SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
CIVIL DIVISION

EARTH ISLAND INSTITUTE, **Plaintiff,** **v.** **BLUETRITON BRANDS,** **Defendant.**	**Case No. 2021 CA 003027 B** **Judge Juliet J. McKenna** **Next Event: Scheduling Conference Hearing, July 22, 2022 at 9:30 am**

ORDER

Pending before the Court is Defendant BlueTriton Brands' Motion to Dismiss, filed on March 4, 2022; Plaintiff Earth Island Institute's Opposition, filed on April 8; and Defendant's Reply thereto, filed on April 29. Upon consideration of the pleadings, and for the reasons set forth below, the Defendant's Motion to Dismiss is denied.

Background Information

The Plaintiff, Earth Island Institute (hereinafter "Earth Island" or "Plaintiff"), filed a Complaint against Defendant, BlueTriton Brands ("BlueTriton" or "Defendant"), on August 27, 2021, for violations of the District of Columbia Consumer Protection Procedures Act ("CPPA"), D.C. Code §28-3901, *et seq*.

Earth Island is a non-profit, public interest organization whose mission is to advocate for environmental and human health through activism, education, legal advocacy, and leadership, in the District of Columbia and throughout the United States. Compl. at ¶ 28–29. Earth Island oversees and sponsors various projects relating to environmental harms, nature and wildlife preservation, and the conservation of natural resources. Compl. at ¶¶ 28–31. One such project is the Plastic Pollution Coalition ("PPC"), a "global alliance of . . . organizations and businesses, working to promote a world free of plastic pollution and its toxic impacts on humans, animals,

waterways, oceans, and the environment" by educating consumers, including those in D.C., on the "negative environmental and health impacts that single-use plastics have and strives to help consumers make more informed choices when shopping." Compl. at ¶¶ 33–35. The Plaintiff asserts that there is a widely accepted, growing trend amongst consumers to support sustainable businesses and seek out and purchase products from companies known for being environmentally responsible. Compl. at ¶ 44; *Id*. at n.9; *Id*. at ¶¶ 128–29.

According to the Plaintiff, BlueTriton Brands, is one of the largest plastic-producing companies in the world, and owns many of the top selling bottled water brands, including Poland Spring, Deer Park, Pure Life, Natural Spring Water, Ozarka, Ice Mountain Brand, Zephyrhills Brand, Arrowhead Brand Mountain Spring Water, and Splash. Compl. at 38. BlueTriton's sales "account for roughly 1/3 of the U.S. bottled water market . . ." and it sells its products and services in the District of Columbia and throughout the United States. Compl. at ¶¶ 40, 70.

In filing its Complaint, Plaintiff alleges that the Defendant deceptively portrays its business practices as being environmentally friendly, sustainable, and committed to reducing plastic pollution, in the hopes of "motivating climate-concerned consumers to continue to purchase its products and services." *Id.* at ¶¶ 44–45. Plaintiff cites to various statements found across BlueTriton's business platforms[1] regarding the quality of its products, the sustainable and environmentally beneficial manufacturing practices, the success and frequency of recycling in the industry, the company's goals for the future, and the overall positive impact that its business and sustainability efforts have had on the environment. *See generally* Compl. at ¶¶ 46–66. Plaintiff challenges the accuracy of these statements and argues that, contrary to Defendant's

[1] For example, Plaintiff references statements made on BlueTriton's webpages (Compl. at ¶¶ 52–56), and promotional materials (*Id.* at ¶ 50–51); and in press releases (*Id.* at ¶¶ 46–48, 65) and social media posts (*Id.* at ¶¶ 47, 51). *See also generally* Compl.

representations, BlueTriton's business practices and products have a detrimental effect on human health, environmental health, the marine and wildlife community, and the availability of natural resources. *See generally* Compl. at ¶¶ 68-82. Plaintiff, therefore initiated this suit on behalf of the "growing class of consumers [in the District] who wish to support environmentally sustainable companies" and who have been targeted by the Defendant or who "obtained products under the misrepresentations made by BlueTriton," representations the Plaintiff alleges violate the District of Columbia Consumer Protection Procedures Act, D.C. Code §28-3901, *et seq*. Compl. at ¶¶ 130, 149.

Following remand from the United States District Court for the District of Columbia on January 27, 2022 (docketed February 8, 2022), the Defendant filed a Motion to Dismiss the Complaint on March 4, 2022. The Plaintiff filed its Opposition to the Motion to Dismiss on April 8, 2022, and Defendant filed its Reply on April 29, 2022.[2]

The Defendant advances three main arguments in support of its contention that Plaintiff's Complaint, alleging violations of the CPPA, D.C. Code §28-3901, *et seq*., should be dismissed. First, Defendant argues that the Plaintiff lacks standing pursuant to D.C. Code § 28-4905(k)(1)(D). *See* Mot. to Dismiss at 6. The Defendant contends that Plaintiff has not established statutory standing under § 28–3905(k)(1)(D), because it fails show that "'D.C. [c]onsumers generally'—the class of consumers Plaintiff seeks to represent—all face an actual and imminent threat of being misled by the [Defendant's] representations . . . such that they could bring their own CPPA action under section (k)(1)(D)." *Id.* at 5.

Second, the Defendant contends that the Plaintiff fails to identify "unfair or deceptive trade practices," sufficient to establish a CPPA violation claim. Mot. to Dismiss at 7–9. The

[2] Parties agreed to this extended briefing schedule in an October 14, 2021 Stipulation filed in District Court.

CPPA applies only to "unfair or deceptive trade practices," and Defendant contends that its representations do not constitute "trade practices" because they were not "made to 'make available' or to 'provide information about' 'a sale, lease or transfer, of consumer goods or services.'" Mot. to Dismiss at 7. According to the Defendant, because the challenged statements regarding the company's "alleged practices and aspirations," were on brand websites and social media posts, rather than marketing materials or directly associated with the sale of the company's products, the representations do not constitute "deceptive trade practices" within the definition of the CPPA. *Id.* Additionally, Defendant contends that the statements do not fall within the definition provided in the CPPA because they were not "misrepresentations of material fact that tend to mislead." *Id.* (citing D.C. Code § 28-3904(e), (f), (f-1)).

Third, the Defendant asserts that the challenged statements are not actionable because a claim of unfair trade practice is evaluated in terms of whether a reasonable consumer would be misled. Defendant argues that these statements are not misleading when properly qualified and viewed in context and many constitute non-actionable "puffery." Mot. to Dismiss at 9.

Legal Standard

To determine whether a claim survives a motion to dismiss, a court must conduct a two-pronged inquiring, considering (1) whether the complaint includes well-pled factual allegations; and (2) whether such allegations plausibly entitled the plaintiff to relief. *See Potomac Dev. Corp. v. District of Columbia*, 28 A.3d 531, 544 (D.C. 2011) (citing *Ashcroft v. Iqbal*, 556 U.S. 662, 677-78 (2009)). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* (quoting *Iqbal*, 556 U.S. at 678). The "plausibility" pleading standard does not require "detailed factual allegations" at the initial litigation stage of filing the complaint, but "it demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation." *Iqbal*, 556

U.S. at 678. Although a court "must accept as true all of the allegations contained in the complaint," "threadbare recitals of the elements of a cause of action supported by mere conclusory statements" do not suffice. *Sundberg v. TTR Realty, LLC*, 109 A.3d 1123, 1128–29 (D.C. 2015) (quoting *Iqbal*, 556 U.S. at 678).

Dismissal pursuant to D.C. Superior Court Civil Rule 12(b)(6) is appropriate only if, after "accepting the [factual] allegations in the complaint as true and viewing all facts and drawing all reasonable inferences in favor of the plaintiff," the plaintiff can prove no set of facts to establish that it is entitled to relief. *Tingling-Clemmons v. District of Columbia*, 133 A.3d 241, 245, (D.C. 2016) (citing *Hillbroom v. PricewaterhouseCoopers LLP*, 17 A.3d 566, 572 (D.C. 2011)); *see also Atkins v. Indus. Telecomm. Ass'n*, 660 A.2d 885, 887 (D.C. 1995).

Analysis

The CPPA establishes "an enforceable right to truthful information from merchants about consumer goods and services that are or would be purchased, leased, or received in the District of Columbia." D.C. Code § 28-3901(c). The CPPA provides an extensive list of violations covered by the Act, including making it unlawful for "any person"[3] to "(a) represent that goods or services have a source, sponsorship, approval, certification, accessories, characteristics, ingredients, uses, benefits, or quantities that they do not have;" "(d) represent that goods or services are of particular standard, quality, grade, style, or model, if in fact they are of another;" "(e) misrepresent as to a material fact which has a tendency to mislead;" "(f) fail to state a material fact if such failure tends to mislead;" "(f-1) [u]se innuendo or ambiguity as to a material fact, which has a tendency to mislead;" "(h) advertise or offer goods or services without the

[3] A "person" within the meaning of the CPPA is "an individual, firm, corporation, partnership, cooperative, association, or any other organization, legal entity, or group of individuals however organized." D.C. Code § 28-3901(a)(1).

intent to sell them or without the intent to sell them as advertised or offered." *See* D.C. Code § 28-3904.

1. Plaintiff Has Established Standing Under D.C. Code § 28–3905(k)(1)(D)

The CPPA modified the traditional Article III standing requirements with a statutory test, that if satisfied, confers standing upon public interest organizations. *Animal Legal Defense Fund v. Hormel Foods Corp.*, 258 A.3d 174, 185 (D.C. 2021). D.C. Code § 28-3905(k)(1)(D) states that "(i)[s]ubject to sub-subparagraph (ii) of this subparagraph, a public interest organization may, on behalf of the interests of a consumer or a class of consumers, bring an action seeking relief from the use by any person of a trade practice in violation of a law of the District if the consumer or class could bring an action under subparagraph (A) of this paragraph for relief from such use by such person of such trade practice. (ii) [a]n action brought under sub-subparagraph (i) of this subparagraph shall be dismissed if the court determines that the public interest organization does not have sufficient nexus to the interests involved of the consumer or class to adequately represent those interests."

To satisfy the standing requirement of section (k)(1)(D), a plaintiff must "check three boxes: (1) it must be a public interest organization, . . . (2) it must identify 'a consumer or class of consumers' that could bring suit in their own right; and (3) it must have a 'sufficient nexus' to those consumers 'to adequately' represent them." *Id.* This subsection of the CPPA is intended to "confer maximum standing" to public interest organizations. *See id.* at 184–85 (quoting Consumer Protection Act of 2012, Report on Bill 19-0581, at 4, 6 (Nov. 28, 2012)).[4]

[4] Subsection (k)(1)(D) is intended to reach "the full extent of standing as may be recognized by the District of Columbia courts . . . beyond what would be afforded under subparagraphs (A)–(C), beyond what would be afforded under a narrow reading of prior D.C. court decisions, and beyond what would be afforded in a federal case under a narrow reading of prior federal court decisions on federal standing." *Hormel*, 258 A.3d at 184–85 (quoting Consumer Protection Act of 2012, Report on Bill 19-0581, at 4, 6 (Nov. 28, 2012)).

The Defendant concedes the first and third *Hormel* prongs, acknowledging that Earth Island is a public interest organization as defined by §28-3901(a)(15) and has a "sufficient nexus" to the consumers its seeks to represent. *See* Mot. to Dismiss at 4. With respect to the second-prong in the *Hormel* statutory-standing test, the Defendant contends that Plaintiff has not established statutory standing under § 28–3905 (k)(1)(D), because it fails show that the class of consumers Plaintiff seeks to represent face an actual and imminent threat of being misled. Mot. to Dismiss at 5. The Plaintiff proffers that many consumers, including those in the District of Columbia, are motivated to "conduct business with environmentally conscious retailers." *See generally* Compl. at ¶¶ 6, 7, 15. Plaintiff contends that the Defendant consciously targets these "environmental conscious consumers" through the challenged representations of "sustainability." *See generally* Compl. at ¶¶ 6, 7, 15. This "growing class of consumers [in the District] who wish to support environmentally sustainable companies" and who have "obtained [the Defendant's] products under the misrepresentations made by BlueTriton" is the group of individuals the Plaintiff has identified as the class it seeks to represent. Compl. at ¶¶ 130, 149.

Contrary to Defendant's argument, the CPPA provides that the statement simply needs to have a tendency to mislead, regardless of whether "any consumer is in fact misled, deceived, or damaged thereby." D.C. Code § 28-3904(e); *see also Organic Consumers Ass'n v. Gen. Mills, Inc.*, No. 2016 CA 6309 B, 2017 D.C. Super. LEXIS 4, at *6 (D.C. Super. Ct. Jul. 6, 2017) (Edelman, J.) ("The Court of Appeals has interpreted the CPPA broadly and has found that violations of the statute (for example, improper trade practices and misrepresentations in advertising) can by themselves confer standing.").[5] As such, the Plaintiff has satisfied the

[5] *See also generally*, *Clean Label Project Found. v. Panera, LLC*, No. 2019 CA 001898 B, 2019 D.C. Super. LEXIS 14 at *5–8 (D.C. Super. Ct. Oct. 11, 2019) (Williams, J.) ("The deprivation of a statutory right derived from improper trade practices that are in violation of the CPPA may constitute an injury-in-fact sufficient to establish standing, even though a plaintiff would have suffered no judicially cognizable injury in the absence of the statute.").

second prong of the *Hormel* test and has met the pleading standard to establish standing under D.C. Code § 28–3905(k)(1)(D).

2. The Plaintiff Properly Identifies "Unfair or Deceptive Trade Practices" Subject to the CPPA

The CPPA applies to "unfair or deceptive trade practices." D.C. Code §28-3904. The Code defines "trade practice" as "any act which does or would create, alter, repair, furnish, make available, provide information about, or, directly or indirectly, solicit or offer for or effectuate, a sale, lease or transfer, of consumer goods or services." D.C. Code §28-3901(a)(6). The CPPA also provides a non-exhaustive list of types of practices that constitute unlawful trade practices, including "(a) represent[ing] that goods or services have a source, sponsorship, approval, certification, accessories, characteristics, ingredients, uses, benefits, or quantities, that they do not have. . . (d) represent[ing] that goods or services are of particular standard, quality, grade, style, or model, if in fact they are of another; (e) misrepresent[ing] as to a material fact which has a tendency to mislead." D.C. Code §28-3904.

The statements challenged by the Plaintiff pertain to BlueTriton's manufacturing procedures and products, which speak directly to the products' "source," "characteristics," "benefits," "style," and "quality." *See* D.C. Code §28-3904. Plaintiff cites to data contradicting the factual accuracy of these statements and sustainability representations which, if accepted as true, establishes a plausible claim that BlueTriton's statements constitute misrepresentations of "material facts which may have a tendency to mislead." Opp. to Mot. to Dismiss at 7; D.C. Code §28-3904(e).

Many courts, including in this jurisdiction, have held that a company's representations that its products are "sustainable," when they are in fact not, constitute unlawful "trade practices" under the CPPA. *See, e.g.*, *GMO Free USA v. ALDI Inc*., No. 2021 CA 001694 B, 2022 D.C.

Super. LEXIS 1, at *7–8 (Feb. 16, 2022); *Organic Consumers Ass'n v. Tyson Foods, Inc.*, No. 2019 CA 004547 B, 2021 WL 1267807, at *3 (D.C. Super. Mar. 31, 2021); *Lee v. Can. Goose U.S., Inc*., No. 20 Civ 9809, 2021 U.S. Dist. LEXIS 121084 at *12 (S.D.N.Y. June 29, 2021) (denying motion to dismiss CPPA claim finding that company's statement regarding its commitment to ethical and sustainable sources could be misleading to consumer). Although a number of these cases involve misrepresentations made on labels, product packaging or in advertising campaigns, here, BlueTriton's statements existed on a multitude of mediums across the Defendant's brands that were presented to, or at the very least accessible by, D.C. consumers and the public in general. Given that BlueTriton admittedly targeted a consumer base that would be affected by these types of statements, and holds itself out in the public as producing products with these specific qualities,[6] construing all of Plaintiff's facts and allegations as true, these representations could be found to have the same effect on the consumer as direct advertising, or statements on the packaging or label of the product itself. For these reasons, the Plaintiff has sufficiently identified representations by the Defendant that may establish "unfair or deceptive trade practices" subject to the CPPA.

3. The Challenged Statements are Actionable under the CPPA.

The "determination of whether [a statement] would be both material and misleading [to a reasonable consumer] . . . is 'a question of fact for the jury and not a question of law for the court." *See Saucier v. Countrywide Home Loans*, 64 A.3d 428, 445 (2013) (citations omitted); *see also Mann v. Bahi*, 251 F. Supp. 3d 112, 126 (D.D.C. 2017) (stating that the question of how a

[6] Defendant's top executives stated in a press release "[b]y embedding sustainability into the foundation of our brands, we are able to deliver a superior product experience that also aligns with what our consumers want . . . " Compl. at ¶¶ 47–48; *Id.* at n.10 (citing *Nestle Waters North America Expands Use of 100% Recycled Plastic (rPET) in Three Additional Brands, Doubles rPET Use Across U.S. Domestic Portfolio*, Nestle Waters North American (July 16, 2020), https://www.nestle-watresna.com/media/pressreleases/allpressreleases/expanding-use-of-recycled-plastic.

reasonable consumer would consider a statement having a "tendency to mislead" is "generally a question for the jury"); *Pearson v. Soo Chung*, 961 A.2d 1067, 1075 (D.C. 2008) (interpretation of "satisfaction guaranteed" sign was a factual question). *But see Mann*, 251 F. Supp. 3d at 126 (noting that "there are times when it is sufficiently clear to be determined as a matter of law").

The challenged statements are comprised of representations regarding the quality and characteristics of Defendant's products, the company's manufacturing practices, the environmental impact of these practices, general representations about the plastic and recycling industry across the country, the company's efforts to counter the negative effects of its industry, and the goals for the company going forward. *See generally* Compl. The Defendant asserts that these challenged statements cannot be determined to be misleading or deceptive when viewed in the context of the entire representation, for example the full webpage or social media post, or entire press release, especially where the Complaint only identifies the challenged statements in isolation. Mot. to Dismiss at 10; Reply to Opp. at 5.[7]

Accepting all facts and allegations set forth in the Complaint as true, it would be improper and beyond the scope of the 12(b)(6) inquiry for the Court to engage in a detailed analysis of whether each statement is "properly qualified" or likely to mislead a reasonable consumer, at this stage in the litigation. *See generally Organic Consumers Ass'n v. Smithfield Foods, Inc.*, 2020 D.C. Super. LEXIS 28, at 16 n.3 (D.C. Super. Ct. 2020) (denying defendant's motion to dismiss on grounds that whether statements are misleading raises a factual dispute). For the same reasons,

[7] While "a defendant raising a 12(b)(6) defense cannot assert any facts which do not appear on the face of the complaint itself" *see Carey v. Edgewood Mgmt. Corp.,* 754 A.2d 951 (D.C. 2000), the Court may consider documents attached to a motion to dismiss when those documents are referenced in the complaint, such as the Declaration of Kate Spelman in support of Defendant's Motion to Dismiss, which provides the webpages and posts that Plaintiff referenced in the Complaint for purposes of completeness. *See Washkoviak v. Student Loan Mktg. Ass'n*, 900 A.2d 168, 178 (D.C. 2006); *see generally* Spelman Decl. (filed Mar. 4. 2022) (filed along with Defendant's Motion to Dismiss).

the Defendant's argument that the statements are "non-actionable," "aspirational" or "unquantifiable" statements of puffery, and therefore cannot form the basis of a CPPA claim, must fail. Whether a statement is likely to mislead a consumer is a question for the jury. The Court finds that the Plaintiff has pled sufficient facts to establish a plausible claim that Defendant's statements may have a tendency to mislead a reasonable consumer pursuant to the CPPA.

For the aforementioned reasons, the Plaintiff's has set forth sufficient facts in the Complaint to survive Defendant's Motion to Dismiss. Wherefore it is this 7th day of June, 2022 hereby

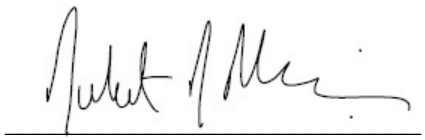
ORDERED that Defendant's Motion to Dismiss the Complaint is **DENIED**; and it is

FURTHER ORDERED that it appearing that no Answer has been filed, Defendant shall file its Answer by June 29, 2022; and it is

FURTHER ORDERED that the Status Hearing on Friday, June 10, 2022 is **VACATED**; and it is

FURTHER ORDERED that parties shall appear for a Scheduling Conference Hearing on July 22, 2022 at 9:30 am in Courtroom 519, utilizing the remote log-in instructions appended to this order.

IT IS SO ORDERED.



Juliet J. McKenna
Associate Judge

Copies to:

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