

MAYOR AND CITY COUNCIL  
OF BALTIMORE,

Plaintiff,

v.

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

Defendants.

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

**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**

Upon consideration of this Reply, Defendant Hess Corporation (“Hess”) respectfully requests this Court to dismiss Plaintiff’s eighth cause of action against Hess for alleged violations of the Maryland Consumer Protection Act (“MCPA”) with prejudice.

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Plaintiff bases its cause of action for alleged violations of the MCPA on Defendants' alleged "deceptive marketing and promotion of their [fossil fuel] products by [] making false and misleading statements," which allegedly caused Defendants to obtain "income, profits, and other benefits it would not otherwise have obtained." (Compl. ¶¶ 295, 297). However, this allegation cannot apply to Hess because Hess did not market, sell, or promote the use of fossil fuel products to Maryland consumers after September 30, 2014. As of that date, Hess had completely divested all of its retail marketing assets, including those in Maryland. Therefore, Hess could not and did not market, advertise, or sell fossil fuel products to Maryland consumers in the three years preceding the filing of the Complaint. This fact is not disputed by Plaintiff. All of Plaintiff's last-ditch theories to improperly circumvent the applicable statute of limitations with respect to its MCPA cause of action should be rejected by this Court. Just this month, a state court in Delaware dismissed a cause of action against Hess brought under the Delaware Consumer Fraud Act for these exact same reasons, stating, "This Court finds that the DCFA claims are barred by the five-year statute of limitations. Tolling does not apply."<sup>1</sup> This Court should do the same.

## **ARGUMENT**

### **1. No Violative Conduct Could Have Occurred Within the Statute of Limitations**

The question for this Court is whether Plaintiff's MCPA 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 three-year statute of limitations.<sup>2</sup> In the entire 132-page Complaint, only two paragraphs contain any specific allegations about Hess. (Compl. ¶¶ 28, 31). However, these paragraphs do not allege any particular violative conduct by

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<sup>1</sup> *State of Delaware v. BP America Inc., et al.*, 2024 WL 98888, at \*24 (Del. Super. Ct. Jan. 9, 2024).

<sup>2</sup> See *MCB Woodberry Dev., LLC v. Council of Owners of Millrace Condo., Inc.*, 253 Md. App. 279, 310-313 (2021) (affirming grant of dismissal where complaint lacked non-conclusory allegations and was "devoid of specific facts" to support plaintiff's claims); see also *Morris v. Osmose Wood Preserving*, 340 Md. 519, 531 (1995) (stating, the Court does "not consider...merely conclusory charges that are not factual allegations.").

Hess; they contain only generic, conclusory allegations insufficient to support a cause of action.<sup>3</sup> (Mot. 4-5). Plaintiff defends its lack of specific allegations against Hess by pointing to other generic, conclusory allegations against all 26 Defendants, which allegedly put Hess on notice of the claim against it. (Opp. 2-4). However, Plaintiff provides no explanation for how Hess could be engaged in the “same wrongful conduct” as other Defendants when Hess has not engaged in consumer-facing conduct in the state *at all* since 2014. (Opp. 2-4). At no point does Plaintiff provide any examples of how Hess marketed 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. Thus, Hess cannot be on notice of any specific and individual claim against it, especially where there is no possible basis to say that Hess engaged in any consumer-directed marketing or sales activity within the applicable statute of limitations.<sup>4</sup>

This Court should follow Maryland precedent in determining that Plaintiff has failed to plead its MCPA claim with sufficient particularity, as Plaintiff has failed to allege any specific and individual violative acts by Hess.<sup>5</sup> “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.)...,” which Plaintiff has failed to plead with respect to Hess.<sup>6</sup>

## **2. Fraudulent Concealment Does Not Apply to Toll the Statute of Limitations**

Plaintiff asserts that the statute of limitations should be tolled because it was not on notice of its MCPA claim due to Hess’s alleged fraudulent concealment. (Opp. 8-10). Fraudulent

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<sup>3</sup> *Supra* fn. 2. For this reason, all claims involving fraud or misrepresentation lack the requisite specificity and should be dismissed. *See also Nigido v. First Nat’l Bank*, 264 Md. 702, 708-11 (1972) (recognizing that plaintiff must allege facts, not merely conclusions, to state a cause of action).

<sup>4</sup> *See RRC Northeast, LLC v. BAA Maryland, Inc.*, 413 Md. 638, 644 (2010) (“The well-pleaded facts setting forth the cause of action must be pleaded with sufficient specificity; bald assertions and conclusory statements by the pleader will not suffice.”); *see also Heritage Harbour, L.L.C. v. John J. Reynolds, Inc.*, 143 Md. App. 698, 710 (2002) (“Pleadings must provide notice to the parties of the nature of claims, state the facts upon which the claims exist, establish the boundaries of the litigation, and afford the speedy resolution of frivolous claims.”).

<sup>5</sup> *See McCormick v. Medtronic, Inc.*, 219 Md. App. 485, 529 (2014) (stating, “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...”).

<sup>6</sup> *Id.* at 528.

concealment only operates to toll the statute of limitations until a plaintiff discovers its rights or could have discovered its rights with the exercise of reasonable diligence.<sup>7</sup> (Mot. 7-9). In this case, Plaintiff's Complaint illustrates its awareness of a connection between the use of fossil fuels and climate change, and any alleged injuries, long before the expiration of the statute of limitations, as admitted in Plaintiff's Opposition. (Mot. 8) (identifying numerous state, national, and international materials cited in Plaintiff's Complaint, illustrating Plaintiff's prior knowledge and notice of its claim); (Opp. 10) (conceding Plaintiff's "historic knowledge of climate change, fossil fuel use, and climate impacts..."). Nevertheless, in an attempt to salvage its claim, Plaintiff argues that "the City's historical knowledge of climate change, fossil fuel use, and climate impacts is not enough to trigger the limitations clock." (Opp. 10).

However, Plaintiff's argument ignores the elements of an MCPA claim. Any alleged violative activity under the MCPA—*i.e.*, misleading advertisements or marketing statements made by Hess to Maryland consumers—was necessarily open, obvious, and able to be observed and/or discovered by Plaintiff. As the *Delaware* court reasoned, Plaintiff's fraudulent concealment tolling defense could not apply because "the general public had knowledge of or had access to information about the disputes, regarding the existence of climate change and effects, decades prior to the expiration of the [] limitations period."<sup>8</sup> When coupled with Plaintiff's admitted knowledge of climate change, fossil fuel use, and climate impacts, Plaintiff was *at least* put on "inquiry notice," certainly by 2015 (*i.e.*, three years preceding the filing of Plaintiff's Complaint), of its claim against Hess.<sup>9</sup> Thus, any purported tolling ended at that time.

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<sup>7</sup> See *Doe v. Archdiocese of Washington*, 114 Md. App. 169, 187 (1997).

<sup>8</sup> *Delaware*, 2024 WL 98888, at \*19 (dismissing Plaintiff's consumer fraud claim against Hess, as barred by the statute of limitations, where fraudulent concealment tolling did not apply because the general public, including plaintiff, had knowledge of or had access to information regarding the existence of climate change and its effects prior to the expiration of the limitations period).

<sup>9</sup> See *Doe*, 114 Md. App. at 188-89 ("The statute of limitations begins to run when the potential plaintiff is on 'inquiry notice' of such facts and circumstances that would 'prompt a reasonable person to inquire further.'"); see also *Cain v. Midland Funding, LLC*, 475 Md. 4, 35-37 (2021) (explaining that the relevant inquiry is knowledge of "the operative

Despite this, and without explanation, Plaintiff waited years to bring its claim against Hess. Plaintiff never explains what reasonable diligence it took to investigate its purported claim once it was put on notice, nor does Plaintiff plead any affirmative fraud or concealment on the part of Hess, as required by Maryland law.<sup>10</sup> Fraudulent concealment requires that a defendant take affirmative steps to keep plaintiff in ignorance of its cause of action.<sup>11</sup> Here, Plaintiff fails to plead any facts even suggestive of an affirmative action by Hess that prevented Plaintiff from gaining knowledge of the facts underlying its claim. Plaintiff has also failed to plead any specific facts supporting how or why any actions by Hess only recently became discoverable, as the law requires to claim fraudulent concealment.<sup>12</sup> This is fatal to Plaintiff's claim of fraudulent concealment, as a plaintiff must plead facts supporting the applicability of that exception.<sup>13</sup> (Mot. 7-9).

### **3. The Alleged Conduct of Other Defendants Cannot be Imputed to Hess**

Plaintiff attempts to save its MCPA claim by shifting the blame to API, claiming that Hess is somehow responsible and "jointly liable" for any violative actions committed by API within the statute of limitations. (Opp. 4-6). In furtherance of this goal, Plaintiff improperly equates mere membership in API to the commission of fraudulent activity in violation of the MCPA. (Opp. 4-6). This argument must fail as a matter of law. Plaintiff focuses its argument on a wholly unexplained and unsupported allegation, that through API, Defendants acted in concert to deceive Maryland consumers in order to sell more fossil fuel products. (Opp. 4-6). However, even if the Court were to assume this statement were true, Plaintiff's MCPA must still fail, as Hess did not

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facts giving rise to the cause of action"); *see also Moreland v. Aetna U.S. Healthcare, Inc.*, 152 Md. App. 288, 298 (2003) ("Knowledge of facts, [] not actual knowledge of their legal significance, starts the statute of limitations running...") (internal citations omitted).

<sup>10</sup> *See Windesheim v. Larocca*, 443 Md. 312, 335 (2015); *see also Dual Inc. v. Lockheed Martin Corp.*, 383 Md. 151, 172-73 (2004).

<sup>11</sup> *See Doe*, 114 Md. App. at 187; *see also Dual*, 383 Md. at 170, 172; *see also Bacon v. Arey*, 203 Md. App. 606, 653-54 (2012).

<sup>12</sup> *See supra* fns. 7-11.

<sup>13</sup> *Id.*; *see also Bacon*, 203 Md. App. at 653-54. Further, whether fraudulent concealment applies to toll the statute of limitations in this case is a question of law which is proper for this Court's determination at this stage. *Cain*, 475 Md. at 35; *Shulman v. Rosenberg*, 2018 WL 286404, at \*9 (Md. Ct. Spec. App. Jan. 4, 2018); *supra* fn. 8.

sell any fossil fuel products to Maryland consumers since at least September 30, 2014. Thus, there is no predicate activity which can form the basis of an MCPA claim. Regardless, API could not have misled the public on Hess's behalf or at Hess's direction within the statute of limitations because Hess did not market or sell fossil fuel products to Maryland consumers during that time.

Plaintiff's MCPA claim must further fail because the statements of a trade association are not imputable to a member-company, such as Hess.<sup>14</sup> Likewise, Plaintiff's attempt to hold Hess liable for the alleged violative conduct of "other Defendants" within the statute of limitations must be disregarded by this Court.<sup>15</sup> (Opp. 4, 6). Plaintiff alleges no specific role played by Hess in any alleged conspiracy or even how such a conspiracy would work in the context of competitors advertising their own products. And yet again, Plaintiff has ignored the simple, undisputed fact that Hess did not advertise or sell products to Maryland consumers during the statute of limitations period.

## CONCLUSION

For the reasons stated above, Hess respectfully requests this Court to dismiss Plaintiff's eighth cause of action against Hess for alleged violations of the MCPA with prejudice.

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<sup>14</sup> See *SD3, LLC v. Black & Decker (U.S.) Inc.*, 801 F.3d 412, 423 (4th Cir. 2015) (dismissing allegations against corporate subsidiaries where there were no specific allegations against individual defendants as part of alleged conspiracy, as guilt is not recognized "by mere association."); see also *N.A.A.C.P. v. Claiborne Hardware Co.*, 458 U.S. 886, 920 (1982) ("Civil liability may not be imposed merely because an individual belonged to a group...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."); see also *Sewell v. State*, 239 Md. App. 571, 608 (2018) ("It is well established that mere membership in an organization—with aims that are legal or illegal—is insufficient to convict a person of a crime.") (citing *Baird v. State Bar of Ariz.*, 401 U.S. 1, 9 (1971) ("...mere membership in an organization can never, by itself, be sufficient ground for a State's imposition of civil disabilities...")); see also *Silkworth v. Cedar Hill Cemetery, Inc.*, 95 Md. App. 726, at \*4 (1993) (affirming dismissal of conspiracy claim based on defendants' common membership in a statewide trade association). Plaintiff's cited cases are inapposite to this case, as liability may only apply where concerted actions are taken by multiple parties who actively participate in wrongful conduct, none of which has been specifically pled against Hess. See *Alvord-Polk, Inc. v. F. Schumacher & Co.*, 37 F.3d 996, 1013 (3d Cir. 1994) (activities of association may impose liability upon members *only where* association members engage in concerted action with the association, *i.e.*, perform some violative conduct themselves); see also *AD/SAT, Div. of Skylight, Inc. v. Associated Press*, 181 F.3d 216, 234 (2d Cir. 1999) (finding lack of concerted action among association members did not give rise to inference of conspiracy, as the mere opportunity to conspire does not by itself support the inference that illegal activity actually occurred).

<sup>15</sup> *Supra* fn. 14; see *Delaware*, 2024 WL 98888, at \*24 (dismissing "claims alleging misrepresentations" for "fail[ure] to specifically identify alleged misrepresentations for each individual defendant.").



Dated: January 26, 2024

Respectfully submitted,



Martha Thomsen (CPF No. 1212130213)

Sterling Marchand (*pro hac vice*)

Megan Berge (*pro hac vice*)

**BAKER BOTTS L.L.P.**

700 K Street, N.W.

Washington, D.C. 20001-5692

Telephone: (202) 639-7863

Facsimile: (202) 508-9329

Email: martha.thomsen@bakerbotts.com

Email: sterling.marchand@bakerbotts.com

Email: megan.berge@bakerbotts.com

J. Scott Janoe (*pro hac vice*)

**BAKER BOTTS L.L.P.**

910 Louisiana Street, Suite 3200

Houston, Texas 77002-4995

Telephone: (713) 229-1553

Facsimile: (713) 229-7953

Email: scott.janoe@bakerbotts.com

*Attorneys for Defendant Hess Corporation*

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on the 26th day of January, 2024, a copy of the foregoing, 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, was served via email, as agreed by the parties, on the following:

Sara E. Gross, Esq. (CPF No. 412140305)  
Baltimore City Law Department  
100 N. Holliday Street, Suite 109  
Baltimore, MD 21202  
Tel: (410) 396-3947  
sara.gross@baltimorecity.gov

Victor M. Sher (*pro hac vice*)  
Matthew K. Edling (*pro hac vice*)  
Corrie J. Yackulic (*pro hac vice*)  
Stephanie D. Biehl (*pro hac vice*)  
Martin D. Quiñones (*pro hac vice*)  
Katie H. Jones (*pro hac vice*)  
Sher Edling LLP  
100 Montgomery St., Ste. 1410  
San Francisco, CA 94104  
Tel: (628) 231-2500  
Fax: (628) 231-2929  
vic@sheredling.com  
matt@sheredling.com  
corrie@sheredling.com  
stephanie@sheredling.com  
marty@sheredling.com  
katie@sheredling.com

*Attorneys for Plaintiff Mayor and City Council of Baltimore*

  
Martha Thomsen