SUPERIOR COURT FOR THE DISTRICT OF COLUMBIA
CIVIL DIVISION

ORGANIC CONSUMERS ASSOCIATION, Plaintiff, v. THE BIGELOW TEA COMPANY, F/K/A R.C. BIGELOW INC., Defendant.	)	Case No. 2017 CA 008375 B Judge Robert R. Rigsby

ORDER

Before this Court is Defendant's Motion to Dismiss Plaintiff's Complaint, filed August 23, 2018 ("Mot."). Plaintiff filed an Opposition to Defendant's Motion on September 24, 2018, and Defendant filed a Reply on October 8, 2018. Upon consideration of Defendant's Motion, Plaintiff's Opposition, Defendant's Reply, and the entire record herein, Defendant's Motion to Dismiss is **GRANTED IN PART AND DENIED IN PART** for the reasons set forth below.

FACTUAL AND PROCEDURAL HISTORY

Plaintiff, Organic Consumer Association, is a non-profit public interest organization based in Minnesota and acting for the benefit of the general public. Compl. at ¶¶ 20, 28. Defendant, The Bigelow Tea Company, is a Connecticut corporation that markets and distributes tea products. Mot. at 1.

Plaintiff alleges it purchased Defendant's Green Tea at a Walmart in Washington D.C. on October 4, 2017, "to evaluate its purported qualities as an 'All Natural' and 'environmentally friendly' product." Compl. ¶¶ 6, 24. Plaintiff alleges that "[t]ests conducted by an independent

laboratory ... revealed ... [0.38 ppm of] glyphosate in Bigelow Green Tea." *Id.* Plaintiff did not determine the exact source of the glyphosate found in the tea. *Id.* at ¶¶ 8, 14.

In a Complaint filed December 15, 2017, Plaintiff alleges that Defendant made false and misleading representations to consumers, which constitutes an unlawful trade practice under the Consumer Protection Amendment Act ("CPPA"). *See* Compl. ¶¶ 13, 92-100. Plaintiff alleges that Defendant is making false and misleading representations to consumers by labeling, marketing, and selling tea products as "All Natural," "Natural," "environmentally friendly," and "sustainable," when they contain 0.38 ppm of glyphosate. *See id.* Plaintiff is seeking declaratory relief. Compl. ¶ 101. Defendant alleges that federal authorities permit certain levels of glyphosate in food products and tolerate the presence of glyphosate in quantities up to 1 ppm in tea. Mot. at 2. *See also* 40 C.F.R. § 180.364.

On August 23, 2018, Defendant filed a Motion to Dismiss Plaintiff's Complaint. Plaintiff filed an Opposition to Defendant's Motion to Dismiss on September 24, 2018.

DISCUSSION

In the Motion to Dismiss, Defendant asserts that Plaintiff's Complaint should be dismissed in its entirety because: (I) Plaintiff has no standing to sue; (II) Plaintiff's claim is preempted by federal law to the extent it seeks to change Defendant's label; (III) the primary jurisdiction doctrine applies; and (IV) Plaintiff's Complaint has not met the basic pleading standard required to survive a D.C. Super. Ct. R. Civ. P. 12(b)(6) motion. Mot. at 3. The Court will review each in turn.

I. Standing

In the Motion to Dismiss, Defendant first argues that Plaintiff lacks standing to seek relief because Plaintiff has failed to allege a concrete harm. Mot. at 3-5.

Plaintiff is not absolved of Article Ill's constitutional standing requirement, imposed on District of Columbia's Article I trial courts. *Floyd v. Bank of Am. Corp.*, 70 A.3d 246, 250 (D.C. 2013). Article III of the United States Constitution requires a Plaintiff to show (1) an "injury-in-fact"—an invasion of a legally protected interest which is "concrete and particularized" and "actual or imminent;" (2) that the injury "can be traced to the challenged action;" and (3) that this injury is "likely" to be "redressed." *See Padou v. District of Columbia*, 77 A.3d 383, 388 (D.C. 2013). Plaintiff has standing when suffering an "injury in fact" to some interest, "economic or otherwise." *See e.g., Lujan v. Defenders of Wildlife*, 504 U.S. 555, 582 (1992).

Plaintiff can show injury-in-fact as a non-profit organization or as a public interest organization under §§ 28-3905(k)(1)(C) and (D). *See Organic Consumers Ass'n v. Gen. Mills, Inc.*, No. 6309 B, 2017 WL 2901210 (D.C. Super. Ct., April 27, 2017). The D.C. Council amended D.C. Code § 28-3905(k) under the CPPA of 2012 and provided clarification for "the courts with a variety of ways to consider standing options that satisfy the prudential standing principles for non-profit and public interest organizations." Yvette M. Alexander, Report on Bill 19-0581, the "Consumer Protection Amendment Act of 2012," at 2, 4 (Nov. 28, 2012). Therefore, D.C. Code § 28-3905(k)(1)(C)-(D) provide "separate, independent standing provisions." *See id.* at 4.

D.C. Code § 28-3905(k)(1)(C), permits a "non-profit organization" to bring an action "on behalf of the general public . . . seeking relief from […] a trade practice in violation of a law of the District, including a violation involving consumer goods or services that the organization purchased or received in order to test or evaluate." Plaintiff has standing under this provision. First, Plaintiff is a non-profit organization. Compl. at ¶¶ 20, 28; Mot. at 1. Second, Plaintiff seeks relief from Defendant's alleged violation of the CPPA regarding goods purchased by

Plaintiff; particularly, the alleged misleading representation of the properties of Defendant's tea to consumers. *See* Compl. at ¶¶ 3-14, 29-101. As Plaintiff alleges an economic injury - that consumers would not have paid for the Defendant's product had the product not been misrepresented - Plaintiff has standing as a non-profit organization.

D.C. Code § 28-3905(k)(1)(D) permits a "public interest organization" to bring an action "seeking relief from the use by any person of a trade practice in violation of a law of the District" on behalf of "a consumer or a class of consumers." The provision also requires that the public interest organization have a "sufficient nexus to the interests involved of the consumer." D.C. Code § 28-3905(k)(1)(D)(ii). Plaintiff also has standing under this provision. First, Plaintiff is a public interest organization, *see* Compl. at ¶¶ 20, 28; Mot. at 1, that focuses on "representing the views and interests" of consumers and the issue of "truth in advertising accurate food labeling." *See* Compl. at ¶¶ 20, 23. Second, Plaintiff seeks relief for Defendant's alleged misleading labeling, marketing, and advertising practices in violation of the CPPA. Third, the Court finds that Plaintiff's mission and work of protecting consumers through promoting accurate labeling of consumer goods shows sufficient nexus to satisfy § 28-3905(k)(1)(D)(ii). Furthermore, as Plaintiff alleges an economic injury - that consumers would not have paid for the Defendant's product had the product not been misrepresented - Plaintiff also has standing as a public interest organization. *See e.g. Nat. Consumers League v. Bimbo Bakeries USA*, No. 6548 B, 2015 WL 1504745 (D.C. Super. Ct., April 2, 2015).

Thus Plaintiff has standing and the Complaint should not be dismissed for this reason.

II. Preemption

Originally, Defendant moved to dismiss Plaintiff's claim, arguing it was preempted by the Nutritional Labeling and Education Act ("NLEA"), 21 U.S.C. §§ 341, *et seq.*, as Plaintiff

sought to impose additional labeling requirements that are not identical to FDA regulations. Mot. at 3, 9-11. Later, following Plaintiff's clarification in its Opposition Motion, *see* Pl.'s Opp. at 8, 9, Defendant has withdrawn this argument. Def.'s Reply at 8. Therefore, this Court shall not discuss it.

III. Primary Jurisdiction

In the Motion to Dismiss, Defendant argues that the primary jurisdiction doctrine applies and that a dismissal or stay of Plaintiff's Complaint is appropriate. Mot. at 3, 11-15. Defendant, citing to a 2018 article, argues that "recent news indicate the FDA is continuing to evaluate the use of 'natural' and that a decision is imminent." Mot. at 11-12.

The doctrine of primary jurisdiction refers to the suspension of the judicial process pending the resolution of issues placed within *the special competence* of an administrative body. *See District of Columbia v. DC. PSC*, 963 A.2d 1144, 1153 (D.C. 2009); *Lawlor v. District of Columbia*, 758 A.2d 964, 973 (D.C. 2000) (emphasis added). However, the doctrine does not negate the court's jurisdiction; rather, it informs the court's determination whether to exercise its jurisdiction with respect to a specific matter. *D.C. PSC*, 963 A.2d at 1153.

First, Defendant argues that this matter is outside this Court's jurisdiction because Plaintiff's allegation "calls for a definition of what 'natural' means." Mot. at 12. Defendant argues that a definition of "natural" is necessary to determine whether Defendant's labeling, marketing, and advertising practices for its tea misled consumers in the District. Unlike claims that specifically deal with food labeling, this question strikes the Court as one falling within the conventional experience of the court system instead of one that requires "the type of scientific or specialized expertise possessed by the FDA." *See NCL v. Doctor's Assoc.*, No. 2013 CA 006549 B., 2014 WL 4589989, at *4 (D.C. Super. Ct., Sept. 12, 2014). *See e.g., Animal Legal Def. Fund*

v. Hormel Foods Corp., No. 2016 CA 6309 B, 2017 WL 4221129 (D.C. Super. Ct., Sept. 22, 2017) (holding Defendant did not demonstrate that the USDA had special expertise to regulate advertisements or was in a better position than the court to hear false advertising claims arising under District of Columbia law).

Additionally, the FDA's original request for comment was issued in November of 2015, Mot. at 11, and the period for comments closed in May of 2016, Mot. at 11. No additional information concerning final guidance was published, except for a news article that the FDA "will have more to say on the issue soon," Mot. at 12. No timeline suggests that the FDA will issue guidance that could resolve this question in the near future, and consequently, there would be a lengthy delay should the Court invoke primary jurisdiction.

Given these considerations, the Court believes it inappropriate to dismiss or stay this case under the doctrine of primary jurisdiction.

IV. Failure to State a Claim

In determining whether a complaint sufficiently sets forth a claim pursuant to D.C. Super. Ct. R. Civ. P. 12(b)(6), the Court must construe the claim in the light most favorable to the plaintiff and take the facts alleged in the complaint as true. *See Casco Marina Dev., L.L.C., v. District of Columbia Redevelopment Land Agency*, 834 A.2d 77, 81 (D.C. 2003). To survive a motion to dismiss under Rule 12(b)(6), a complaint must "contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face. A claim has facial plausibility when Plaintiff pleads factual content that allows the court to draw the reasonable inference that Defendant is liable for the misconduct alleged." *Potomac Dev. Corp. v. District of Columbia*, 28 A.3d 531, 544 (D.C. 2011).

A plausibility standard "is not akin to a 'probability requirement,' but it asks for more than a sheer possibility that a defendant has acted unlawfully." *Potomac Dev. Corp.*, 28 A.3d at 544 (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). Likewise, "[w]here a complaint pleads facts that are 'merely consistent with' a defendant's liability, it 'stops short of the line between possibility and plausibility of entitlement to relief.'" *Id.* "Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice," and "unadorned, the-defendant-unlawfully-harmed-me accusation[s]" are also insufficient. *Ashcroft*, 556 U.S. at 678; *see also Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007) ("a plaintiff's obligation to provide the 'grounds' of his 'entitlement to relief' requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do").

In its Motion to Dismiss, Defendant argues that Plaintiff's claim must be dismissed for failure to state a plausible claim as (I) "natural" lacks a legally cognizable meaning, and (II) no reasonable consumer would adopt Plaintiff's interpretation of "natural." Mot. at 5. The Court will review these claims before reviewing Plaintiff's claim regarding Defendant's "environmentally friendly" representations (III).

A. Count I and Count II: "Natural" Lacks a Legally Cognizable Meaning and No Reasonable Consumer Would Adopt Plaintiff's Interpretation of "Natural"

In its Motion, Defendant argues that Count I and Count II of Plaintiff's Complaint must be dismissed because labeling the tea as "All Natural" is "accurate" and a "true representation of the product," and that "absent a well-settled definition of a "natural food," there can be no misrepresentation and thus no violation of the CPPA. Mot. at 8. Furthermore, Defendant argues that Plaintiff's claims should be dismissed for failure to state a plausible claim as no reasonable consumer would adopt Plaintiff's definition of "natural." Mot. at 9.

What a reasonable consumer understands as "natural," for purposes of a false or misleading representation, is a question of fact. *See Saucier v. Countrywide Home Loans*, 64 A.3d 428, 442 (D.C. 2013) (holding that "the actual determination of whether the notice would be both material and misleading . . . is a question of fact for the jury and not a question of law for the court"). Indeed, a court must "consider an alleged unfair practice 'in terms of how the practice would be viewed and understood by a reasonable consumer.'" *Saucier*, 64 A.3d at 442 (quoting *Pearson v. Chung*, 961 A.2d 1067, 1075 (D.C. 2008)). However, there are times when it is sufficiently clear to be determined as a matter of law. *See, e.g.*, *Alicke v. MCI Commc'ns Corp.*, 111 F.3d 909, 912 (D.C. Cir. 1997) (determining that no reasonable person could interpret consumer phone contract in the manner the plaintiff asserted).

Here, the Court is persuaded that Plaintiff has alleged enough facts to advance a plausible claim that consumers could be misled by Defendant's use of terms such as "Natural" in advertising its products. Specifically, Plaintiff points to a 2015 Consumer Reports of 1,005 adults indicating that "sixty-three percent of all respondents" said that "a natural label on packaged and processed foods means that 'no toxic pesticides were used.'" Compl. at ¶ 9. Thus, by representing the tea as being "natural" when it allegedly contains glyphosate, Defendant may mislead consumers seeking to purchase only "natural" foods, and Plaintiff has alleged enough facts to survive a motion to dismiss. *See Organic Consumers Ass'n v. General Mills, Inc.*, No. 2016 CA 6309 B, 2017 WL 2901210 (D.C. Super. Ct., April 27, 2017) (concluding that Plaintiff, who alleges that Defendant's products contain traces of a chemical agent, while representing to be made from 100% natural whole grain oats, has "allege[d] specifically and plausibly that the precise wording Defendant uses on its product labels misleads consumers.").

As the Honorable Todd Edelman reasoned in *General Mills*, "whether Plaintiff's claims are meritorious is not at issue at this juncture; plainly, a reasonable fact-finder considering the facts as alleged could conclude that consumers have been misled in violation of the CPPA." *Id.* Accordingly, Plaintiff has alleged enough facts to survive a motion to dismiss on Counts I and II of its Complaint.

B. Count III: Defendant's Environmental Friendliness Representations are non-actionable

Along with the claim concerning the word "natural" on Defendant's product, Plaintiff alleges that the Defendant is misleading consumers by representing that it is committed to protecting the environment. In its Motion, Defendant argues that this claim should also be dismissed as implausible as a matter of law.

A complaint must include well-pled factual allegations that plausibly give rise to an entitlement for relief. *Potomac Dev. Corp.,* 28 A.3d at 554. "A claim has facial plausibility when Plaintiff pleads factual content that allows a court to draw the reasonable inference that Defendant is liable for the misconduct alleged." *Id.* at 543-44. Unlike its claim for the misrepresentation of the product as "natural," Plaintiff here does not allege facts sufficient to advance a plausible claim that consumers could be misled by Defendant's use of the terms "environmentally friendly" and "sustainable." Plaintiff does not give any facts regarding consumer belief or cite to any consumer survey that could render this claim more than a non-actionable opinion.

Accordingly, Count III of Plaintiff's is dismissed.

CONCLUSION

Taking all facts as alleged in the Complaint as true, and construing all reasonable inferences in Plaintiff's favor, this Court **GRANTS IN PART AND DENIES IN PART** Defendant's Motion to Dismiss.

Accordingly, based on the entire record herein, it is this the 31st day of October, 2018, hereby

ORDERED that Defendant's Motion to Dismiss Plaintiff's Complaint is **GRANTED IN PART AND DENIED IN PART**; it is further

ORDERED that **Count I and Count II** of Plaintiff's Complaint are **NOT DISMISSED**; it is further

ORDERED that **Count III** of Plaintiff's Complaint is **DISMISSED.**

SO ORDERED.

Robert R. Rigsby

Judge Robert R. Rigsby
Associate Judge
District of Columbia Superior Court

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