**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 REPLY 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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## INTRODUCTION

Plaintiff State of Delaware bases its cause of action for alleged violations of the Delaware Consumer Fraud Act ("DCFA" or "CFA") on the purported "marketing and selling [of] fossil fuels and promoting" their use through misleading communications that caused Delaware consumers to "continue purchasing and using their fossil fuel products." Compl. ¶¶ 269-274. There's just one problem with Plaintiff's theory as it pertains to Hess; Hess did not market, sell, or promote the use of fossil fuels to consumers in Delaware—or anywhere else—after September 30, 2014. As of that date Hess had completely divested all of its retail marketing assets. Hess could not and did not advertise or sell fossil fuels to Delaware consumers in the five years preceding the filing of the Complaint.

Plaintiff nevertheless maintains in its Opposition to Hess's Supplemental Motion to Partially Dismiss Plaintiff's Complaint for Failure to State a Claim on Statute of Limitations Grounds ("Opposition" and "Hess Motion" respectively) that its DCFA claim against Hess survives because (1) Hess allegedly continues to violate the DCFA to "this day" and this Court should ignore the uncontroverted facts that plainly demonstrate otherwise; (2) Hess "fraudulently concealed" claimed DCFA violations prior to September 2014, thereby tolling the statute of limitations; and (3) Hess is liable for the conduct of other Defendants in this case through a theory of agency/principal relationship between Hess and API or a conspiracy theory

with other fossil fuel producers. For the reasons discussed below, each of these theories must fail.[1]

## ARGUMENT

### I. Plaintiff's Generalized Group Allegations Against "All Defendants" Do Not Support a DCFA Claim Against Hess When No Violative Conduct Could Have Occurred Within the Five-Year Statute of Limitations

Plaintiff has not and cannot dispute the simple fact that Hess stopped selling fossil fuels to consumers in Delaware more than five years before Plaintiff filed this case. Instead, Plaintiff dances around this issue by: 1) citing group pleading allegations in the Complaint; 2) attacking the propriety of Hess's declaration; and 3) arguing that Hess is sufficiently on notice. Each of these arguments fails.

First, the question for this Court is whether Plaintiff's DCFA claim—as it pertains specifically to Hess—includes well-pled, non-conclusory allegations supported by specific facts that sufficiently establish violative conduct by Hess within the five-year statute of limitations. *See Lima USA, Inc. v. Mahfouz*, 2021 WL 5774394, at *6 (Del. Super. Ct. Aug. 31, 2021). Of the 217-page Complaint, only 3 paragraphs make allegations about Hess. Hess Mot. 8-10; *see also* Compl. ¶¶ 25, 37, 265. None of these paragraphs allege specific conduct by Hess. Rather, they contain only generic, conclusory allegations, which this Court need not accept as

[1] Plaintiff incorporates by reference its Opposition to Defendants' Joint 12(b)(6) Motion. Hess hereby incorporates the Joint Response in Support of Defendants' Joint 12(b)(6) Motion, filed concurrently, as well.

true. *See Spence v. Funk*, 396 A.2d 967, 968 (Del. 1978). Plaintiff has not alleged any specific violative acts by Hess—at all, but certainly not within the DCFA's five-year statute of limitations. As a result, Plaintiff's DCFA claim against Hess must be dismissed. Hess Mot. 8-10.

Plaintiff defends its lack of specific allegations against Hess, by pointing to generic, conclusory allegations against 18 or more Defendants. *See, e.g.*, Opp'n 1, 2, 4, 5, 7, 9, 12. With respect to this group pleading, Plaintiff claims, "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." Opp'n 7. But pointing to rote allegations against "all Defendants" only underscores that Plaintiff *cannot* allege specific violations by Hess. Plaintiff provides no explanation for how Hess, which ceased all retail operations in Delaware by September 30, 2014, (Hess Mot., Exh. A) could be engaged in the "same conduct" as others or continue to violate the Consumer Fraud Act "to this day," (Opp'n 4) when Hess is not engaging in any consumer-facing conduct in the state at all.

Second, Plaintiff argues that the Court cannot consider Hess's declaration because it is outside the scope of a 12(b)(6) motion. Opp'n 9-11. This is an incorrect analysis of the cited case law and the standard for judicial notice.

In *In re General Motors (Hughes) Shareholder Litigation*, 897 A.2d 162 (Del. 2006), cited by Plaintiff (Opp'n 10), the Supreme Court of Delaware upheld the

dismissal of a complaint on a 12(b)(6) motion where the lower court relied on matters outside of the complaint addressing an alleged omission and misrepresentation. *See In re General Motors*, 897 A.2d at 169-172 (considering the entire Consent Solicitation where the Complaint challenged the adequacy of shareholder disclosures). Here, the same reasoning applies: Plaintiff alleges that Hess continues to violate the DCFA through misleading advertising and marketing to this day, putting whether Hess continued retail operations directly at issue. Opp'n 4. The declaration simply addresses the fact that Hess sold all its retail marketing assets in September 2014. If Hess engaged in public advertising during this time period—a necessary element of Plaintiff's DCFA claim—Plaintiff fails to identify it. Plaintiff has not because it cannot.

Alternatively, this Court can take judicial notice of Hess's SEC filings that similarly establish that Hess divested its retail marketing assets in September 2014.[2] *See In re General Motors*, 897 A.2d at 170 (approving judicial notice of "publicly available facts" that illustrated the defendants' arguments, specifically, statements in an SEC Form 10-Q). Plaintiff argues this is "hotly disputed by the State," and

[2] *See, e.g.*, Hess Corp.'s 2014 10-K, at 11, 33, 34, 60 (filed Feb. 26, 2015) (describing the divestiture of retail business in September 2014) (*available at*: sec.gov/Archives/edgar/data/4447/000156459015001040/hes-10k_20141231.htm); Hess Corp.'s Sept. 30, 2014 10-Q, at 7, 8, 28, 36 (filed Nov. 10, 2014) (same) (*available at:* sec.gov/Archives/edgar/data/4447/000156459014005364/hes-10q_20140930.htm).

therefore judicial notice is inappropriate. Opp'n 10. But Plaintiff only disputes taking judicial notice of this fact at this stage. Nowhere does Plaintiff challenge whether Hess indeed divested itself of all retail marketing assets in September 2014. Opp'n 9-11.

Third, Plaintiff spends much of its Opposition arguing that Hess is sufficiently on notice of the DCFA claims against it, and that the Complaint satisfies the pleading requirements of both Rule 8(a) and Rule 9(b). Opp'n 5-6. This is both erroneous and a red herring.

As an initial matter, Plaintiff argues that Rule 9(b) is satisfied by the "group pleading" of allegations in the Complaint, Opp'n 6-8, but the main case cited actually supports Hess's Motion. In *Grant v. Turner*, 505 F. App'x 107, 112 (3d Cir. 2012), cited by Plaintiffs (Opp'n 6-8), *for two of the defendants*, the Third Circuit upheld dismissal of the RICO claims because "by grouping VTC [(one particular defendant)] together with the Travel Club Defendants [(a separate group of individual and corporate defendants)], Plaintiffs *do not adequately allege* that VTC *itself* agreed to commit the predicate acts of fraud, nor do they adequately allege knowledge that the acts were part of a pattern of racketeering activity." *Grant*, 505 F. App'x at 112 (emphasis added). That is precisely the problem with Plaintiff's Complaint against Hess—it fails to adequately allege that Hess itself engaged in violative conduct within the five-year statutes of limitations.

Next, Plaintiff's Complaint relies on "group pleading" to allege that each fossil fuel producing Defendant *individually* advertised or marketed its own products in the State of Delaware during the five-year statute of limitations. Opp'n 6 ("the State alleges that each CFA Defendant engaged in the same wrongful conduct and fraudulent scheme"). In other words, Plaintiff's DCFA claim argues that Hess itself used misleading advertising in support of sales of its own fossil fuel products. As a result, even if it is true that the Complaint alleges actions by Defendants as a *group*—it does not put Hess on notice as to how Plaintiff claims Hess "individually" has violated or can violate the DCFA "through today." *See, e.g.*, Opp'n 4; Compl. ¶¶ 270, 275, 276. Especially when, as here, it is uncontroverted that Hess did not engage in any such activity during that time.

Finally, and most critically, the focus on whether there is sufficient notice misses the larger point. The lack of specific allegations against Hess goes not just to lack of notice, but to Plaintiff's *inability* to produce a single allegedly misleading advertisement or communication by Hess to Delaware consumers at any time much less within the past five years. Again, Hess ceased any 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. Hess Mot., Exh. A ¶¶ 4-6.

## II. Plaintiff Cannot Toll the DCFA Statute of Limitations as to Hess Based on the Complaint's Allegations of "Fraudulent Concealment"

After failing to allege even a single DCFA violative act by Hess during the five-year statute of limitations period, Plaintiff next claims that Hess engaged in DCFA violations *prior to* September 2014, and that Hess's subsequent "fraudulent concealment" tolled any statute of limitations under the DCFA. Opp'n 11-13. However, 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 State ex rel. Brady v. Pettinaro Enterprises,* 870 A.2d 513, 531 (Del. Ch. 2005). "Tolling ends when the plaintiff is placed on inquiry notice, in the sense that the plaintiff knew or should have known about the wrongful act." *Lebanon Cnty. Employees' Retirement Fund v. Collis*, 287 A.3d 1160, 1214 (Del. Ch. Dec. 15, 2022).

In this case, Plaintiff's Complaint alleges it was aware of a connection between the use of fossil fuels and climate change since at least as early as 2014. Compl. ¶ 11, fn. 9; *see also* Hess's Mot. 14-15; *accord* Jt. 12(b)(6) Mot. 56-57, 61-62. Plaintiff also knew the alleged injuries suffered and to be suffered by Plaintiff as a result of climate change by that time. *See id*. This is apparently undisputed (Opp'n 13), and instead Plaintiff argues that "the State's historical knowledge of climate change, fossil fuel use, and climate impacts is not enough to trigger the

limitations clock." *Id.* Plaintiff argues alternatively that it is "for a jury to decide" when the State reasonably could have discovered these facts. *Id.* at 12-13.[3]

But this ignores the elements of Plaintiff's DCFA claim. Any alleged violative activity under the DCFA—*i.e.*, misleading advertisements or marketing statements made by Hess to the public—were necessarily open, obvious, and able to be observed and/or discovered by Plaintiff. When coupled with the State's admitted "knowledge of climate change, fossil fuel use, and climate impacts," Delaware was on "inquiry notice," certainly by 2014, of its potential claims against Hess and any purported tolling ended at that time. *See Lebanon*, 287 A.3d at 1214; *see also Brady,* 870 A.2d at 531. Despite this, and without explanation, Plaintiff waited more than five years, *after* the DCFA statute of limitations had run, to brings its claim against Hess. Plaintiff never explains what reasonable diligence it took to investigate its purported claims against *Hess* once it was put on notice in 2014.[4]

Plaintiff then alleges that "Defendants' deceit only recently became discoverable." Opp'n 12. But fraudulent concealment "requires that something

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[3] As Plaintiff acknowledges, however, the threshold question is whether "fraudulent concealment" is "successfully pled." Opp'n Jt. 12(b)(6) Mot. 50 (*citing Snyder v. Butcher & Co.*, 1992 WL 240344, at *4 (Del. Super. Sept. 15, 1992). As described below, Plaintiff has failed to plead fraudulent concealment against Hess.

[4] Plaintiff's claimed ignorance is no defense. Elsewhere, Plaintiff argues that it was unaware of the "campaign of deception" until September 2015 news articles. Opp'n Jt. 12(b)(6) Mot. 50-51. "Mere ignorance of the facts by a plaintiff, where there has been no such concealment, is no obstacle to operation of the statute." *Halpern*, 313 A.2d at 143.

affirmative be done by a defendant, some 'actual artifice' which prevented a plaintiff from gaining knowledge of the facts, or some misrepresentation which is intended to put the Plaintiff off the trail of inquiry." *Halpern v. Barran*, 313 A.2d 139, 143 (Del. Ch. 1973). Here, Plaintiff fails to plead any facts demonstrating an affirmative "actual artifice" by Hess that prevented Plaintiff from gaining knowledge of the facts. *See, e.g.*, Compl. ¶¶ 219-225. That is fatal to its claim of "fraudulent concealment" against Hess, especially considering the fact that "[a] plaintiff asserting a tolling exception must plead facts supporting the applicability of that exception." *Brady*, 870 A.2d at 525.

Plaintiff's allegation of fraudulent concealment suffers the same defect as its generalized allegations elsewhere: they fail to put Hess on sufficient notice of the allegations against it. Here, there is no dispute that Rule 9(b) applies: "[w]hen a plaintiff relies on fraudulent concealment, the plaintiff must plead the circumstances supporting the doctrine with particularity sufficient to advise the defendant of the basis for the claim." *Lebanon*, 287 A.3d at 1215 (*citing* Delaware Court of Chancery Rule 9(b)); *see also Halpern*, 313 A.2d at 143 (same, stating "Those allegations must have 'particularity sufficient to advise the charged defendant of the basis of the claim[.]'").

Yet, Plaintiff's Complaint lacks any particular allegations of "fraudulent concealment" by Hess. *See* Compl. ¶ 25(e) (Hess's alleged acts); *cf.* Compl. ¶ 276

(DCFA fraudulent concealment claim against "all CFA Defendants"); Compl. ¶¶ 219-225 (describing the alleged campaign of deception by "Defendants"). Instead, Plaintiff returns to its now well-worn argument that by alleging fraudulent concealment against "all Defendants," it has sufficiently put Hess on notice. Opp'n 12-13.

Even assuming *arguendo* that Plaintiff's generic allegations against all "CFA Defendants" can be relied upon to put Hess on notice under Rule 9(b), those generalized allegations are insufficient, as Plaintiff merely uses the word "fraud" and its synonyms without alleging any particularized conduct. *See, e.g.*, Compl. ¶ 276 (alleging "CFA Defendants" "engaged in a campaign of deception," that they "affirmatively concealed their fraud," and that they "conceal[ed] their lies from the public"). This is simply not enough to satisfy Rule 9(b), as "mere use of the word 'fraud' or its equivalent is not a sufficiently particular statement of the circumstances relied upon." *Halpern*, 313 A.2d at 143. Moreover, because Hess ceased the marketing, advertising, and sale of fossil fuels to Delaware consumers by September 30, 2014, (Hess Mot., Exh. A ¶¶ 3-5), the generic allegation that any conduct "continues to this day," Compl. ¶ 220, is patently false and cannot put Hess on notice of any specific acts under Rule 9(b).

## III. Allegations Against Other Defendants Cannot Be Imputed to Hess

Plaintiff attempts to salvage its DCFA claim against Hess by creatively arguing that *other* Defendants' alleged actions during the five-year statute of limitations[5] can be imputed to Hess through (i) a theory of agency/principal relationship between Hess and API (Opp'n 13-16); or (ii) a conspiracy with other fossil fuel producers (Opp'n 16-19). But on their face, each argument is non-sensical: there are zero specific allegations as to Hess's alleged "control" over API as an agent; zero explanation for how API's purported acts were within any "scope of employment" as a purported agent; and zero allegations that Hess was anything more than a "member" of API.[6] As to the alleged conspiracy between 18 defendants: there are zero allegations as to Hess's specific role and zero explanation as to how such a conspiracy would work in the context of competitors' advertising their own products.

Furthermore, this last-ditch attempt again fails to deal with the simple fact that Hess had zero retail operations after September 30, 2014, and therefore zero motivation to "mislead" retail customers directly or through some supposed theory

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[5] Plaintiff has not actually alleged actions by other Defendants during the five-year statute of limitations. *See* Jt. 12(b)(6) Mot. 60.

[6] Membership alone is insufficient to allege a theory of agency or conspiracy. *Cf. In re Asbestos Sch. Litig.*, 46 F.3d 1284, 1289 (3d Cir. 1994) ("For liability to be imposed by reason of association alone, it is necessary to establish that the group itself possessed unlawful goals and that the individual held a specific intent to further those illegal aims.").

of agency or conspiracy. No alleged "agent" could mislead the public on Hess's behalf, because Hess simply did not sell oil and gas products to consumers in Delaware.[7] (Hess Mot., Exh. A ¶¶ 3-6) For this same reason, there was no purpose for Hess to be involved in any alleged "conspiracy" to mislead Delaware consumers.[8] Plaintiff's belated arguments of agency and conspiracy fail to save its DCFA claim against Hess.

## CONCLUSION

For the reasons stated above, Plaintiff's Fourth Cause of Action for alleged violations of the DCFA must be dismissed.

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[7] *See* Restatement (Second) of Agency § 235 (1958) ("An act of a servant is not within the scope of employment if it is done with no intention to perform it as a part of or incident to a service on account of which he is employed.")

[8] *See Weinberger v. UOP, Inc.*, 426 A.2d 1333, 1348 (Del. Ch. 1981), *rev'd on other grounds*, 457 A.2d 701 (Del. 1983) (conspiracy requires a combination of persons "for an unlawful purpose, or a combination for the accomplishment of a lawful purpose by unlawful means.")

Dated: August 17, 2023

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## CERTIFICATE OF SERVICE

I, Joseph Bellew, hereby certify that on this 17th day of August 2023, I caused a true and correct copy of Defendant Hess's Reply 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*
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