

MAYOR AND CITY COUNCIL
OF BALTIMORE

Plaintiff,

v.

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

Defendants.

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IN THE

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CIRCUIT COURT

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FOR BALTIMORE CITY

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CASE NO. 24-C-18-004219

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CIVIL DIVISION

**DEFENDANT HESS'S SUPPLEMENTAL MOTION TO PARTIALLY DISMISS
PLAINTIFF'S COMPLAINT FOR FAILURE TO STATE A CLAIM UPON WHICH
RELIEF CAN BE GRANTED ON STATUTE OF LIMITATIONS GROUNDS AND
REQUEST FOR HEARING**

Having joined in Defendants' Joint Motion to Dismiss for Failure to State a Claim Upon Which Relief Can be Granted for the reasons set forth in Defendants' Memorandum of Law in Support of that Motion, pursuant to Maryland Rule 2-322(b)(2) and the August 15, 2023 Order of this Court, Defendant Hess Corporation ("Hess") respectfully submits this Supplemental Motion to Partially Dismiss Plaintiff's Complaint for Failure to State a Claim Upon Which Relief Can be Granted on Statute of Limitations Grounds to address additional statute of limitations arguments specific to Hess. For the reasons set forth in Defendant Hess's accompanying Memorandum in Support of this Motion, Plaintiff's Eighth Cause of Action against Hess for alleged violations of the Maryland Consumer Protection Act should be dismissed with prejudice.

REQUEST FOR HEARING

Pursuant to Maryland Rule 2-311(f), Hess respectfully requests a hearing on all issues raised in this Motion and the accompanying Memorandum of Law.

Dated: October 16, 2023

Respectfully submitted,



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Attorneys for Defendant HESS CORPORATION

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 16th day of October, 2023, a copy of the foregoing, Defendant Hess's Supplemental Motion to Partially Dismiss Plaintiff's Complaint for Failure to State a Claim Upon Which Relief Can Be Granted On Statute of Limitations Grounds, was served via email, as agreed by the parties, on the following:

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MAYOR AND CITY COUNCIL
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Plaintiff,

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Defendants.

* * * * *

* IN THE
* CIRCUIT COURT
* FOR BALTIMORE CITY
* CASE NO. 24-C-18-004219
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**DEFENDANT HESS'S MEMORANDUM OF LAW IN SUPPORT OF ITS
SUPPLEMENTAL MOTION TO PARTIALLY DISMISS PLAINTIFF'S COMPLAINT
FOR FAILURE TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED ON
STATUTE OF LIMITATIONS GROUNDS**

Defendant Hess Corporation ("Hess"), by its undersigned attorneys and pursuant to Maryland Rule 2-322(b)(2), files this Memorandum of Law in Support of its Supplemental Motion to Partially Dismiss Plaintiff's Complaint for Failure to State a Claim Upon Which Relief Can Be Granted on Statute of Limitations Grounds. For the reasons set forth below, this Court should dismiss Plaintiff's Eighth Cause of Action against Hess for alleged violations of the Maryland Consumer Protection Act with prejudice.

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I. INTRODUCTION AND BACKGROUND

Pursuant to Maryland Rule 2-322(b)(2) and the August 15, 2023 Order of this Court, Hess, by and through its undersigned attorneys, having joined in Defendants' Memorandum of Law in Support of Defendants' Motion to Dismiss for Failure to State a Claim Upon Which Relief Can be Granted, respectfully submits this Memorandum in Support of its Supplemental Motion to Partially Dismiss Plaintiff's Complaint for Failure to State a Claim Upon Which Relief Can be Granted on Statute of Limitations Grounds to address additional statute of limitation arguments specific to Hess.

On July 20, 2018, Plaintiff Mayor and City Council of Baltimore ("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 public and private nuisance, strict liability and negligent failure to warn, strict liability and negligent design defect, trespass, and violations of the Maryland Consumer Protection Act ("MCPA"), Md. Code Ann., Com. Law § 13-301 *et. seq.* Plaintiff's Eighth Cause of Action, Compl. ¶¶ 291-298, based on alleged violations of sections 13-301(1) and (9) of the MCPA, is subject to a three-year statute of limitations, under which Plaintiff must allege acts by Hess that violate the MCPA that occurred on or after July 20, 2015. *See, e.g.*, Md. Code Ann., Cts. & Jud. Proc. § 5-101; *see also Cain v. Midland Funding, LLC*, 475 Md. 4, 39 (2021) (applying three-year statute of limitation to MCPA claim). Yet, Plaintiff's Complaint is devoid of *any* specific allegations regarding Hess, let alone conduct within the three years preceding the filing of the Complaint. *Compare* Compl. ¶¶ 28, 31 (only mentions of Hess) *with* Compl. ¶¶ 291-298 (MCPA cause of action). And while this alone would be dispositive, Hess moves not just because Plaintiff failed to allege such conduct. Rather, Hess moves also because Plaintiff cannot do so. Hess has not sold, advertised, or marketed oil and

gas products to consumers in Maryland since before September 30, 2014, when it divested all of its retail marketing assets throughout the U.S., including those in Maryland. *See* Affidavit of Jason Wiley ¶¶ 3-6 (“Exhibit A”). Thus, Hess ceased any activity even ostensibly directed towards consumers in Maryland relating to fossil fuel products well before the relevant limitations period. *See* Exhibit A ¶ 6.

II. LEGAL STANDARD

Upon review of a motion to dismiss for failure to state a claim upon which relief can be granted, this Court must order dismissal if the “well-pleaded facts and allegations in the complaint” and “permissible inferences, if true, would not afford relief to the plaintiff, *i.e.*, the allegations do not state a cause of action.” *Lloyd v. Gen. Motors Corp.*, 397 Md. 108, 121 (2007). The Court need “not consider, however, merely conclusory charges that are not factual allegations.” *Morris v. Osmose Wood Preserving*, 340 Md. 519, 531 (1995); *see Lloyd*, 397 Md. at 121; *see also McIntyre v. Guild, Inc.*, 105 Md. App. 332, 343 (1995) (limiting review “to specific allegations of fact and the inferences deducible from them, and not ‘merely conclusory charges’”). “[A]ny ambiguity or uncertainty in the allegations bearing on whether the complaint states a cause of action must be construed against the pleader.” *Ronald M. Sharrow, Chartered v. State Farm Mut. Auto. Ins. Co.*, 306 Md. 754, 768 (1986).

To state a claim under the MCPA, Plaintiff must allege that Hess’s conduct was “(1) an unfair or deceptive practice or misrepresentation that [was] (2) relied upon, and (3) cause[d] them actual injury.” *Stewart v. Bierman*, 859 F.Supp.2d 754, 768 (D. Md. 2012) (citing *Lloyd*, 397 Md. at 140), *aff’d sub nom. Lembach v. Bierman*, 528 F. App’x 297 (4th Cir. 2013). Where “the alleged misrepresentations were not made in the course of a sale, Plaintiffs’ MCPA claims fail as a matter of law.” *Rutherford v. BMW of N. Am., LLC*, 579 F.Supp.3d 737, 751 (D. Md. 2022); *accord Md.*

Code Ann., Com. Law § 13-303(a). “[A] claim for money damages under the MCPA is subject to the three-year statute of limitations.” *Cain*, 475 Md. at 39; *see Master Fin., Inc. v. Crowder*, 409 Md. 51, 65 (2009) (applying Md. Code Ann., Cts. & Jud. Proc. § 5-101 in finding that MCPA claims are subject to the three-year period of limitations) (citing *Greene Tree Home Owners Ass’n, Inc. v. Greene Tree Assocs.*, 358 Md. 453 (2000)).

III. ARGUMENT

Plaintiff’s Complaint was filed on July 20, 2018. Under Md. Code Ann., Cts. & Jud. Proc. § 5-101, Plaintiff’s MCPA claim must have accrued on or after July 20, 2015, to be timely. *See Cain*, 475 Md. at 39. As a result, Plaintiff’s MCPA claim against Hess fails as a matter of law and as a matter of fact for the following reasons:

First, Plaintiff’s Complaint lacks *any* specific allegations regarding conduct by Hess that is violative of the MCPA, let alone conduct within the three years preceding the filing of the Complaint. *Second*, Plaintiff cannot allege such conduct because by that time Hess had ceased all retail sales of oil and gas products in Maryland, including any advertising and/or marketing that could have formed the basis of Plaintiff’s MCPA claim. *Third*, any discussion of tolling or concealment of the statute of limitations by Plaintiff is unavailing. As a result, Plaintiff’s MCPA claim against Hess fails, is barred by the statute of limitations, and must be dismissed.

A. Plaintiff Fails to Allege Any Specific Conduct by Hess

Plaintiff’s Complaint contains no specific MCPA allegations against Hess at all—no specific misstatements, no specific unfair or deceptive advertisements, nothing—much less any actions within the three-year statute of limitations. Instead, Plaintiff groups all 26 Defendants together and asserts the same allegations against the collective: that Defendants “engaged in deceptive marketing and promotion of their products” by making “false and misleading

statements” and “omissions of material fact” with “the intent that consumers would rely on those representations.” Compl. ¶ 295. Plaintiff’s Complaint makes clear that the alleged violative conduct consists of “making false and misleading statements regarding the known severe risks posed by their fossil fuel products that had the capacity, tendency, or effect of misleading consumers and by [] making false representations and misleading omissions of material fact regarding the known severe risks posed by their fossil fuel with the intent that consumers would rely on those representations.” Compl. ¶ 295.

However, there are no examples of how Hess marketed, promoted, or sold fossil fuel products in Maryland while concealing and misrepresenting their dangers—at any time—and certainly not within the three-year statute of limitations. The sum total of Plaintiff’s allegations in its Complaint that even mention Hess include:¹

- Descriptions of Hess as a corporate entity. Compl. ¶ 28(a)-(d).
- Generic allegations regarding Hess’s activity (or former activity) in Maryland, such as directing “substantial fossil fuel-related business to Maryland” and marketing “gasoline and other fossil fuel products to consumers in Maryland, including through petroleum service stations.” Compl. ¶ 28(e). Plaintiff also generically alleges that a “substantial portion of Hess’s fossil fuel products are or have been extracted, refined, transported, traded, distributed, promoted, marketed, manufactured, sold, and/or consumed in Maryland.” Compl. ¶ 28(e).
- Allegation that Hess and/or its “predecessor in interest are and/or have been API members at times relevant to this litigation.” Compl. ¶ 31(a).

¹ 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 the U.S. Oil & Gas Association's membership "has included" Hess. Compl. ¶ 31(c).

Nowhere in the Complaint does Plaintiff allege specifically what statements or facts were false, misleading, wrongful, or otherwise actionable or what deceptive marketing and/or promotion materials or advertisements were directed by Hess to Maryland. *See* Compl. ¶¶ 291-298. Plaintiff has not alleged any specific conduct within the MCPA's three-year statute of limitations. Instead, Plaintiff alleges only that Hess conducted retail operations "prior to 2014," which is outside the applicable statute of limitations. Compl. ¶ 28(b). For this reason alone, the MCPA claim against Hess must be dismissed.²

B. No MCPA Violative Conduct Could Have Occurred by Hess in Maryland Within the Applicable Statute of Limitations

No MCPA violative conduct by Hess could have taken place in Maryland within the three years preceding the filing of this case. Hess divested all of its retail marketing assets in Maryland by September 30, 2014. *See* Exhibit A ¶ 6. Since that time, Hess has not advertised or marketed oil and gas products to Maryland 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 Maryland since at least September 30, 2014. *See* Exhibit A ¶ 5. Additionally, since that time, Hess has not sold any oil and gas products to Maryland consumers. *See* Exhibit A ¶ 3. As a result,

² As a result, Plaintiff's Complaint fails to satisfy the heightened pleadings standard for MCPA claims that replicate common-law fraud, as Plaintiff's claims under section 13-301(9) do here. *See McCormick v. Medtronic, Inc.*, 219 Md. App. 485, 529 (2014) (finding that "if a party alleges an 'unfair or deceptive trade practice' under [Md. Code Ann., Com. Law § 13-301(9)], he or she must allege fraud with particularity"); *see also* Compl. ¶ 292 (citing § 13-301(9)). "The requirement of particularity ordinarily means that a plaintiff must identify who made what false statement, when, and in what manner (*i.e.*, orally, in writing, etc.)," among other requirements. *See McCormick*, 219 Md. App. at 528. Plaintiff's Complaint fails to meet such particularity requirements.

not only does Plaintiff's Complaint fail to allege any actions by Hess in violation of the MCPA within the three-year statute of limitations, but Plaintiff *cannot* do so because Hess was simply not engaged in any such activities directed towards Maryland after September 30, 2014. *See* Exhibit A ¶¶ 3-6. The public record maintained by the SEC, as can be considered by this Court, also provides support for Hess's divestiture.³ For these reasons, the Court can and should consider the sworn affidavit submitted with this Motion that simply addresses the fact that Hess sold all of its retail marketing assets in September 2014.⁴ If Hess engaged in public advertising to Maryland consumers during this time period—a necessary element of Plaintiff's MCPA claim—Plaintiff fails to identify it. Plaintiff has not because it cannot, and in fact, Plaintiff admits that Hess conducted retail operations “prior to 2014,” which is outside the applicable statute of limitations. Compl. ¶ 28(b).

³ *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); *see also* 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).

⁴ In the alternative, Hess requests this Court take judicial notice of the SEC filings, 10-K and 10-Q, identified in footnote 3. Md. Rule 5-201 (Maryland Courts have the discretion to take judicial notice “at any stage of the proceeding” of adjudicative facts, including facts that are not subject to reasonable dispute in that it is either “(1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.”); *see Faya v. Almaraz*, 329 Md. 435, 444-47 (1993) (taking judicial notice of additional facts that are capable of certain verification in the context of a motion to dismiss, such as those facts that are “capable of immediate and certain verification by resort to sources whose accuracy is beyond dispute.”); *see also Dashiell v. Meeks*, 396 Md. 149, n. 6 (2006) (explaining that adjudicative facts under Md. Rule 5-201 can include “facts about the parties and their activities, businesses and properties. They usually answer the questions of who did what, where, when, how, why, with what motive or intent.”) (quoting *Montgomery County v. Woodward & Lothrop, Inc.*, 280 Md. 686, 711-12 (1977)); *see also In re Humphrey Hospitality Trust, Inc. Securities Litigation*, 219 F.Supp.2d 675, n. 7 (D. Md. 2002) (showing that federal courts in Maryland have also historically taken judicial notice of defendant company's SEC filings).

**C. There is No Basis to Toll or Otherwise Extend the MCPA Statute of Limitations
as to Hess**

The statute of limitations cannot be tolled or otherwise extended in this case. Plaintiff generically claims that Defendants' alleged violative conduct occurred "[t]hroughout all times at issue." Compl. ¶ 295. However, as proven, Hess did not make any advertisements or marketing statements regarding oil and gas products to Maryland consumers after September 30, 2014. *See* Exhibit A ¶¶ 4-5. Accordingly, Hess could not have performed any violative conduct "[t]hroughout all times at issue." Compl. ¶ 295.

Moreover, Plaintiff does not assert any conduct by Hess that would operate to toll the applicable statute of limitations. *See* Compl. ¶¶ 291-298. Plaintiff does not contend that any alleged violative action by Hess only recently became discoverable, nor can Plaintiff do so. *See, e.g., Dual Inc. v. Lockheed Martin Corp.*, 383 Md. 151, 170 (2004) ("The aggrieved party asserting such fraud or concealment must plead affirmatively and with specificity the supporting facts in its complaint."); *see also Doe v. Archdiocese of Washington*, 114 Md. App. 169, 187 (1997) ("[T]he complaint relying on the fraudulent concealment doctrine must also contain specific allegations of how the fraud kept the plaintiff in ignorance of a cause of action, how the fraud was discovered, and why there was a delay in discovering the fraud, despite the plaintiff's diligence.") The only allegations that even mention Hess are generic and conclusory, and would therefore be insufficient to support the application of a tolling exception for fraudulent concealment. *See, e.g.,* Compl. ¶ 28.

In arguendo, a claim of fraudulent concealment ignores the elements of Plaintiff's MCPA claim. Any alleged violative activity under the MCPA—*i.e.*, alleged misleading advertisements or marketing statements made by Hess to Maryland consumers—were necessarily open, obvious,

and able to be observed and/or discovered by Plaintiff. Additionally, the nature of climate change and the alleged connection to Defendants' fossil fuel products has been known and widely reported for years, including in a number of state, national, and international reports cited specifically by Plaintiff.⁵ Plaintiff even admits in its Complaint that "Defendants" previously "recognized that the science of anthropogenic climate change was clear..." Compl. ¶ 146. Clearly Plaintiff was *at least* on "inquiry notice" of such facts and circumstances that would prompt a "reasonable person to inquire further." *See Doe*, 11 Md. App. at 188; *accord Poffenberger v. Risser*, 290 Md. 631, 636 (1981) ("the cause of action accrues when the claimant in fact knew or reasonably should have known of the wrong"); *see also Cain*, 475 Md. at 35-37 (applying the rule of accrual to claims under the MCPA and finding that the relevant inquiry is knowledge of "the operative facts giving rise to the cause of action"). It would be disingenuous for Plaintiff to now claim that Hess specifically concealed widely-known information within the three years before the filing of Plaintiff's Complaint (*i.e.*, 2015 – 2018), so as to artificially toll the applicable statute of limitations. And in fact, the Maryland Court of Appeals "has held that 'knowledge of the identity of a particular defendant is not a necessary element to trigger the running of the statute of

⁵ *See, e.g.*, Compl. ¶ 68, n. 69 (citing a November 29, 2012 Baltimore Climate Action Plan); *id.* ¶ 83, n. 97 (same); *id.* ¶ 59, n. 55 (one example of many citations in the Complaint to an October 2013 City of Baltimore Disaster Preparedness and Planning Project Report that cites the 2012 Climate Action Plan); *id.* ¶ 59, n. 57 (citing a Maryland Commission on Climate Change 2015 Annual Report); *id.* ¶ 3, n. 3 (citing Intergovernmental Panel on Climate Change ("IPCC") 2014 Climate Change Report); *id.* ¶ 52, n. 47 (citing IPCC 2013 Summary); *id.* ¶ 52, n. 48 (citing IPCC 2013 Working Group Contribution to Fifth Assessment Report); *id.* ¶ 63, n. 61 (citing IPCC 2007 Fourth Assessment Report Summary); *id.* ¶ 63, n. 62 (citing 2007 IPCC Fourth Assessment Report Working Group); *id.* ¶ 143, n. 165 (citing 1990 IPCC First Assessment Report); *id.* ¶ 143, n. 166 (citing 1990 IPCC First Assessment Report Summary); *id.* ¶ 143, n. 167 (citing IPCC Supplement to 1990 First Assessment Report); *id.* ¶ 164, n. 189 (citing 2007 IPCC Working Group Contribution to Fourth Assessment Report).

limitations.”” *Doe*, 114 Md. App. at 188-89 (quoting *Conway v. State*, 90 Md. App. 234, 253 (1992)).

Because Plaintiff’s generic, conclusory allegations against Hess fail to “demonstrate specific facts that support a finding of fraud or concealment,” and do not “go beyond mere conclusory statements,” as required under Maryland law, there is no basis to toll the MCPA statute of limitations. *Dual*, 383 Md. at 170 (citing *Doe*, 114 Md. App. at 187).

CONCLUSION

Plaintiff’s Complaint fails to allege any specific acts by Hess within the MCPA’s three-year statute of limitations period. Even Plaintiff’s generic allegations regarding Hess cannot support a claim because Hess divested all of its retail marketing assets well before the applicable statute of limitations period. As a result, Plaintiff’s Eighth Cause of Action against Hess for alleged violations of the MCPA should be dismissed with prejudice.

Dated: October 16, 2023

Respectfully submitted,



Martha Thomsen (CPF No. 1212130213)

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Attorneys for Defendant HESS CORPORATION

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CERTIFICATE OF SERVICE


I HEREBY CERTIFY that on the 16th day of October, 2023, a copy of the foregoing, Defendant Hess's Memorandum of Law in Support of its Supplemental Motion to Partially Dismiss Plaintiff's Complaint for Failure to State a Claim Upon Which Relief Can Be Granted on Statute of Limitations Grounds, was served via email, as agreed by the parties, on the following:

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Martha Thomsen

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Plaintiff,

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**AFFIDAVIT OF JASON WILEY IN SUPPORT 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**

I, Jason Wiley, being of legal age and competent to testify, make the following statements under penalty of perjury:

1. My name is Jason Wiley. I am the Associate General Counsel for Hess Corporation ("Hess"). I submit this Affidavit in support of 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.

2. I am over eighteen years of age and have personal knowledge of the following facts and could testify competently and truthfully thereto if called upon to do so.

3. Hess has not sold oil and gas products to consumers in Maryland since at least September 30, 2014.

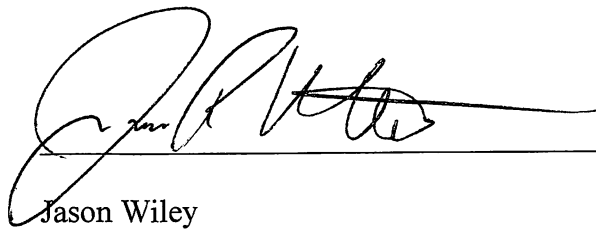
4. Hess has not advertised or marketed oil and gas products to consumers in Maryland since at least September 30, 2014.

5. Hess has not made any advertising or marketing statements regarding oil and gas products and/or climate change directed to consumers in Maryland since at least September 30, 2014.

6. Hess completed divestiture of all of its retail marketing assets, including in Maryland, by September 30, 2014.

7. I solemnly affirm under the penalties of perjury and upon personal knowledge that the contents of this document are true.

Executed this 10th day of October 2023, in Harris County, Texas.



Jason Wiley

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CIVIL DIVISION

MAYOR AND CITY COUNCIL
OF BALTIMORE

Plaintiff,

v.

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Defendants.

* IN THE
* CIRCUIT COURT
* FOR BALTIMORE CITY
* CASE NO. 24-C-18-004219
*

* * * * *

[PROPOSED] ORDER

Upon review and consideration of Defendant Hess's Supplemental Motion to Partially Dismiss Plaintiff's Complaint for Failure to State a Claim Upon Which Relief Can Be Granted On Statute of Limitations Grounds, Plaintiff's Opposition thereto, and any further Reply, it is this _____ day of _____, 2023, by the Circuit Court for Baltimore City, Maryland, hereby

ORDERED that Defendant Hess's Supplemental Motion to Partially Dismiss Plaintiff's Complaint for Failure to State a Claim Upon Which Relief Can Be Granted On Statute of Limitations Grounds is **GRANTED**; and it is further

ORDERED that Plaintiff's Eighth Cause of Action against Hess for alleged violations of the Maryland Consumer Protection Act be **DISMISSED WITH PREJUDICE**.

The Honorable Steven Platt