SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
CIVIL DIVISION

ORGANIC CONSUMERS ASSOCIATION : Case Number: 2020 CA 2566 B

v. : Judge: Florence Y. Pan

SMITHFIELD FOODS, INC. :

ORDER

This matter comes before the Court on consideration of defendant Smithfield Foods, Inc.'s Motion to Dismiss ("Def. Mot."), filed on August 17, 2020; plaintiff Organic Consumers Association's Opposition ("Pl. Opp."), filed on September 16, 2020; and defendant's Reply ("Def. Reply"), filed on September 30, 2020. The Court has considered the papers, the relevant law, and the entire record. For the following reasons, defendant's Motion to Dismiss is denied.

PROCEDURAL HISTORY

On May 20, 2020, plaintiff Organic Consumers Association ("OCA") filed a Complaint against Smithfield Foods, Inc. ("Smithfield"), alleging violations of the D.C. Consumer Protection Procedures Act ("CPPA"). *See generally* Compl. Plaintiff is "a non-profit, public-interest organization dedicated to consumer protection." *See id*. ¶ 2. Defendant "produces, processes, markets, and distributes fresh, frozen, and value-added pork products." *See id*. ¶ 49. Defendant "is incorporated in Delaware and has its principal executive office in Smithfield, Virginia," but defendant's "[p]roducts are available in a wide variety of national supermarket chains, regional stores, and other retail outlets, including stores in [the District of Columbia]." *See id*. ¶ 49-50.

Defendant states on its website, in YouTube videos, and on other media that its products are the "safest" possible U.S. pork products. *See id*. ¶¶ 4, 14 ("We are committed to setting the industry standard for providing our customers with the highest quality and safest U.S. born and

bred products possible"); ¶ 18 ("all of us at Smithfield Foods work to produce the safest pork products in the world . . . the safety and quality of our products always comes first . . . [W]e work hard to deliver the safest, highest-quality pork in the world"); ¶ 19 (because of Smithfield's "stringent food safety policies that we follow each and every day . . . consumers and customers should be confident in the products that we provide to them"); ¶ 20 (Smithfield's "food safety practices capture the latest in science and best practices," and Smithfield is "'Leading the Industry' on food safety"); ¶ 21 (Smithfield practices the "strictly controlled use of antibiotics to care for our animals and to provide consumers with the safest food possible"). Defendant also states on its website that it maintains "extremely hygienic and sanitary environments . . . at all times," and that its COVID-19 response "complement[s] the extensive safety measures in place at all our locations." *See id.* ¶ 5, note 3.

Plaintiff asserts that these statements are false and misleading. *See id.* ¶ 7. Plaintiff alleges that, "[i]n reality, Smithfield employs production practices that result in less-safe conditions, effects, and Products, including the routine preventative use of medically important antibiotics, crowded conditions, the use of potentially carcinogenic drugs, and rapid slaughter methods." *See id.* ¶ 5. Plaintiff alleges that defendant's products "are commonly contaminated with dangerous pathogens to a degree that makes them far less than the 'safest' possible U.S. born and bred products," and that "[t]he USDA frequently notifies Smithfield that pork processed product in its slaughter plants is more likely to be contaminated with *Salmonella* than similar products" from other plants. *See id.* ¶ 6. Plaintiff also alleges that defendant's "dangerous and deceptive practices recently led to one of the largest coronavirus outbreaks in the United States." *See id.* ¶ 5, note 3.

According to plaintiff, defendant's misleading statements are material because "[c]onsumers care deeply about food safety and rely on representations like those made by Smithfield to identify animal products that conform to higher food safety standards." *See id.* ¶ 42. Plaintiff alleges that a majority of consumers are "willing to pay more for safer pork products," and "are concerned about the possibility of foodborne illness" and "the use of antibiotics in animals raised for food contribut[ing] to the growth of antibiotic-resistant bacteria that threaten . . . health." *See id.* ¶¶ 43-45 (citing consumer surveys). Plaintiff further alleges that "[c]onsumers expect . . . that products marketed with Smithfield's Food Safety Representations are produced in conformance with international guidelines regarding antibiotics use, produced without the use of potentially carcinogenic drugs, have lower-than-average rates of *Salmonella* contamination, [] are not contaminated with particularly dangerous disease strains," and "are not made under crowded, unsanitary, pharmaceutical-dependent, and dangerously rapid production conditions." *See id.* ¶¶ 46-47.

The Complaint alleges that on May 17, 2020, plaintiff bought two Smithfield items – one "tenderloin product" and one "loin roast product" – at a Walmart store in the District of Columbia, "in order to evaluate Smithfield's marketing and advertising claims regarding food safety." *See id*. ¶ 52-53. Plaintiff alleges that it "determined, through its evaluation of the products, that these products originated from a slaughter plant" that the USDA found "to vastly exceed 'industrywide' rates of *Salmonella* contamination." *See id*. ¶ 53.

In sum, plaintiff alleges that defendant

> violated the CPPA by 'representing that goods have a source or characteristics that they do not have; representing that goods are of a particular standard, quality, grade, style, or model, [when] in fact they are of another; misrepresenting as to a material fact which has a tendency to mislead, failing to state a material fact if such failure tends to mislead; using innuendo or ambiguity as to a material fact,

> which has a tendency to mislead; and advertising goods without the intent to sell them as advertised.

See id. ¶ 63 (citing D.C. Code § 28-3904(a-h)).

On August 17, 2020, defendant filed the instant Motion to Dismiss, arguing that: (1) plaintiff lacks standing; (2) the challenged statements are not actionable; (3) plaintiff's requested injunction is unconstitutional and would violate the Dormant Commerce Clause and the First Amendment; and (4) the Court should strike plaintiff's allegations related to COVID-19 because they have no bearing on the safety of defendant's pork products. *See generally* Def. Mot.[1] On September 16, 2020, plaintiff filed its Opposition, arguing that: (1) plaintiff has standing under the CPPA's provisions addressing non-profit and public interest organizations; (2) the challenged statements are actionable because they are plausibly false and misleading to customers; (3) the requested injunction does not violate either the Dormant Commerce Clause or the First Amendment; and (4) the Court should not strike plaintiff's COVID-19 allegations. *See generally* Pl. Opp. Defendant filed its Reply on September 30, 2020.

APPLICABLE LEGAL STANDARD

A complaint should be dismissed for failure to state a claim upon which relief can be granted only if it appears "beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *See Fingerhut v. Children's Nat'l Med. Ctr.*, 738 A.2d 799, 803 (D.C. 1999); Super. Ct. Civ. R. 12(b)(6). When considering a motion to dismiss a complaint for failure to state a claim, the Court must "construe the facts on the face of the complaint in the light most favorable to the non-moving party, and accept as true the allegations in the complaint." *See Fred Ezra Co. v. Pedas*, 682 A.2d 173, 174 (D.C. 1996). A court should

[1] In the alternative, defendant requests staying the proceedings for 90 days to allow the parties to complete expedited discovery on plaintiff's standing. *See* Def. Mot. at 14. As the Court finds plaintiff to have standing under the CPPA, there is no need to stay the proceedings.

not dismiss a complaint merely because it "doubts that a plaintiff will prevail on a claim." *See Duncan v. Children's Nat'l Med. Ctr.*, 702 A.2d 207, 210 (D.C. 1997).

A pleading must contain a "short and plain statement of the claim showing that the pleading is entitled to relief." *See* Super. Ct. Civ. R. 8(a); *Ashcroft v. Iqbal*, 556 U.S. 662, 677-78 (2009). Plaintiffs who wish to survive a motion to dismiss under Super. Ct. Civ. R. 12(b)(6) must provide "enough facts to state a claim to relief that is plausible on its face." *See Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007) (plaintiffs must "[nudge] their claims across the line from conceivable to plausible"); *Mazza v. Housecraft LLC*, 18 A.3d 786, 791 (D.C. 2011) (holding that *Twombly* and *Iqbal* apply in our jurisdiction because Super. Ct. Civ. R. 8(a) is identical to its federal counterpart). 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." *See Iqbal*, 556 U.S. at 678. A claim is plausible on its face "when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *See id.*

ANALYSIS

I. CPPA

A. Standing

Plaintiff has standing under the CPPA to bring the instant case. As a general matter, to have standing, a plaintiff must demonstrate that: "(1) he or she has suffered injury in fact—an actual or imminent, concrete and particularized, invasion of a legally protected interest; (2) the injury is fairly traceable to defendant's challenged actions; and (3) it is likely the injury will be redressed by a favorable decision." *See Equal Rights Ctr. v. Props. Int'l*, 110 A.3d 599, 603

(D.C. 2015) (internal citations omitted); *see also Grayson v. AT&T Corp.*, 15 A.3d 219, 224 (D.C. 2011) (en banc) ("[E]ven though Congress created the District of Columbia court system under Article I of the Constitution, rather than Article III, this court has followed consistently the constitutional standing requirement embodied in Article III. Thus, appellants must allege some threatened or actual injury resulting from putatively illegal action."). Under the CPPA § 28-3905(k)(1)(C) and (D), a "[p]laintiff can show injury-in-fact as a non-profit organization or as a public interest organization." *See, e.g.*, *Organic Consumers Ass'n v. Bigelow Tea Co.,* No. 2017 CA 8375, 2018 D.C. Super. LEXIS 11, at *3 (D.C. Super. Ct. Oct. 31, 2018) (Rigsby, J.).

D.C. Code § 28-3905(k)(1)(C) (hereinafter "Subparagraph (C)") and D.C. Code § 28-3905(k)(1)(D) (hereinafter "Subparagraph (D)") allow nonprofit or public-interest organizations to establish standing to bring actions on behalf of consumers. Subparagraph (C) refers to goods or services purchased by a nonprofit organization "in order to test or evaluate qualities" of the goods and services; while Subparagraph (D) more generally confers standing on a public interest organization that has a sufficient nexus to the interests of the consumers that it represents. Subparagraphs (C) and (D) provide, in relevant part, as follows:

> (C) A nonprofit organization may, on behalf of itself or any of its members, or on any such behalf and on behalf of the general public, bring an action seeking relief from the use of 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 qualities pertaining to use for personal, household, or family purposes.
>
> (D)
> (i) Subject 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) An 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.

See D.C. Code § 28-3905(k)(1)(C), (D).

Notably, judges of the D.C. Superior Court have repeatedly relied on Subparagraphs (C) and (D) to hold that non-profit groups that bring consumer-protection actions under the CPPA have standing to bring such claims on behalf of consumers and the general public. *See, Bigelow Tea Co.*, 2018 D.C. Super. LEXIS 11, at *1-5 (non-profit organization that purchased products had standing to allege that defendant violated the CPPA); *Nat'l Consumers League v. Gerber Prods. Co.*, No. 2014 CA 8202, 2015 D.C. Super. Ct. LEXIS 10, at *14-18 (D.C. Super. Ct. Aug. 5, 2015) (Ross, J.) (same); *Nat'l Consumers League v. Bimbo Bakeries USA*, No. 2013 CA 6548, 2015 D.C. Super. Ct. LEXIS 5, at *11-15 (D.C. Super. Ct. Apr. 2, 2015) (Mott, J.) (same).

Plaintiff has standing under Subparagraph (D), as it is a "public interest organization" that has a "sufficient nexus" to the interests of D.C. consumers. *See* D.C. Code § 28-3905(k)(1)(D) (allowing 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 the "interests of a consumer or a class of consumers," where the public interest organization has a "sufficient nexus to the interests involved of the consumer"). Plaintiff is a non-profit that "focuses on promoting the views and interests of consumers." *See* Compl. ¶ 51. It "represents and advances the rights and interests of consumers by educating consumers on food safety, industrial agriculture, genetic engineering, corporate accountability, and environmental sustainability issues." *See id.* Plaintiff's work concerning truthful advertising, "accurate food labeling, food safety, children's health, corporate accountability, and environmental

sustainability" establishes the required nexus. *See id*. Finally, plaintiff sufficiently alleges an injury to those consumers who have been or will be deceived by defendant's alleged deceptive marketing and advertising. *See id.* ¶¶ 22, 41-48. Plaintiff therefore has standing under Subparagraph (D).

Defendant argues that plaintiff does not have standing to represent the general public because plaintiff itself does not independently have standing. *See* Def. Mot. at 12. But the cases upon which defendant relies are inapposite. *See id.* (citing *Organic Consumers Ass'n v. Hain Celestial Group, Inc.*, 285 F. Supp. 3d 100, 102-03 (D.D.C. 2018); *Beyond Pesticides v. Dr Pepper Snapple Grp., Inc.*, Case No. 17-1431, 2019 U.S. Dist. LEXIS 109812 (D.D.C. July 1, 2019)). Those cases were brought in the United States District Court for the District of Columbia, which applies standards for "Article III standing" that are stricter than the standards applied by this Court. The *Beyond Pesticides* court specifically noted that the local District of Columbia courts enjoy "greater flexibility in regard to [the case or controversy requirement] not possessed by the federal courts." *See Beyond Pesticides*, U.S. Dist. LEXIS 109812 at *4 (citing *Atchison v. District of Columbia*, 585 A.2d 150, 153 (D.C. 1991)).

Furthermore, other judges of the D.C. Superior Court have interpreted the CPPA more broadly to allow standing based on a statutory violation. *See, e.g., 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"); *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"); *Bigelow Tea Co.*, 2018 D.C. Super. LEXIS 11, at *3 ("D.C. Code § 28-3905(k)(1)(C)-(D) provide separate, independent standing provisions"). Thus, plaintiff has standing to bring the instant case.[2]

B. Injunctive Relief

Defendant argues that plaintiff "does not allege facts showing that it will be harmed by the challenged conduct in the future," and therefore "an injunction is unnecessary." *See* Def. Mot. at 9. But plaintiff claims that the allegedly misleading statements induce consumers to purchase products that they might not otherwise buy. *See* Compl. ¶ 48 ("Because Smithfield sells pork products that are not the 'safest' possible and utilizes especially hazardous production practices, its Products marketed with Smithfield's Food Safety Representations are misleading to consumers"); *see also id*. ¶ 41 ("Smithfield's Food Safety Representations are . . . false[,] material and misleading to consumers"); ¶ 42 ("Consumers care deeply about food safety and rely on representations like those made by Smithfield to identify animal products that conform to higher food safety standards"); ¶¶ 43-45 (a majority of consumers are "willing to pay more for safer pork products," and "are concerned about the possibility of foodborne illness" and about "the use of antibiotics in animals raised for food contribut[ing] to the growth of antibiotic-resistant bacteria that threaten . . . health"); ¶¶ 46-47 ("Consumers expect . . . that products

[2] Defendant also argues that plaintiff has not "tested" the products that it purchased in order to establish standing under Subparagraph (C), because merely determining which plant processed the pork in question is not "testing"; and that plaintiff lacks "organizational" standing under Subparagraph (C), because plaintiff does not allege facts showing that Smithfield's statements "so *disrupted* OCA's mission-driven activities that OCA was *forced* to divert resources to counteract those statements." *See* Def. Mot. at 1, 6 (emphasis in original) (arguing that plaintiff "was not injured by the statements it challenges and the sole relief it seeks (an injunction) will not redress any alleged injury"). As discussed *supra,* plaintiff establishes standing under Subparagraph (D), and the Court therefore need not address these arguments.

marketed with Smithfield's Food Safety Representations are produced in conformance with international guidelines regarding antibiotics use, produced without the use of potentially carcinogenic drugs, have lower-than-average rates of *Salmonella* contamination, [] are not contaminated with particularly dangerous disease strains . . . and are not contaminated with particularly dangerous disease strains"). An injunction against the making of such statements is an appropriate remedy if plaintiff's allegations are proven to be true. *See* D.C. Code § 28-3905(k)(2) (permitting the issuance of "[a]n injunction against the use of the unlawful trade practice").

II. The Challenged Statements Are Actionable

Defendant argues that plaintiff's claims are nonactionable because (1) the challenged statements are mere "puffery" and "too general to be actionable," and (2) plaintiff's allegations about consumer understanding are implausible. *See* Def. Mot. at 1, 14-15. The Court rejects these arguments, and finds that plaintiff's claims are actionable under the CPPA.

Puffery is defined as "exaggerations [made by a] seller as to the degree of quality of his product, the truth or falsity of which cannot be precisely determined." *See Pearson v. Soo Chung*, 961 A.2d 1067, 1076 (D.C. 2008) (internal citations omitted). Phrases such as "quality satisfaction guaranteed" are "classic example[s] of commercial puffery on which no reasonable person would rely." *See id*. (internal citations omitted). The challenged statement that defendant's products are the "safest" possible is detailed and concrete enough to be actionable. *See* Compl. ¶ 4 ("We are committed to setting the industry standard for providing our customers with the highest quality and safest U.S. born and bred products possible"); *see also* Compl. ¶¶ 18-21. Other statements made by defendant also are considerably more specific than those characterized as "puffery," including: that Smithfield's "food safety practices capture the latest

in science and best practices," that Smithfield "is 'Leading the Industry' on food safety," and that Smithfield "practices the 'strictly controlled use of antibiotics to care for [its] animals and provide consumers with the safest food possible.'" *See* Compl. ¶¶ 20-21.

Plaintiff's allegations about consumer understanding are plausible.[3] The Complaint cites sources stating that food safety is an issue of significant concern to consumers; and also cites studies supporting plaintiff's claims that a "reasonable consumer" would expect "that products marketed with Smithfield's Food Safety Representations are produced in conformance with international guidelines regarding antibiotics use, produced without the use of potentially carcinogenic drugs, have lower-than-average rates of *Salmonella* contamination, and are not contaminated with particularly dangerous disease strains." *See* Compl. ¶¶ 42-47.

III. Constitutional Issues

A. Dormant Commerce Clause

Plaintiff's requested relief does not violate the Dormant Commerce Clause. Defendant argues that plaintiff's claim violates the Dormant Commerce Clause because plaintiff improperly seeks to apply the CPPA, a District of Columbia statute, to all fifty states. *See* Def. Mot. at 2. The Commerce Clause "has long been understood to have a negative or dormant aspect that denies the States the power unjustifiably to discriminate against or burden the interstate flow of

[3] Defendant argues that even if reasonable consumers were to rely on these statements, it would be implausible for consumers to understand the statements as plaintiff claims they would. *See* Def. Mot. at 15-16 ("The broad inferences OCA claims consumers draw from Smithfield's general statements are . . . inconsistent with the specific information Smithfield provided to explain its general statements"); Def. Reply at 9 ("OCA claims Smithfield violated the CPPA by making statements on the Internet . . . [but] [n]one of the challenged statements appear on Smithfield's product labels or in ads that ran in the District"). According to defendant, plaintiff's interpretations of Smithfield's general statements about "food safety" contradict specific information found on Smithfield's webpages, and thus, reasonable consumers are unlikely to be misled. *See* Def. Mot. at 1-2. At best, this argument raises a factual dispute as to whether the statements are material and misleading, and it certainly does not entitle defendant to dismissal of the Complaint. *See Saucier v. Countrywide Home Loans*, 64 A.3d 428, 445 (D.C. 2013); *see also Mann v. Bahi*, 251 F. Supp. 3d 112, 126 (D.D.C. 2017) (denying motion to dismiss because whether statements have "a tendency to mislead are . . . questions for a jury").

articles of commerce." *See District of Columbia v. Beretta, U.S.A., Corp.*, 872 A.2d 633, 656 (D.C. 2005) (internal citations omitted); *see also Am. Bus Ass'n v. District of Columbia*, 2 A.3d 203, 212-13 (D.C. 2010). The Dormant Commerce Clause "precludes the application of a state statute to commerce that takes place wholly outside the State's borders." *See Pharm. Research & Mfrs. of Am. v. District of Columbia*, 406 F. Supp. 2d 56, 69 (D.D.C. 2005) (internal citations omitted).

Here, defendant "sells products in the District," and the commerce at issue therefore does not take place wholly outside the borders of the District of Columbia. *See* Def Mot. at 18, n. 15; *compare with Pharm. Research & Mfrs. of Am.*, 406 F. Supp. 2d at 69. Furthermore, "legislation . . . may affect commerce and persons engaged in it without constituting a regulation of it, within the meaning of the Constitution." *See Beretta*, 872 A.2d at 656 (quoting *Head v. New Mexico Bd. of Exam'rs in Optometry*, 374 U.S. 424, 428 (1963)). When "a statute has only indirect effects on interstate commerce and regulates evenhandedly," courts examine "whether the state's interest is legitimate and whether the burden on interstate commerce clearly exceeds the local benefits." *See Beretta*, 872 A.2d at 656 (quoting *Brown-Forman Distillers Corp. v. New York State Liquor Auth.*, 476 U.S. 573, 579 (1986)). The validity of a state statute "depends on whether it imposes a burden on interstate commerce that is clearly excessive in relation to the putative local benefits." *See id*. at 657 (internal citations omitted). The CPPA was passed to protect District of Columbia residents from unfair or deceptive trade practices, has significant local benefits, and defendant has not demonstrated that it imposes an excessive burden on interstate commerce. At least one court has upheld a state consumer-protection statute under the Dormant Commerce Clause, and defendant does not cite any authority that supports its contention that such a statute, as applied against a merchant that sells goods within the

jurisdiction governed by the statute, violates the Dormant Commerce Clause. *See generally* Def. Mot.; *see, e.g.* Pl. Opp. at 15 (citing *Clark v. Citizens of Humanity, LLC*, 97 F. Supp. 3d 1199 (S.D. Cal. 2015) (finding "a legitimate state interest in combating deceptive advertising" and no violation of the Dormant Commerce Clause where clothing label allegedly violated state statute)).[4]

B. First Amendment

Defendant argues that applying the CPPA would violate the First Amendment because the commercial speech that plaintiff challenges is grounded in legitimate scientific evidence and facts. *See* Def. Mot. at 2, 19. But commercial speech is only protected if it is not misleading. *See Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557, 566 (1980); *see also in Re Banks*, 805 A.2d 990, 1001 (D.C. 2002) (finding that appellant "had no First Amendment right to engage in commercial speech calculated to deceive or mislead prospective clients by misrepresenting his qualifications"). "[F]alse statements, erroneous statements, or statements that have the likelihood or tendency to deceive . . . are not entitled to protection in the first place." *See Ass'n of Private Sector Colleges & Univs. v. Duncan*, 681 F.3d 427, 457 (D.C. Cir. 2012). Even commercial speech that "is only potentially misleading" may be regulated without violating the First Amendment, if "the asserted governmental interest in regulating the speech is substantial." *See Alliance for Natural Health U.S. v. Sebelius*, 786 F. Supp. 2d 1, 13

[4] The cases defendant cites are not persuasive because the statutes at issue are readily distinguishable from the CPPA. *See* Def. Mot. at 16-18 (citing *Yakima Valley Mem. Hosp. v. Wash. State Dep't of Health*, 731 F.3d 843, 846 (9th Cir. 2013) (considering regulations governing surgical procedure certifications); *Pharm. Research & Mfrs. of Am. v. County of Alameda*, 768 F.3d 1037, 1043 (9th Cir. 2013) (considering an ordinance governing drug disposal); *Publius v. Boyer-Vine*, 237 F. Supp. 3d 997, 1023 (E. D. Cal. 2017) (considering a statute prohibiting online posting of public officials' home addresses and telephone numbers without permission); *McLemore v. Gumucio*, 2019 U.S. Dist. LEXIS 122525 (M.D. Tenn. 2019) (considering a statute governing online auctions); *Sam Francis Foundation v. Christies, Inc*., 784 F.3d 1320, 1324-25 (9th Cir. 2015) (considering a statute requiring artist royalties); *Eric M. Berman, P.C. v. City of New York*, 895 F. Supp. 2d 453, 483 (E.D.N.Y. 2012) (considering a city law governing debt collection licensing)).

(D.D.C. 2011). Here, plaintiff's allegations that defendant's misleading statements violate the CPPA do not raise any First Amendment concern. The First Amendment affords no protection for statements that are misleading and deceptive, as alleged in the Complaint.

IV. COVID-19 Allegations

Defendant argues that the Complaint "includes improper allegations that Smithfield is not taking adequate steps to protect its workers from COVID-19" and that "[t]hese allegations have no bearing on whether Smithfield's pork products are safe." *See* Def. Mot. at 20. The Court "may strike from a pleading an insufficient defense or any redundant, immaterial, impertinent, or scandalous matter." *See* D.C. Super. Ct. R. 12(f). Plaintiff alleges that defendant's "dangerous and deceptive practices recently led to one of the largest coronavirus outbreaks in the United States," and that "the company intends to continue misleading consumers about its production practices." *See* Compl. ¶ 5, note 3. These statements appear to link a COVID-19 outbreak to the unsafe practices at issue in this case, and therefore are not "redundant, immaterial, impertinent, or scandalous." *See* D.C. Super. Ct. R. 12(f). The Court therefore declines to strike the Complaint's references to COVID-19. *See* Compl. ¶ 5, note 3; D.C. Super. Ct. R. 12(f).

V. Preemption and Primary Injunction

Defendant argues that plaintiff's claims may be preempted by federal law, because the USDA Food Safety and Inspection Service determines and decides if Smithfield's products are safe. *See* Def. Mot. at 20, note 17. To the extent that plaintiff asserts that defendants must adhere to standards that differ from – and conflict with – federal law, such claims clearly would be preempted. But the Court understands plaintiff to be alleging that defendant's representations about their production practices violate the CPPA, not that the practices themselves violate D.C. law.

Accordingly, it is this 14th day of December, 2020, hereby

ORDERED that defendants' Motion to Dismiss plaintiff's Complaint is **DENIED**.

SO ORDERED.

Judge Florence Y. Pan
Superior Court of the District of Columbia

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