in favor of the non-moving party,'" nor must it "adopt

‘every strained interpretation of the allegations’ the plaintiff proposes.” *Lima USA, Inc. v. Mahfouz*, 2021 WL 5774394, at \*6 (Del. Super. Ct. Aug. 31, 2021). This Court must then determine whether Plaintiff may recover under any reasonable set of circumstances that are susceptible of proof. *Spence*, 396 A.2d at 968.

To state a claim under the DCFA, 6 *Del. C.* § 2511, *et. seq.*, Plaintiff must allege that (1) Defendants engaged in conduct that violates the statute,<sup>1</sup> (2) Plaintiff was a victim of the unlawful conduct, and (3) a causal relationship exists between Defendants’ unlawful conduct and Plaintiff’s loss. *Teamsters Loc. 237 Welfare Fund v. AstraZeneca Pharm. LP*, 136 A.3d 688, 693 (Del. 2016). The DCFA applies only to fraud that takes place within the State of Delaware. *Marshall v. Priceline.com Inc.*, 2006 WL 3175318, at \*2 (Del. Super. Ct. Oct. 31, 2006) (“DCFA is only applicable if the fraudulent conduct occurs within Delaware.”).

The Delaware General Assembly enacted 6 *Del. C.* § 2506 “to provide a five-year limitation period for actions brought by the Attorney General under various consumer protection statutes,” including the DCFA. *See State ex rel. Brady v. Pettinaro Enterprises*, 870 A.2d 513, 526 (Del. Ch. 2005) (stating that § 2506

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<sup>1</sup> Under the DCFA, “[t]he act, use, or employment by any person of any deception, fraud, false pretense, false promise, misrepresentation, unfair practice, or the concealment, suppression, or omission of any material fact with intent that others rely upon such concealment, suppression, or omission, in connection with the sale, lease, receipt, or advertisement of any merchandise, whether or not any person has in fact been misled, deceived, or damaged thereby, is an unlawful practice.” 6 *Del. C.* § 2513(a).

explicitly limits actions brought by the Attorney General); 6 *Del. C.* § 2506 (“Notwithstanding any other statute to the contrary, no action at law by the Attorney General brought under this chapter shall be initiated after the expiration of 5 years from the time the cause of action accrued.”)

### **ARGUMENT**

Plaintiff’s Complaint was filed on September 10, 2020, and under 6 *Del. C.* § 2506, Plaintiff’s DCFA claim must have accrued on or after September 10, 2015 to be timely. *See Brady*, 870 A.2d at 526. As a result, Plaintiff’s DCFA claim against Hess fails as a matter of law and as a matter of fact for the following reasons:

*First*, Count IV of Plaintiff’s Complaint is devoid of *any* specific allegations regarding Hess, let alone conduct within the five years preceding the filing of the Complaint. *Second*, Plaintiff cannot allege such conduct because by that time Hess had ceased all oil and gas product related commercial activity directed towards consumers in Delaware, including any advertising and/or marketing that could have formed the basis of Plaintiff’s DCFA claim. *Third*, any conduct by Hess outside the State of Delaware within the five-year statute of limitations period cannot form the basis of a DCFA claim.<sup>2</sup> *Fourth*, any discussion of tolling or concealment of the statute of limitations by Plaintiff is unavailing.

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<sup>2</sup> In any event, Hess divested all of its retail marketing assets before the relevant limitations period. *See* Exhibit A ¶ 6.

As a result, Plaintiff's DCFA claim against Hess fails, is barred by the statute of limitations, and must be dismissed.

### **I. Plaintiff Fails To Allege Any Specific Conduct By Hess**

Plaintiff's Complaint contains no specific DCFA allegations against Hess at all—no specific statements, no specific advertisements, nothing—much less any actions within the five-year statute of limitations. Instead, Plaintiff groups all 18 DCFA Defendants together and asserts the same allegations against the collective: that “Defendants” had a duty to disclose certain information “to Delaware consumers in order to prevent their advertising<sup>3</sup> and marketing statements from being misleading, and their failure to do so constituted a misrepresentation and/or omission in violation of the DCFA.” Compl. ¶ 269. Similarly, Plaintiff alleges that “Defendants” intended for Delaware consumers to rely on their alleged omissions to continue purchasing and using their fossil fuel products. Compl. ¶ 272. Plaintiff's Complaint makes clear that the alleged violative conduct consists of “marketing and selling fossil fuels and promoting their unchecked use while concealing and misrepresenting their dangers.”<sup>4</sup> Compl. ¶ 273.

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<sup>3</sup> As defined under the DCFA, “advertisement means the attempt by publication, dissemination, solicitation or circulation to induce, directly or indirectly, any person to enter into any obligation or acquire any title or interest in, any merchandise.” 6 *Del. C.* § 2511(1).

<sup>4</sup> *See* Complaint, ¶ 274 (“Each instance in which the CFA Defendants **have advertised or sold fossil fuel products** and either misrepresented material facts or suppressed, concealed, or omitted material facts related to the harms caused by the



But as to Hess, there are no specific allegations that Hess marketed or sold fossil fuel products in Delaware, or promoted their use while concealing and misrepresenting their dangers—at any time—and certainly not within the five-year statute of limitations. The sum total of Plaintiff’s allegations in its Complaint that even mention Hess include:<sup>5</sup>

- Descriptions of Hess as a corporate entity. Compl. ¶ 25(a)-(d).
- Generic allegations that Hess “wrongfully distributed, marketed, advertised, and promoted its products in Delaware”; made “statements in and outside of Delaware”; and “marketed, advertised, and sold its products both in and outside of Delaware . . . .” Compl. ¶ 25(e).
- Generic allegations that a “significant amount of Hess’s fossil fuel products” have some connection to Delaware and that “during the time relevant to this complaint, Hess owned, operated, and/or franchised Hess-branded service stations in Delaware at which it marketed and sold its fossil fuel products.” Compl. ¶ 25(f).

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intended use of these products was with the intent that consumers, including those in Delaware, would rely upon such suppressions, concealments, or omissions, and constitutes a violation of Section 2513(a) of the Delaware Consumer Fraud Act.”) (emphasis added).

<sup>5</sup> Hess reserves the right to dispute any and all of the allegations in Plaintiff’s Complaint, and inclusion of these allegations here is for purposes of the Motion to Dismiss only.

- Allegation that Hess is or has been “core API members at times relevant to this litigation . . . .” Compl. ¶ 36.
- Generic allegation that Hess (and every other DCFA Defendant) has “persistently misrepresented material facts, or suppressed, concealed, or omitted material facts, with the intent that consumers will rely thereon.” Compl. ¶ 265 (Fourth Cause of Action for alleged DCFA violations).

But nowhere in the Complaint does Plaintiff allege specifically what statements were wrongful, what facts were misrepresented, or what wrongful marketing materials or advertisements were directed by Hess to Delaware. *See* Compl. ¶¶ 264-279. With no specific statements against Hess alleged, Plaintiff has not alleged any specific conduct within the DCFA’s five-year statute of limitations. For this reason alone, the DCFA claim against Hess must be dismissed.<sup>6</sup>

## **II. No DCFA Violative Conduct Could Have Occurred by Hess in Delaware Within the Applicable Statute of Limitations**

While Plaintiff’s current Complaint is plainly insufficient, no amount of amendment can correct it. Plaintiff cannot allege any conduct by Hess within DCFA’s five-year statute of limitations because by that time, Hess ceased any

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<sup>6</sup> As a result, and as argued in the Joint 12(b)(6) Memo, Plaintiff’s Complaint fails to satisfy the Rule 9(b) heightened pleadings standard for claims alleging fraud under Rule 9(b). *See* Joint 12(b)(6) Memo, Argument, Part V (filed concurrently).

activity ostensibly directed towards consumers in Delaware almost a full year before the relevant limitations period, including any advertising and/or marketing that could have formed the basis of Plaintiff's DCFA claim. See Exhibit A ¶¶ 4-6. The Delaware Supreme Court "has repeatedly held that a cause of action 'accrues' . . . at the time of the wrongful act." *Wal-Mart Stores, Inc. v. AIG Life Ins. Co.*, 860 A.2d 312, 319 (Del. 2004). And that is so "even if the plaintiff is ignorant of the cause of action." *Brady*, 870 A.2d at 531 (applying this rule of accrual to claims under the DCFA). But no such acts by Hess could have taken place in Delaware within the five years preceding the filing of this case. For this reason, Plaintiff's DCFA claim is barred by the statute of limitations and must be dismissed.

Hess divested all of its retail marketing assets in Delaware by September 30, 2014. See Exhibit A ¶ 6. Since that time, Hess has not advertised or marketed oil and gas products to Delaware consumers. See Exhibit A ¶ 4. Hess has not made any advertising or marketing statements regarding oil and gas products, or climate change, directed to consumers in Delaware since at least September 30, 2014. See Exhibit A ¶ 5. Additionally, since that time, Hess has not sold any oil and gas products to Delaware consumers. See Exhibit A ¶ 3. As a result, not only does Plaintiff's Complaint fail to allege any actions by Hess in violation of the DCFA within the five-year statute of limitations—Plaintiff **cannot** do so because Hess was

simply not engaged in any such activities directed towards Delaware after September 30, 2014. *See* Exhibit A ¶¶ 3-6.

### **III. Out-Of-State Conduct Cannot Form the Basis of a DCFA Claim**

While Hess divested all of its retail marketing assets as of September 30, 2014, Exhibit A ¶ 6, any sales or advertisements made outside of Delaware cannot give rise to a DCFA claim in any event. 6 *Del. C.* § 2512 (specifying that the purpose of the DCFA is to protect consumers from unfair or deceptive merchandising practices “in the conduct of any trade or commerce in part or wholly within this State.”) Per Delaware precedent, “relief can only be granted under the [DCFA] for unlawful practices occurring or performed partly or wholly within Delaware.” *Wal-Mart Stores, Inc. v. AIG Life Ins. Co.*, 872 A.2d 611, 631 (Del. Ch. 2005), *aff'd in part, rev'd in part* on other grounds, 901 A.2d 106 (Del. 2006) (dismissing DCFA claim where no transaction occurred in Delaware and there were no allegations that any misrepresentations were made in Delaware) (citing *Goodrich v. E.F. Hutton Group, Inc.*, 542 A.2d 1200, 1203 (Del. Ch. 1988)); *see Nieves v. All Star Title, Inc.*, 2010 WL 2977966, at \*4 (Del. Super. Ct. July 27, 2010) (finding 6 *Del. C.* §§ 2512 and 2522(a) “have been applied to bar any attempt to give extraterritorial effect to the DCFA”). Here, even if there was such activity outside the State of Delaware during this time (which there was not), it could not be the basis of a DCFA claim.

Additionally, the mere fact that a company is incorporated in Delaware is not sufficient to permit application of the DCFA to out-of-state conduct. *See Yarger v. ING Bank, fsb*, 285 F.R.D. 308, n. 19 (D. Del. 2012) (“incorporation in Delaware is not sufficient to permit application of the DCFA to out-of-state conduct.”); *see also Priceline.com*, 2006 WL 3175318, at \*2 (“courts have consistently ruled that the DCFA is only applicable if the fraudulent conduct occurs within Delaware.”) Because Plaintiff has failed to allege any violative conduct specific to Hess in Delaware during the applicable statute of limitations, and cannot do so given Hess’s divestiture of its retail marketing assets in September 2014, Plaintiff’s cause of action for violations of the DCFA is barred and must be dismissed.

#### **IV. The DCFA Statute of Limitations Cannot be Tolled or Otherwise Extended**

The statute of limitations cannot be tolled or otherwise extended in this case. Plaintiff claims that “Defendants’ continuing material misrepresentations and omissions” are not time-barred under the five-year statute of limitations. Compl. ¶ 278. However, Hess did not *continue* to make any advertisements or marketing statements regarding oil and gas products towards Delaware consumers after September 30, 2014. *See* Exhibit A ¶¶ 4-5. Accordingly, Hess could not have made the alleged “continuing material misrepresentations or omissions” towards Delaware consumers so as to avoid the statute of limitations.

Plaintiff also alleges that “Defendants’ deceit only recently became discoverable . . .” Compl. ¶ 276 (referring to Part V(I); *see* Compl. ¶¶ 219-225 (Part V(I)). But Plaintiff fails to plead any facts supporting how or why Hess’s purported actions “only recently became discoverable,” *see, e.g.*, Compl. ¶¶ 219-225, and the allegations that do mention Hess, *see, e.g.*, Compl. ¶ 25, are insufficient to support Plaintiff’s application of its alleged tolling exception. *See Brady*, 870 A.2d at 525 (“A plaintiff asserting a tolling exception must plead facts supporting the applicability of that exception.”). And indeed, given that Hess has conducted no marketing, advertising, or sales of oil and gas products to Delaware consumers since September 30, 2014, Exhibit A ¶¶ 3-5, the generic allegations that the conduct “continues to this day,” Compl. ¶ 220, cannot apply to Hess.

Moreover, any alleged violative advertisement or marketing statement made by Hess was easily discernable by Plaintiff, such that Plaintiff’s purported injury was not inherently unknowable or otherwise concealed by Hess. The nature of climate change and the alleged connection to Defendants’ products has been known and widely reported for years, including specifically by Plaintiff, the State of Delaware. It is disingenuous for Plaintiff to now claim that Hess specifically concealed widely-known information within the five years before the filing of Plaintiff’s Complaint (*i.e.*, 2015 – 2020), so as to artificially toll the applicable statute of limitations.

By way of one example, as identified in the Complaint, Plaintiff has been aware of climate change and its impacts on the State and residents since *at least* 2014. Compl. ¶ 11, fn. 9. The Delaware Department of Natural Resources and Environmental Control published a Delaware Climate Change Impact Assessment in February 2014, wherein it identified the connection between the use of fossil fuel products and climate change.<sup>7</sup> This Assessment also identified the potential impact climate change would have on Delaware public health, water resources, agriculture, ecosystems and wildlife, and infrastructure.<sup>8</sup> As Plaintiff was clearly aware of the connection between the use of fossil fuels and climate change before the statute of limitations began to run on September 15, 2015, Plaintiff cannot claim that this connection was concealed by Hess during this time period so as to wholly prevent Plaintiff from knowing about any alleged violative conduct that occurred and bringing suit timely in accordance with the DCFA.

Fraudulent concealment only operates to toll the statute of limitations until a plaintiff discovers its rights or could have discovered them with the exercise of reasonable diligence. *See Brady*, 870 A.2d at 531. Similarly, for a limitations period to be tolled under the doctrine of inherently unknowable injury, “there must have

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<sup>7</sup> Delaware Climate Change Impact Assessment (Feb. 2014), Delaware Department of Natural Resources and Environmental Control, *available at* <https://dnrec.alpha.delaware.gov/climate-coastal-energy/climate-change/>.

<sup>8</sup> *Id.*

been no observable or objective factors to put a party on notice of injury.” *Id.* In this case, because Plaintiff was already aware of the connection between the use of fossil fuels and climate change, as well as the alleged injuries suffered and to be suffered by Plaintiff as a result of said connection, any alleged advertisements or marketing statements made by Hess to the contrary (*i.e.*, alleged violative activity) were open, obvious, and able to be observed and/or discovered by Plaintiff. Thus, the statute of limitations cannot be tolled in this case.

### **CONCLUSION**

Plaintiff's Complaint fails to allege any specific acts by Hess within the DCFA's five-year statute of limitations period, and indeed, Plaintiff cannot do so, as Hess had divested all of its retail marketing assets well before the statute of limitations period in this case began. As a result, Plaintiff's claim against Hess in the Fourth Cause of Action for alleged violations of the DCFA must be dismissed.



Dated: May 18, 2023

GORDON REES SCULLY MANSUKHANI

*/s/ Joseph J. Bellew*

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*Attorneys for Defendant HESS  
CORPORATION*

**CERTIFICATE OF SERVICE**

I, Joseph Bellew, hereby certify that on this 18<sup>th</sup> day of May 2023, I caused a true and correct copy of Defendant Hess's Memorandum in Support of its Supplemental Motion to Partially Dismiss Plaintiff's Complaint for Failure to State a Claim on Statute of Limitations Grounds to be served upon all counsel of record via File & ServeXpress:

*/s/ Joseph J. Bellew*  
Joseph Bellew (DE Bar No. 4816)