IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

STATE OF DELAWARE, *ex rel.* KATHLEEN JENNINGS, Attorney General of the State of Delaware,	)	
Plaintiff,	)	C.A. No. N20C-09-097 MMJ CCLD
v.	)	**TRIAL BY JURY OF 12 DEMANDED**
BP AMERICA INC., *et al.*,	)	
Defendants.	)	

PLAINTIFF'S ANSWERING BRIEF IN OPPOSITION TO DEFENDANT HESS CORPORATION'S SUPPLEMENTAL MOTION TO PARTIALLY DISMISS FOR FAILURE TO STATE A CLAIM ON STATUTE OF LIMITATIONS GROUNDS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Rules

Other Authorities

INTRODUCTION

On September 10, 2020, the State of Delaware filed a 217-page Complaint with numerous detailed allegations about corporate misconduct by Hess Corporation ("Hess")[1] and other defendants (with Hess, "Defendants"). Hess's motion to dismiss under Superior Court Civil Rule 12(b)(6) ("Motion") contends that the five-year statute of limitations applicable to claims under Delaware's Consumer Fraud Act, 6 *Del. C.* § 2511, *et seq.* ("CFA") bars the State's CFA claim against Hess. That argument fails for four main reasons.[2]

First, the Complaint alleges that Hess and other Defendants continue to engage in conduct that violates the CFA, both in and out of Delaware, to this day. And although Hess protests that the State "reference[s] [Hess] only a few times in its Complaint" and does not allege "specific misrepresentations" by Hess, this Court has already rightly rejected analogous arguments in another recent case, denying a motion to dismiss where, as here, the complaint grouped defendants together for purposes of some allegations because they engaged in the same wrongful conduct.

[1] For purposes of the Complaint, "Hess" includes Hess Corporation and its predecessors, successors, parents, subsidiaries, affiliates, and divisions. Compl. ¶ 25(d).

[2] The State incorporates by reference all arguments it asserts in its Answering Brief in Opposition to Defendants' Joint Motion ("Joint Opposition") as if fully set forth herein.

See State ex rel. Jennings v. Purdue Pharma L.P, 2019 WL 446382, at *8 (Del. Super. Feb. 4, 2019) ("*Purdue*").

Second, Hess cannot negate the Complaint's allegations of ongoing misconduct by introducing a self-serving declaration from one of its employees. On a Rule 12(b)(6) motion, the Court is limited to the four corners of the Complaint. It must therefore disregard Hess's premature and improperly submitted declaration.

Third, even if Hess had not engaged in ongoing violations of the CFA (contrary to the allegations in the Complaint), its defense would still fail under the fraudulent concealment doctrine. The Complaint alleges that Hess and other Defendants "deliberately obscured" the existence and operation of their deception campaigns by using front groups and third parties to disseminate their climate disinformation. Compl. ¶¶ 37(b), 39–42, 110–35, 219, 276–77. This fraudulent concealment tolled the statute of limitations, rendering Hess's pre-2015 conduct actionable under the CFA.

Fourth and finally, even assuming *arguendo* that none of Hess's own conduct was timely, the State's CFA claims against Hess would still survive based on the ongoing misconduct of the American Petroleum Institute ("API") and other Defendants. The Complaint identifies specific examples of these other Defendants violating the CFA within the five-year limitations period. *See, e.g.*, Compl. ¶¶ 172–73, 184–85, 195, 198, 201. Those violations are imputable to Hess because, as

alleged, API was acting as Hess's agent and Hess formed a civil conspiracy with API and the other Defendants.

For these reasons, the Court should reject Hess's statute-of-limitations defense and deny its Motion, which impermissibly seeks to resolve disputed questions of fact at the pleading stage.

QUESTIONS INVOLVED

1. Does the Complaint allege that Hess violated the CFA during the five-year limitations period?
2. Can the Court consider evidence that is not referenced in the Complaint on a Rule 12(b)(6) motion?
3. Does the Complaint allege that Hess's fraudulent concealment tolled the statute of limitations for the State's CFA claim?
4. Are the other Defendants' ongoing violations of the CFA imputable to Hess?

ARGUMENT

CFA claims are subject to a five-year statute of limitations. 6 *Del. C.* § 2506. However, where "a defendant knowingly acted to prevent a plaintiff from learning facts or otherwise made misrepresentations intended to 'put the plaintiff off the trail of inquiry,'" the fraudulent concealment doctrine tolls the statute until the plaintiff discovers—or could have discovered through reasonable diligence—the violative

conduct. *State ex rel. Brady v. Pettinaro Enters.*, 870 A.2d 513, 531 (Del. Ch. 2005) (quotation omitted). Because application of this doctrine is highly fact-intensive, courts rarely sustain statute-of-limitations defenses as a matter of law at the pleading stage. *See, e.g.*, *Snyder v. Butcher & Co.*, 1992 WL 240344, at *4 (Del. Super. Sept. 15, 1992) ("[A]s Plaintiffs have successfully pled fraudulent concealment, the affirmative statute of limitations defense turns on a question of fact, and relief on a motion to dismiss is not appropriate."); *cf. Crest Condo. Ass'n v. Royal Plus, Inc.*, 2017 WL 6205779, at *5 (Del. Super. Dec. 7, 2017) (denying summary judgment on statute of limitations grounds because whether fraudulent concealment doctrine tolled the statute of limitations was a "question[] of fact that must be left to the jury"). Hess's defense is no different.

I. The Complaint Alleges Conduct by Hess in Violation of the CFA Within the Statute of Limitations

Hess contends that the Complaint lacks allegations that it engaged in any conduct in violation of the CFA within the five-year statute of limitations. Mot. 7–11. But Hess overlooks the allegations that it and other CFA Defendants continue to violate the CFA to this day.

The Complaint alleges that CFA Defendants, including Hess, have both "individually and in concert" engaged in acts in violation of the CFA, both within and outside of Delaware, "since at least 1977 and continuing through today."

Compl. ¶¶ 270, 275; *see also id.* ¶ 276 (alleging that CFA Defendants' campaign of deception "continues to this day").

Although Hess takes issue with the State's allegations that apply to all Defendants and the number of times that Hess is referenced by name in the Complaint, Mot. 8–10, there is nothing improper in grouping Hess with other Defendants with respect to certain allegations because the Complaint alleges that Hess and the other CFA Defendants engaged in the same fraudulent conduct. A significant portion of the conduct alleged in the Complaint was undertaken by Defendants as a whole, and the allegations in the Complaint appropriately reflect that joint conduct. So long as the Complaint puts Hess on notice of the CFA claims against it, it satisfies the pleading requirements under both Rule 8(a) and Rule 9(b). *See In re Benzene Litig.*, 2007 WL 625054, at *6 (Del. Super. Feb. 26, 2007) (describing "notice pleading" standards applicable to Rule 8 and describing a primary purpose of Rule 9(b)'s heightened particularity standard as "provid[ing] defendants with enough notice to prepare a defense").[3]

As this Court explained in *Purdue*, "that there [a]re no allegations of specific misrepresentations" by certain defendants, or that a defendant is "only

[3] In passing, Hess suggests that Rule 9(b) applies to all the State's claims. Mot. 10 n.6. Rule 9(b) does not apply to the State's CFA, trespass, or public nuisance claims. *See* Joint Opp'n at Part V.A–B. But even if it did, the Complaint would satisfy Rule 9(b)'s particularity standard because it notifies Hess of the conduct that violates the CFA. *See id.* at Part V.C.

referenced . . . specifically a few times in [the] [c]omplaint," is not a basis to dismiss claims against that defendant under Rule 9(b). *Purdue*, 2019 WL 446382, at *8; *see also Grant v. Turner*, 505 F. App'x 107, 112 (3d Cir. 2012) (vacating dismissal of fraud-based claims because "[a]lthough Plaintiffs d[id] not allege who, specifically, made misrepresentations to whom in all cases," complaint sufficiently notified defendants of their charged misconduct); *Swartz v. KPMG LLP*, 476 F.3d 756, 764 (9th Cir. 2007) ("[T]here is no absolute requirement that where several defendants are sued in connection with an alleged fraudulent scheme, the complaint must identify *false statements* made by each and every defendant."). Instead, Delaware courts permit group pleading "so long as individual defendants are on notice of the claim against them." *River Valley Ingredients, LLC v. Am. Proteins, Inc.*, 2021 WL 598539, at *3 (Del. Super. Feb. 4, 2021). In fact, "nothing in Rule 9"—nor Rule 8, for that matter—"*per se* prohibits group pleading." *Id.* Because the cornerstone of Rule 9(b) is notice, a complaint that notifies defendants of the "precise misconduct with which they are charged" suffices even if it charges multiple defendants with the same conduct. *Grant*, 505 F. App'x at 111 (citation omitted); *see also River Valley Ingredients*, 2021 WL 598539, at *3.

Here, the collective allegations referencing "CFA Defendants" are permissible because the State alleges that each CFA Defendant engaged in the same wrongful conduct and fraudulent scheme. This provides Hess with ample notice.

See Joint Opp'n at Part V.C. The Complaint alleges that, in marketing and selling their fossil fuel products, Hess and other CFA Defendants have misrepresented and omitted material facts about the climatic risks posed by and environmental benefits of their products, along with their own efforts to invest in renewable and low-carbon energy, with the intent that consumers rely on those misstatements and omissions. *See, e.g.*, Compl. ¶¶ 20–36, 46(b), 160, 265–79. This conduct has resulted in significant injuries to the State and Delaware consumers, as CFA Defendants predicted. *See id.* ¶¶ 273, 279. These allegations, in addition to those specifically directed at Hess, *see, e.g.*, *id.* ¶ 25(e), suffice to notify Hess of the CFA claim against it. Hess is charged with the same misconduct as the other CFA Defendants, because they engaged in the same conduct, and is on notice of what is alleged.

Indeed, collective pleading is particularly appropriate where, as here, defendants are alleged to have deliberately concealed facts regarding their misconduct, leaving the plaintiff unable to further specify a defendant's actions "absent discovery." *Grant*, 505 F. App'x at 112. Group allegations are likewise appropriate where "information that would permit greater particularity is exclusively within the possession of a defendant, and defendants are alleged to have acted together to facilitate a general scheme." *Hawk Mountain LLC v. Mirra*, 2016 WL 4541032, at *2 (D. Del. Aug. 31, 2016). Both factors are alleged here.

The State alleges that Defendants relied on third parties like API to conceal their participation in their campaigns of deception. *See, e.g.*, Compl. ¶¶ 37(b), 39–42, 134–35. Defendants "deliberately obscured" their efforts to conceal and misrepresent their fossil fuel products' known dangers, *id.* ¶ 134, including through nominally independent organizations like think tanks, citizen groups, and foundations advancing a skeptical view of climate change the Defendants knew to be misleading and false, *see id.* ¶ 135. These groups disseminated climate disinformation "from a misleadingly objective source" on Defendants' behalf, *id.* ¶ 37(b), helping to deliberately conceal their misconduct, *see Grant*, 505 F. App'x at 112. The State's allegations to that effect against multiple defendants are appropriate here.

Group pleading is permissible in circumstances such as these, and Hess is not without notice in order to mount its defense. Although "[a]t the pleading stage, *a defendant* in a group of similar defendants *may attempt to distinguish its behavior* from other defendants," it is not the plaintiff's burden to do so. *Purdue*, 2019 WL 446382, at *8 (emphasis added).

Finally, although Hess argues that its conduct outside of Delaware is irrelevant for purposes of the CFA claim, Mot. 12–13, this argument fails for the simple reason that the CFA protects Delaware consumers "from unfair or deceptive merchandising practices . . . *in part or wholly within* this State." 6 *Del. C.* § 2512

(emphasis added); *see also Goodrich v. E.F. Hutton Grp., Inc.*, 542 A.2d 1200, 1203 (Del. Ch. 1988) ("Relief, therefore, can be granted under the Act only as to those unlawful practices occurring or performed *partly or wholly within Delaware*." (emphasis added)). Contrary to Hess's framing, relief under the CFA is available for out-of-state conduct if "at least some part of the defendant's alleged fraudulent conduct occurred in Delaware." *Nieves v. All Star Title, Inc.*, 2010 WL 2977966, at *4 (Del. Super. July 27, 2010); *see also Marshall v. Priceline.com Inc.*, 2006 WL 3175318, at *2 (Del. Super. Oct. 31, 2006) (requiring only that "some conduct took place in Delaware"). Because the Complaint alleges that at least some of Hess's and other CFA Defendants' conduct forming the basis of the State's CFA claim occurred in Delaware, *see* Compl. ¶¶ 25(f), 270, this requirement is easily satisfied.

Contrary to Hess's assertions, then, the State's allegations against Hess and the other CFA Defendants are proper. These allegations are specific and detailed, and along with the allegations targeted specifically at Hess, suffice to notify Hess of the CFA claim against it.

II. Hess's Reliance on Evidence Outside the Complaint Is Improper

Hess next disputes the allegations in the Complaint through extrinsic evidence. In a declaration attached to Hess's Motion, one of its employees states that Hess has not marketed or sold its products in Delaware since September 30, 2014. *See* Mot. Ex. A. On a Rule 12(b)(6) motion, however, the Court must accept

as true the well-pleaded factual allegations in the complaint. *See Savor, Inc. v. FMR Corp.*, 812 A.2d 894, 896 (Del. 2002). And it may not consider evidence extrinsic to that complaint unless that evidence is (1) "integral to a claim and incorporated into a complaint," (2) "not being relied upon to prove the truths of [its] contents," or (3) an "adjudicative fact subject to judicial notice." *Murray v. Mason*, 244 A.3d 187, 192 (Del. Super. 2020) (the complaint "defines the universe of facts that the trial court may consider in ruling on a Rule 12(b)(6) motion to dismiss").

Hess does not even attempt to argue that any of those three narrow exceptions apply here. Nor could it. The declaration is neither integral to, nor incorporated into, the Complaint. Hess relies on the declaration to prove the truth of its contents—an assertion that the company ceased all activity in Delaware in 2014. This assertion is not capable of judicial notice because it is hotly disputed by the State. *See* D.R.E. 201(b) ("The court may judicially notice a fact *that is not subject to reasonable dispute* . . . ." (emphasis added)); *In re Gen. Motors (Hughes) S'holder Litig.*, 897 A.2d 162, 169 (Del. 2006) ("The trial court may . . . take judicial notice of matters that are not subject to reasonable dispute." (citing D.R.E. 201(b)). The Court should therefore disregard Hess's exhibit and credit the allegations in the Complaint, which

establish that Hess violated the CFA during the five-year limitations period. *See supra* Part I.[4]

III. Hess's Fraudulent Concealment Tolled the Statute of Limitations

Even if the Complaint did not allege conduct by Hess within the statute of limitations, the limitations period is tolled as to Hess's pre-2015 statements because Hess fraudulently concealed the unlawful nature of its deception campaign.

Under the fraudulent concealment doctrine, the statute of limitations is tolled "until [the State] discover[ed] [its] rights or could have discovered them by the exercise of reasonable diligence." *Pettinaro Enters.*, 870 A.2d at 531 (citing *Shockley v. Dyer*, 456 A.2d 798, 799 (Del. 1983)). This doctrine applies when "a defendant knowingly acted to prevent a plaintiff from learning facts or otherwise made misrepresentations intended to put the plaintiff off the trail of inquiry." *Id.* (quotation omitted); *see also AssuredPartners of Va., LLC v. Sheehan*, 2020 WL 2789706, at *12 (Del. Super. May 29, 2020); *Lincoln Nat'l Life Ins. Co. v. Snyder*, 722 F. Supp. 2d 546, 563 (D. Del. 2010). Whether a defendant fraudulently concealed its conduct is generally a question of fact for the jury to resolve. *See Crest Condo. Ass'n*, 2017 WL 6205779, at *5; *Snyder*, 1992 WL 240344, at *4.

[4] Alternatively, if the Court is inclined to consider Hess's exhibit in deciding the statute of limitations issue, it should convert Hess's Rule 12(b)(6) motion into a motion for summary judgment and grant the State leave to take discovery. *See In re Santa Fe Pacific Corp. S'holder Litig.*, 669 A.2d 59, 69 (Del. 1995).

Because Hess fraudulently concealed its CFA violations, the State could not have discovered the full basis of its claims against Hess within the limitations period. The Complaint alleges that Hess, along with the other Defendants, "wrongfully distributed, marketed, advertised, and promoted its products in Delaware, with knowledge that those products would cause climate crisis-related injuries in Delaware, including the State's injuries," and did so "in furtherance of its campaign of deception and denial." Compl. ¶ 25(e). Furthermore, it alleges that statements made by Hess "were intended to conceal and mislead consumers about the serious adverse consequences from continued use of Hess's products." *Id.* The State's Joint Opposition extensively explains how, to cover their tracks, Hess and other Defendants "deliberately obscured" the existence and operation of their deception campaigns by using think tanks, citizen groups, foundations, fringe scientists, and trade associations to spread climate disinformation. *Id.* ¶¶ 37(b), 39–42, 110–35, 219, 276–77; *see also* Joint. Opp'n at Part IV.D.1. In doing so, Hess and other Defendants not only concealed their role in spreading misinformation, but purposefully directed the attention of the State away from them and toward apparently unconnected sources, "put[ting] the [State and other consumers] off the trail of inquiry," and rendering their violative conduct undiscoverable. *See Pettinaro Enters.*, 870 A.2d at 531. Hess and other Defendants' comprehensive campaign of deception and use of front groups obscured their involvement in the spread of

misinformation. It is for a jury to decide when, in light of this conduct, the State reasonably could have discovered the essential facts underpinning its CFA claim against Hess. *See Crest Condo. Ass'n*, 2017 WL 6205779, at *5; *Snyder*, 1992 WL 240344, at *4.

In arguing otherwise, Hess insists that the "nature of climate change and the alleged connection to Defendants' products has been known and widely reported for years," and that therefore the fraudulent concealment doctrine does not apply. Mot. 14–16. However, this argument conflates knowledge of climate change and its impacts with knowledge of the facts underpinning the deceptive nature of Hess's statements. Hess did not violate the CFA by producing fossil fuels; it did so by concealing and misrepresenting the dangers of its products. Accordingly, the State's historical knowledge of climate change, fossil fuel use, and climate impacts is not enough to trigger the limitations clock. Hess's remaining arguments for why fraudulent concealment does not apply, Mot. 13–16, simply amount to reformulations of its arguments (1) about the number of allegations referencing Hess by name or (2) that depend on Hess's improper extra-pleading evidence.

IV. The Allegations Against Other Defendants Can Be Imputed to Hess

Even if Hess itself had not violated the CFA within the limitations period, its defense would fail because, as alleged and supported in the Complaint, the other

Defendants' timely CFA violations can be imputed to Hess under either an agent-principal or conspiracy theory.

An agent's conduct or knowledge can be imputed to a principal by establishing the existence of an agent-principal relationship between the two parties, and that the agent's actions were within the scope of its authority. *Grand Ventures, Inc. v. Whaley*, 622 A.2d 655, 665 (Del. Super. 1992) ("[L]iability for an agent's culpable conduct imputes to the principal if the act falls within the scope of the agent's authority."), *aff'd*, 632 A.2d 63 (Del. 1993); *In re Am. Int'l Grp., Inc.*, 965 A.2d 763, 806 (Del. Ch. 2006) ("[T]he knowledge of an agent is normally imputed to the agent's principal." (citing *E.I. du Pont de Nemours & Co. v. Admiral Ins. Co.*, 1996 WL 111133, at *2 (Del. Super. Feb. 22, 1996))). Such a relationship exists when: (1) the agent has the power to act on behalf of the principal with respect to third parties, (2) the agent does something at the behest of the principal and for the principal's benefit, and (3) the principal has the right to control the agent's conduct. *See Fasciana v. Elec. Data Sys. Corp.*, 829 A.2d 160, 169 n.30 (Del. Ch. 2003). Agency may be express or implied. *J.E. Rhoads & Sons, Inc. v. Ammeraal, Inc.*, 1988 WL 32012, at *4 (Del. Super. Mar. 30, 1988). Finally, an agent may have multiple coprincipals. *See NAMA Holdings, LLC v. Related WMC LLC*, 2014 WL 6436647, at *18 (Del. Ch. Nov. 17, 2014) (citing Restatement (Third) of Agency § 3.16 cmt. b (2006)).

Here, the Complaint alleges that API acted as Hess's agent, which would impute the allegations of API's knowledge and conduct to Hess. The Complaint alleges that Fossil Fuel Defendants, including Hess, "employed and financed" API and other "front groups to serve their climate change disinformation and denial mission," and that API acted on behalf of and under the control of Hess and the other Fossil Fuel Defendants in implementing public relations campaigns, funding shoddy scientific research, denying the reality of climate change, and misrepresenting the link between fossil fuels and climate change. *See* Compl. ¶ 39. Additionally, the Complaint alleges that these "Defendants actively supervised, facilitated, consented to, and/or directly participated in the misleading messaging of these front groups" and profited from their activities. *Id.* And the Complaint details a wide range of examples of conduct API undertook on behalf of Fossil Fuel Defendants. *See, e.g.*, *id.* ¶¶ 37, 39, 62–64, 69–72, 78–80, 92, 122–28, 152(g)–(k), 198–201. In other words, API had the power to act on behalf of Fossil Fuel Defendants by marketing their fossil fuel products and promoting disinformation. API did so at the behest of Fossil Fuel Defendants and for their benefit. And Fossil Fuel Defendants had the right to—and did—supervise and control API's conduct. The Complaint identifies specific examples of statements by API that violate the CFA within the limitations period, including API's "Power Past Impossible" advertisements during the 2017 Super Bowl and a series of Facebook advertisements API ran in 2020 as part of its

"Energy for Progress" campaign. *See, e.g., id.* ¶¶ 198, 201. API's deceptive conduct, which was within the scope of the agency relationship and intended to advance Fossil Fuel Defendants' "climate change disinformation and denial mission," *id.* ¶ 39, is therefore imputable to Hess.

At minimum, whether an agent-principal relationship existed between API and Hess is a question of fact that is premature for resolution at the pleading stage. *See Lang v. Morant*, 867 A.2d 182, 186 (Del. 2005) (because the existence of an agent-principal relationship "depends on the presence of factual elements," it is "a question usually reserved to the factfinder"); *Knerr v. Gilpin, Van Trump & Montgomery, Inc.*, 1988 WL 40009, at *2 (Del. Super. Apr. 8, 1988) ("[W]hether an agency or other type of relationship exists is an intensely factual [inquiry]."); *J.E. Rhoads & Sons, Inc.*, 1988 WL 32012, at *20–21 (denying motion to dismiss because there was "a question of fact as to whether [one defendant] was the agent of [moving defendant]").

Conduct can also be imputed from one party to another where the parties participated in a tortious activity in concert, *Kuczynski v. McLaughlin*, 835 A.2d 150, 156–57 (Del. Super. 2003), or pursuant to a common scheme, Restatement (Second) of Torts § 876(a) (1979). "[C]o-conspirators are jointly and severally liable for the acts of their confederates committed in furtherance of the conspiracy." *Laventhol, Krekstein, Horwath & Horwath v. Tuckman*, 372 A.2d 168, 170 (Del. 1976) (citation

omitted); *see also Empire Fin. Servs., Inc. v. Bank of N.Y. (Del.)*, 900 A.2d 92, 97 n.16 (Del. 2006) (construing Section 876(a) of the Restatement (Second) of Torts as applying to civil conspiracy under Delaware law). A civil conspiracy requires (1) a confederation of two or more persons, (2) an unlawful act done in furtherance of the conspiracy, and (3) actual damage. *Nicolet, Inc. v. Nutt*, 525 A.2d 146, 149–50 (Del. 1987). There need not be an express agreement between co-conspirators to show a person's knowing participation in a conspiracy, as "tacit ratification is sufficient." *Id.* at 148 (quotation omitted). Membership in a trade association and knowledge of the association's wrongful conduct, when "coupled with a consistent later act," suffice to give rise to an inference of knowing participation in a conspiracy. *In re Asbestos Litig.*, 509 A.2d 1116, 1121 (Del. Super. 1986), *aff'd sub nom. Nicolet*, 525 A.2d at 147.

Here, the Complaint sufficiently alleges that Hess and other Fossil Fuel Defendants engaged in a civil conspiracy by and through API to impute the other Defendants' conduct that violated the CFA to Hess. In addition to alleging that Hess was a "core API member[]" at relevant times, Compl. ¶ 37(e), the Complaint alleges that:

> All Fossil Fuel Defendants, by and through API and other organizations . . . , conspired to conceal and misrepresent the known dangers of fossil fuels, to knowingly withhold information regarding the effects of using fossil fuel products, to discredit climate change science and create the appearance such science is uncertain, and to engage in massive campaigns to promote heavy use of their fossil fuel products, which

> they knew would result in injuries to the State. Through their own actions and through their membership and participation in organizations like API . . . , each Defendant was and is a member of that conspiracy.

Id. ¶ 46(b). Moreover, "Defendants committed substantial acts to further the conspiracy in Delaware by making misrepresentations and omissions to Delaware consumers and failing to warn them about the disastrous effects of fossil fuel use." *Id.*; *see also id.* ¶ 25(e) (describing Hess's conduct in furtherance of the deception and denial campaigns). And that conspiracy foreseeably resulted in damage in Delaware, including through the effects of sea level rise, flooding, erosion, loss of wetlands and beaches, and ocean acidification, about which Hess knew or should have known. *Id.* ¶ 46(b). Again, the Complaint identifies specific examples of statements by several of Hess's co-conspirators within the limitations period that violate the CFA, including BP's "Possibilities Everywhere" advertising campaign launched in 2019 and a 2019 Chevron advertisement touting the supposed climate benefits of expanded natural gas production available online as of the filing of the Complaint. *See, e.g.*, *id.* ¶¶ 184–85, 195.

To the extent some of the State's allegations about the relationship between Fossil Fuel Defendants and API group defendants together, that is understandable and permissible. "Delaware courts have recognized that the nature of conspiracies often makes it impossible to provide details at the pleading stage and that the pleader should be allowed to resort to the discovery process and not be subjected to a

dismissal." *Szczerba v. Am. Cigarette Outlet, Inc.*, 2016 WL 1424561, at *2 (Del. Super. Apr. 1, 2016) (cleaned up). Here, because API has been far from transparent, the State cannot be charged with knowledge of each defendant's precise role before engaging in discovery. Whether a conspiracy existed is a factual question best reserved for the jury after the record is developed. *Gannett Co. v. Irwin*, 1985 WL 189242, at *3 (Del. Super. Aug. 9, 1985).

Thus, the Complaint's allegations against API can be imputed to Hess through an agent-principal theory, and the allegations against API and other Fossil Fuel Defendants can be imputed to Hess through a conspiracy theory.

CONCLUSION

For the foregoing reasons, and those in the Joint Opposition, the Court should deny Hess's Motion.

Respectfully submitted,

DELAWARE DEPARTMENT OF JUSTICE

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