SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
CIVIL DIVISION

ORGANIC CONSUMERS ASSOCIATION,	)	
Plaintiff	)	
	)	**Case No. 2018 CA 004850 B**
v.	)	
	)	**Judge Neal E. Kravitz**
BEN & JERRY'S HOMEMADE, INC, et al.,	)	
Defendants	)	

ORDER DENYING DEFENDANTS' MOTION TO DISMISS

The plaintiff, Organic Consumers Association ("OCA"), has brought suit against defendants Ben & Jerry's Homemade, Inc. and Conopco, Inc. d/b/a Unilever United States (together, "Ben & Jerry's"), under the District of Columbia Consumer Protection Procedures Act ("CPPA"). OCA alleges that Ben & Jerry's labeling and marketing of its ice cream products as humanely sourced and environmentally responsible are materially false and tend to mislead consumers in that the products contain ingredients sourced from inhumane dairy farms and traces of the herbicide glyphosate.

Now before the court is Ben & Jerry's motion to dismiss the complaint for failure to state a claim on which relief can be granted. *See* Super. Ct. Civ. R. 12(b)(6). Ben & Jerry's contends (1) that OCA has failed to allege a plausible claim for relief under the CPPA based on misleading labeling suggesting ice cream made with milk and cream from "happy cows" raised in a healthy environment of "green fields [and] blue skies"; and (2) that OCA's claim that consumers are misled by Ben & Jerry's reputation as an environmentally responsible company given tests showing traces of glyphosate in some of Ben & Jerry's products is implausible and, in any event, preempted by federal law.

The court has carefully considered Ben & Jerry's motion, OCA's opposition, Ben & Jerry's reply, and a later notice of supplemental authority filed by Ben & Jerry's. For the reasons that follow, the court concludes that the motion must be denied.

Legal Standard

A complaint is subject to dismissal under Rule 12(b)(6) for failure to state a claim on which relief can be granted if it does not satisfy the requirement, set forth in Super. Ct. Civ. R. 8(a)(2), that it contain a "short and plain statement of the claim showing that the pleader is entitled to relief." *Potomac Dev. Corp. v. District of Columbia*, 28 A.3d 531, 544 (D.C. 2011). The notice pleading rules do "not require detailed factual allegations," *id*. (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)), and all factual allegations in a complaint challenged under Rule 12(b)(6) must be presumed true and liberally construed in the plaintiff's favor, *Grayson v. AT&T Corp.*, 15 A.3d 219, 228-29 (D.C. 2011) (en banc). Nevertheless, "a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face," *Potomac Dev. Corp.*, 28 A.3d at 544 (quoting *Iqbal*, 556 U.S. at 678), and the plaintiff must plead "factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged," *id.* "The requirement of facial plausibility 'asks for more than a sheer possibility that a defendant has acted unlawfully,' and a complaint falls short of showing a plausible entitlement to relief if it 'pleads facts that are merely consistent with a defendant's liability.'" *Tingling-Clemmons v. District of Columbia*, 133 A.3d 241, 246 (D.C. 2016) (quoting *Potomac Dev. Corp.*, 28 A.3d at 544). "To satisfy Rule 8 (a), plaintiffs must 'nudge[] their claims across the line from conceivable to plausible.'" *Id.* (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). Thus, although a plaintiff may survive a Rule 12(b)(6) motion even if "recovery is very remote and unlikely," *Grayson*, 15 A.3d at 229, the "factual

allegations must be enough to raise a right to relief above the speculative level," *OneWest Bank, FSB v. Marshall*, 18 A.3d 715, 721 (D.C. 2011) (quoting *Chamberlain v. American Honda Fin. Corp.*, 931 A.2d 1018, 1023 (D.C. 2007)). And although "legal conclusions can provide the framework of a complaint," conclusory allegations "are not entitled to the assumption of truth," and "they must be supported by factual allegations." *Potomac Dev. Corp.*, 28 A.3d at 544 (citing *Iqbal*, 556 U.S. at 664).

Discussion

Humane sourcing

Ben & Jerry's argues that OCA fails to state a valid CPPA claim regarding the sourcing of ingredients because (1) no reasonable customer would interpret Ben & Jerry's statements about "happy cows" and its "Caring Dairy" program "to mean that none of the milk used in Ben & Jerry's ice cream products comes from ordinary farms"; and (2) whether cows are "happy" or Ben & Jerry's lives up to its stated ethical aspirations does "not provide a predicate for a viable CPPA claim." OCA contends in response that Ben & Jerry's misconstrues the complaint and that OCA simply alleges therein that the company's labeling and marketing as a whole mislead customers into believing that Ben & Jerry's uses ingredients only from dairy farms with higher-than-average animal welfare standards. OCA points, in particular, to Ben & Jerry's website, which OCA asserts gives the impression that all of the farms supplying Ben & Jerry's participate in the company's "Caring Dairy" program when, in fact, participation in the program is voluntary.

The court concludes that the complaint alleges facts sufficient to advance a plausible claim that consumers would be misled by Ben & Jerry's labeling and marketing regarding the sourcing of its ingredients. Although the complaint might be deficient if it were focused

exclusively on unquantifiable representations about the "happiness" of cows or "respect" for the cow, the complaint is not so limited. To the contrary, the complaint alleges that fewer than 100% of Ben & Jerry's partner farms are "Caring Dairies" even though content on Ben & Jerry's website suggests that all farms supplying ingredients are in the program. Taken together with the complaint's references to Ben & Jerry's general messages about humane treatment of cows and "values-led sourcing," the allegations concerning the misleading suggestions of full participation in the Caring Dairies program are sufficient to state a claim of misleading labeling and marketing, since a reasonable consumer could plausibly interpret Ben & Jerry's labeling and marketing as affirmatively (and inaccurately) communicating that the company's ice cream products are sourced exclusively from Caring Dairies and/or other humane sources. Ben & Jerry's is thus not entitled to a dismissal on this ground at the pleading stage.

Environmental Responsibility – Glyphosates

Ben & Jerry's argues that the complaint fails to state a plausible CPPA claim of misleading labeling and marketing based on issues of environmental responsibility. Specifically, Ben & Jerry's contends that the complaint identifies no false or misleading statements Ben & Jerry's has made regarding glyphosate, and that no reasonable consumer would view its environmental advocacy as a guarantee that its products contain no glyphosate, which it describes as a "ubiquitous herbicide." OCA responds that it is at least a disputed question of fact whether certain levels of glyphosate harm the environment and that Ben & Jerry's marketing, considered as a whole, misleads consumers into believing that Ben & Jerry's ice cream products contain no chemicals that harm the environment.

The court concludes that the facts alleged in the complaint are sufficient to support a plausible claim that consumers would be misled by Ben & Jerry's statements into believing that

the company's ice cream products contain no traces of chemicals like glyphosate. Unlike *Organic Consumers Ass'n v. The Bigelow Tea Co.*, 2017 CA 8375 B, 2018 D.C. Super LEXIS 11, at *12-13 (D.C. Super. Ct. Oct. 31, 2018) (Rigsby, J.), a case relied on by Ben & Jerry's in which a CPPA claim based on a company's stated commitments to environmental sustainability was dismissed for failure to state a claim, OAC's complaint in this case identifies specific representations from Ben & Jerry's beyond vague commitments to environmentalism and sustainability. *Cf. Organic Consumers Ass'n v. General Mills, Inc.*, 2016 CA 6309 B, 2017 D.C. Super. LEXIS 4, at *23-25 (D.C. Super. Ct. July 6, 2017) (Edelman, J.) (denying a motion to dismiss where the complaint alleged the presence of a chemical agent in the defendant's products, notwithstanding the defendant's labeling suggesting that its products are 100% natural). For example, in addition to phrases like "promoting business practices that respect the Earth and the Environment" and "high standards for environmental practices," the complaint identifies specific messages related to the purity of Ben & Jerry's products like "values-led sourcing" and advocacy for transparency in labeling ("Labelize It!"). Compl. 45–50. The complaint thus plausibly alleges that a reasonable consumer would be misled into believing that Ben & Jerry's ice cream products are free of glyphosate or that the company would disclose the presence of glyphosate on the label of any product that contained it.

Federal Preemption

Under the Supremacy Clause, federal law preempts state law that "interferes with or is contrary to federal law." *Bostic v. D.C. Hous. Auth.*, 162 A.3d 170, 173 (D.C. 2017) (internal quotation marks omitted); *see also* U.S. Const. art. VI., cl. 2; *Murray v. Motorola, Inc.*, 982 A.2d 764, 771 (D.C. 2009). Federal law can preempt state law expressly or impliedly. *Bostic*, 162 A.3d at 173. Express preemption occurs "where statutory language reveals an explicit

congressional intent to pre-empt state law." *Murray*, 982 A.2d at 771 (internal quotation marks and ellipses omitted). Implied preemption occurs in either of two ways: through conflict preemption, which occurs "where compliance with both federal and state regulations is a physical impossibility or where state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress," *id.* (internal quotation marks, ellipses, and brackets omitted); or through field preemption, which "occurs when federal law so thoroughly occupies a legislative field as to make reasonable the inference that Congress left no room for the States to supplement it," *id.* at 771-72 (internal quotation marks omitted). Courts addressing questions of preemption, whether express or implied, begin "with the assumption that the historic police powers of the States [are] not to be superseded by [federal law] unless that was the clear and manifest purpose of Congress." *Altria Group, Inc. v. Good*, 555 U.S. 70, 77 (2008) (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)) (internal quotation marks omitted).

Ben & Jerry's argues that OCA's claims under the CPPA concerning glyphosate are expressly preempted by the Federal Insecticide, Fungicide, and Rodenticide Act, 21 U.S.C. 346a ("FIFRA"), and by the Food, Drug & Cosmetic Act, 21 U.S.C. 343-1(a) ("FDCA"). Specifically, Ben & Jerry's contends that the relief sought by OCA would interfere with the Environmental Protection Agency's exclusive power to establish the acceptable tolerance of glyphosate under FIFRA and the Food and Drug Administration's exclusive power to impose labeling requirements on manufacturers under the FDCA. Essential to Ben & Jerry's arguments is its characterization of OCA's suit as seeking to require Ben & Jerry's to produce 100% glyphosate-free products or to place statements on its products indicating that the products may contain traces of glyphosate.

The court is not persuaded. It is premature to enter a Rule 12(b)(6) dismissal on preemption grounds based on arguments about potential relief. *See Organic Consumers Ass'n v.General Mills, Inc.*, 2017 D.C. Super. LEXIS 4, at *25; *Nat'l Consumers League v. Bimbo Bakeries USA*, 2013 CA 6548 B, 2015 D.C. Super. LEXIS 5, at *19 (D.C. Super. Ct. April 2, 2015) (Mott, J.). Moreover, the complaint is focused not on these specific forms of relief but on Ben & Jerry's advertising messages as a whole, and it is difficult to imagine that the suit would have any effect on the federal government's ability to set acceptable levels of glyphosate consumption under FIFRA or that it would run afoul of the FDCA's preemption clause, which does not expressly preclude state laws that regulate false or misleading advertising of products covered under the Act. *See* 21 U.S.C. 678, 467e (precluding states from enacting "[m]arking, labeling, packaging, or ingredient requirements . . . in addition to, or different than, those made under [the Acts]").

Accordingly, it is this 7th day of January 2019

ORDERED that the motion is **denied**. It is further

ORDERED that the defendants have until January 22, 2019 to file an answer to the complaint. *See* Super. Ct. Civ. R. 12(a)(4)(A). It is further

ORDERED that the case remains set for an initial scheduling conference on January 18, 2019 at 9:00 a.m. (unless Judge Fern Saddler, to whom the case is now assigned, rules otherwise).

Neal E. Kravitz, Associate Judge
(Signed in Chambers)

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