SUPERIOR COURT FOR THE DISTRICT OF COLUMBIA
CIVIL DIVISION

ORGANIC CONSUMERS ASSOCIATION, *et al.,*	:	
Plaintiffs,	:	
v.	:	**Case No. 2016 CA 6309 B**
	:	**Judge Todd Edelman**
GENERAL MILLS, INC.,	:	
Defendant.	:	

ORDER

In this "private attorney general" action brought pursuant to the District of Columbia Consumer Protection Procedures Act, D.C. Code § 28-309 *et seq.,* three non-profit organizations have brought suit against the Defendant food manufacturer, claiming that Defendant misleads consumers by marketing of some of its products as containing "100% Natural Whole Grain Oats" when in fact they contain detectable quantities of a chemical agent. This matter now comes before the Court upon Defendant's General Mills, Inc.'s Amended Opposed Motion to Dismiss Plaintiffs' Complaint ("Defendant's Motion"), filed April 27, 2017. Plaintiffs filed their Opposition on May 10, 2017, and on June 1, 2017, Defendant filed its Reply. While some of the arguments raised in Defendant's Motion foreshadow thorny issues that will likely play a more significant role as this lawsuit proceeds, none of them justify dismissal of the case at this juncture.

I. Background

Plaintiffs are three not-for-profit public interest organizations—Organic Consumers Association ("OCA"), Moms Across America ("MAA"), and Beyond Pesticides ("BP")—

bringing suit against Defendant General Mills for alleged violations of the District of Columbia Consumer Protections Procedures Act (the "CPPA," or the "Act"), D.C. Code § 28-309 *et seq*. Plaintiffs' claims arise out of the alleged "deceptive labeling, marketing, and sale of Defendant's Nature Valley granola products," Compl. p. 1, which, according to Plaintiffs, Defendant falsely labels as made with "100% Natural Whole Grain Oats" when they in fact contain the chemical substance glyphosate, "a potent biocide and human endocrine disruptor, with detrimental health effects that are still becoming known," *Id*. at ¶ 4.

On August 24, 2016, Plaintiffs filed their Complaint alleging that "General Mills' labeling and marketing of the [p]roducts" as "'natural,' 'healthy,' and/or 'Made with 100% Natural Whole Grain Oats'" violates D.C. Code §§ 28-3094(a), (d), (f), (f-1), and (h). Compl. ¶¶ 138–39, 145. Under those provisions, it is a violation of the Act 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;
> (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 intent to sell them or without the intent to sell them as advertised or offered

To remedy these allegedly deceptive practices, Plaintiffs seek:

> (A) a declaration that General Mills' conduct [violates] the [CPPA];
> (B) an order enjoining General Mills' conduct found to [violate] the [CPPA];
> (C) an order granting Plaintiffs costs and disbursements, including reasonable attorneys' fees and expert fees, and prejudgment interest at the maximum rate allowable by law;
> (D) such further relief, including equitable relief, as [the] Court may deem just and proper.

Compl. p. 25.[1]

While Plaintiffs acknowledge purchasing only one variety of product, Compl. ¶¶ 27, 32, 40, they assert identical claims as to at least 23 different varieties, *id*. at ¶ 6, and they leave open the possibility that "[d]iscovery may demonstrate that additional [products] are within the scope of [the] Complaint," *id.* at ¶ 6 n.1. They allege that "[t]ests conducted by an independent laboratory . . . revealed the amount of glyphosate in the [product] to be .45 ppm." *Id.* at ¶ 7. Plaintiffs further acknowledge that "[t]he exact source of glyphosate in these oat products is known only to General Mills and its suppliers," *id.* at ¶ 9, and suggest that "further discovery will reveal the precise source," *id.* at ¶ 9 n.2.

II. Analysis

Defendant bases its request for dismissal on four grounds, maintaining that (i) Plaintiffs lack standing to bring their claims, (ii) the Court should dismiss or defer action on this lawsuit pursuant to the doctrine of primary jurisdiction, (iii) Plaintiffs have failed to meet their burden under Superior Court Rule of Civil Procedure 8, and (iv) the relief Plaintiffs request is partially preempted.

A. Standing

Defendant's Motion challenges Plaintiffs' standing to bring these claims, and does so on a number of grounds. Defendant first argues that because Plaintiffs purchased only one variety

[1] The CPPA, at § 28-3905(k)(2), provides for the following relief: (A) treble damages, or $1,500 per violation, whichever is greater, payable to the consumer; (B) reasonable attorney's fees; (C) punitive damages; (D) an injunction against the use of the unlawful trade practice; (E) in representative actions, additional relief as may be necessary to restore to the consumer money or property, real or personal, which may have been acquired by means of the unlawful trade practice; and/or (F) any other relief which the court determines proper.

of Defendant's products and thus have not suffered an injury relating to the other 22 varieties, they cannot establish standing for any portion of the suit involving those other varieties. In addition, Defendant's Motion contends that Plaintiffs have not clearly pleaded that the variety of Defendant's product they purchased actually contained glyphosate, and that they thus lack standing even as to that item. Finally, Defendant maintains that Plaintiffs have "failed to establish standing to seek an injunction based upon possible future purchases of Nature Valley products." Def.'s Mot. 8.

"Standing is a threshold jurisdictional question which must be addressed prior to and independent of the merits of a party's claims." *Grayson v. AT&T*, 15 A.3d 219, 229 (D.C. 2011) (citing *Bochese v. Ponce Inlet*, 405 F.3d 964, 974 (11th Cir. 2005)). "For purposes of ruling on a motion to dismiss for want of constitutional standing, both the trial and reviewing courts must accept as true all material allegations of the complaint, and must construe the complaint in favor of the complaining party." *Grayson*, 15 A.3d at 246 (quoting *Warth v. Seldin*, 422 U.S. 490, 501 (1975)).

Although they bring their claims under District of Columbia law and in our local court, Plaintiffs are not absolved of Article III's constitutional standing requirement, imposed upon District of Columbia's Article I trial courts by our Court of Appeals. Under Article III of the United States Constitution, a party bringing suit "must allege some threatened or actual injury resulting from putatively illegal action in order for the court to assume jurisdiction." *Floyd v. Bank of Am. Corp.*, 70 A.3d 246, 250 (D.C. 2013) (quoting *Grayson*, 15 A.3d at 224).

Violations of the CPPA's consumer protection provisions can establish standing for several types of possible plaintiffs. The Act "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), and bestows that right upon four groups: consumers, individuals acting on behalf of themselves and the general public, non-profit organizations, and public interest organizations, *see id.* at §§(k)(1)(A)–(D).[2] "[W]hile a lawsuit under the CPPA does not relieve a plaintiff of the requirement to show a concrete injury-in-fact to h[er]self, she may make a showing of concrete injury in fact by alleging that she is a consumer of the defendant's service(s) and that the defendant has misrepresented material facts about the service or has failed to inform the plaintiff of material information about the service." *Floyd*, 70 A.3d at 251 (citing *Grayson*, 15 A.3d at 248–49). 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 on the affected consumers, regardless of whether the consumers suffer further injury. *See, e.g.*, *id.* at 250 n.6 ("[T]he deprivation of the CPPA statutory right to be free from improper trade practices may constitute an injury-in-fact sufficient to establish standing, even though the plaintiff would have suffered no judicially cognizable injury in the absence of the statute.").

[2] Under (k)(1)(B), "[a]n individual may, on behalf of that individual, or on behalf of both the individual and the general public, bring an action seeking relief from the use of a trade practice in violation of a law of the District when that trade practice involves consumer goods or services that the individual purchased or received in order to test or evaluate qualities pertaining to use for personal, household, or family purposes."

Under (k)(1)(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."

And under (k)(1)(D), "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," so long as the organization has a "sufficient nexus to the interests involved of the consumer or class to adequately represent those interests."

i. Unpurchased Products

For whatever reason, Plaintiffs, who bring claims based upon at least 23 varieties of Defendant's products, have purchased only one variety. Defendant argues that Plaintiffs lack constitutional standing to assert claims relating to the unpurchased products:[3] simply put, Defendant contends that because the Plaintiff organizations did not purchase any of the other 23 varieties of the product, they cannot have been injured by any of the alleged misrepresentations that appear on the packaging for those varieties. Plaintiffs respond that they have such standing to bring a representational suit under the CPPA because the varieties of products bought by the other consumers whose interests this lawsuit seeks to represent are "substantially similar" to the sole product purchased by Plaintiffs. Although the standing argument relating to the unpurchased products hardly constitutes the primary thrust of Defendant's Motion—Defendant devotes just one paragraph in its Motion and two more in its Reply to this contention—the Court considers this issue to be the most difficult of those raised by Defendant. The difficulty flows at least in part from the fact that neither the CPPA nor the cases interpreting it appear to answer the question whether (and how) Plaintiffs can represent others who have purchased products that Plaintiffs themselves have not.

Plaintiffs have filed their case "[o]n behalf of the general public," Compl. p. 1, pursuing the type of "private attorney general" action contemplated throughout the CPPA's standing provisions. *See supra* note 2. Subsections (k)(1)(B) and (k)(1)(C) of § 28-3905 permit individuals and non-profit organizations to bring actions seeking relief on behalf of the "the

[3] Setting aside, for the moment, Defendant's other contentions regarding Plaintiffs' standing, it is clear that Plaintiffs have alleged a CPPA-recognized injury based upon the product they purchased. With respect to that product, Plaintiffs are consumers under the CPPA, *see* § D.C. Code §§ 28-3901(a)(1)–(2), who have alleged, among other things, that Defendant "represent[ed] that goods . . . have . . . characteristics [or] ingredients . . . that they do not have," *See* D.C. Code § 28-3904(a).

general public" as well as on their own behalf. Subsection (k)(1)(D) permits public interest organizations to stand in the shoes of a "consumer or class" to bring such actions.

Recent case law has, in the undersigned's view, somewhat obscured the mechanism by which non-profit and public interest organizations can bring such actions on behalf of the public at large or specific groups of consumers. In *Rotunda v. Marriott Int'l, Inc.*, 123 A.3d 980, 988–89 (D.C. 2015), our Court of Appeals held that in "private attorney general" or "representative" actions brought by non-profit or public interest organizations, plaintiffs still must satisfy the class certification and other requirements of Rule 23 in order to obtain damages on behalf of other individuals. Although issued less than two years ago, *Rotunda* does not necessarily require plaintiffs in cases such as the one presently before the Court to seek class certification before proceeding with a representative action under the CPPA. In *Animal Legal Def. Fund v. Hormel Foods Corp.*, 2017 U.S. Dist. LEXIS 51629, at *28–29 (D.D.C. Apr. 5, 2017), a judge of the United States District Court for the District of Columbia ruled that *Rotunda* should be limited to cases involving damages claims, holding that private attorney general actions seeking injunctive and other equitable relief do not require class certification.

Moreover, *Rotunda* did not provide the Court of Appeals with an opportunity to consider the 2012 amendments to the CPPA, which changed the Act's framework for private attorney general actions considerably.[4] Prior to the 2012 amendments, the Act permitted "[a] person, whether acting for the interests of itself, its members, or the general public," to bring an action under the CPPA. The limits of that standing provision were a source of some debate, *see, e.g.*, *Grayson*, 15 A.3d at 249, and in 2012, the legislature amended the Act to explicitly permit actions by individual testers and by non-profit and public interest organizations, and to add

[4] Although *A.L.D.F.* did involve claims brought under the 2012 CPPA, the District Court did not consider how *Rotunda*'s analysis might apply differently given these amendments.

language permitting public interest organizations to sue on behalf of a "class" of consumers.[5] The Court of Appeals in *Rotunda* held that due to "the unique challenges to procedural fairness and administration posed by a representative suit for damages," the "necessary vehicle for suits seeking class-wide damages remains Rule 23," noting that it had been presented with "no unambiguous evidence, in the 2000 amendments or the supporting legislative history, that the [District of Columbia] Council meant to displace the Rule 23 framework in favor of improvised due process and management devices for a whole sub-set of representative actions." *Rotunda*, 123 A.3d at 988–89 (alteration in original). Whether the Council made explicit an intent to create a new type of CPPA private attorney action—one which does "displace the Rule 23 framework"—through the 2012 amendments constitutes a matter of first impression. The Court of Appeals has said nothing more on the matter, so the effect of the 2012 amendments on the class certification requirement that *Rotunda* held exists for representative suits for damages under the earlier iteration of the CPPA—and that *A.L.D.F.* suggested does not apply to suits for injunctive relief—remains, in the undersigned's estimation, debatable.

The Court does not believe, however, that it must determine at this stage in the litigation exactly *how* Plaintiffs can represent "the general public" or specific consumers who have purchased Defendant's allegedly mislabeled products. § 28-3905 (k)(1)(C) permits Plaintiffs to bring an action "on behalf of the general public . . . 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," while § (k)(1)(D)

[5] In response to the Court of Appeals's decision in *Grayson*, which limited standing to persons who had suffered an actual injury, the legislature passed an amendment to the CPPA addressing those limitations—specifically, the "chilling effect" the decision had "on non-profit public interest organizations litigating cases in the public interest." Pl.'s Opp'n Ex. B at 2. The Council made explicit the right of non-profit and public interest organizations to bring actions on behalf of consumers, seeking to permit standing in the broadest possible circumstances, and affirmed that "an interest in truthful information is a sufficient stake upon which to base a claim." *Id.* at 2–3.

authorizes them to sue "on behalf of a consumer or a class of consumers . . . if the consumer or class could bring an action [under the statute]." Given the nature of the statutory scheme, the only members of the "general public" or "class of consumers" whose interests Plaintiffs could represent in this case necessarily would be those who have purchased or received the other varieties of Defendant's products—in other words, members of the public and consumers who have suffered a cognizable injury under the CPPA sufficient to give each of them Article III standing. It may be, under *Rotunda's* interpretation of the CPPA, that Plaintiffs will have to seek to certify a class under Rule 23 to represent the interests of these individuals; it may be, on the other hand, that because they are seeking only equitable remedies, *see A.L.D.F.*, 2017 U.S. Dist. LEXIS 51629 at *28–29, or because the 2012 amendments to the CPPA have changed the mechanism by which these lawsuits can proceed, Plaintiffs can somehow pursue this representational lawsuit without obtaining class certification. In either event, Plaintiffs can bring this action only on behalf of those who have suffered an alleged injury under the statute; through this lens, the question of whether this lawsuit can cover products not purchased by Plaintiffs strikes the Court as less about Article III standing than about whether the statute permits Plaintiffs to represent such consumers, through a class action or otherwise. As a general matter, trial courts consider this issue—whether a class representative may pursue claims on behalf of class members who purchased different products—as part of the inquiry into whether a class can be certified. *See, e.g.*, *Quinn v. Walgreen Co.*, 958 F. Supp. 2d 533, 542 (S.D.N.Y. 2013) (finding that "appropriate time to consider whether plaintiffs can bring claims on behalf of purchasers of [all products] is at the class certification stage, not on a motion to dismiss"); *Cardenas v. NBTY, Inc.*, 870 F. Supp. 2d 984, 992 (E.D. Cal. 2012) (same); *Astiana v. Dreyer's*

Grand Ice Cream, Inc., 2012 U.S. Dist. LEXIS 101371, at *37-38 (N.D. Cal. July 20, 2012) (same).

In the end, Plaintiffs' ability to represent the interests of members of the general public and other consumers despite the fact that Plaintiffs did not purchase products identical to those purchased by these other parties turns, in the Court's view, on a question frequently addressed in the context of similar class actions: whether the representative and the non-litigating consumers purchased "substantially similar products." While "[t]here is no uniformity across the country on the issue of standing for claims related to unpurchased products," *Mednick v. Precor, Inc.*, 2014 U.S. Dist. LEXIS 159687, at *8 (N.D. Ill. Nov. 3, 2014), in the class action context, "[t]he majority of the courts that have carefully analyzed the question hold that a plaintiff may have standing to assert claims for unnamed class members based on products . . . she did not purchase so long as the products and alleged misrepresentations are substantially similar," *Quinn*, 958 F. Supp. 2d at 541 (citing *Brown v. Hain Celestial Grp., Inc.*, 913 F. Supp. 2d 881, 890 (N.D. Cal. 2012)); *see also Vass v. Blue Diamond Growers*, 2015 U.S. Dist. LEXIS 175317, at *17 (D. Mass. Aug. 11, 2015). In determining whether to characterize products as "substantially similar," courts consider the physical similarities of the products and their ingredients, *see Quinn*, F. Supp. 2d at 541 (citing cases), and the similarities of the alleged wrongdoing, *see Mednick*, 2014 U.S. Dist. LEXIS 159687, at *9 (citing cases).

Here, each of these considerations supports permitting Plaintiffs claims to proceed at this juncture. Plaintiffs focus their Complaint on one category of product, what they define as "Nature Valley granola products." Compl. p. 1. Although it can be reasonably inferred that each of the challenged products contain at least *some* different ingredients, given the allegations with respect to labeling—that each product bears a label indicating that the product is "Made with

100% Natural Whole Grain Oats"—the Court believes a reasonable inference can also be drawn that oats are a key ingredient in *all* of the challenged products. Furthermore, the fact that the wrongdoing as alleged is identical across all products—that Plaintiffs are challenging "the same . . . mislabeling"—weighs in favor of finding that the products are substantially similar for present purposes. *Cf. Astiana v. Dreyer's Grand Ice Cream, Inc.*, 2012 U.S. Dist. LEXIS 101371, at *37 (N.D. Cal. July 20, 2012) (allowing claims based upon products with different ingredients to proceed because plaintiffs challenged "the same basic mislabeling across different product flavors"). At this stage in the litigation, Plaintiffs' pleadings thus satisfy the Court that they can proceed with this case on behalf of themselves and members of the "general public" and the "class" of consumers who have purchased the similar products sold by Defendant, as referenced in the Complaint.[6]

ii. Imprecision in Testing Allegations

Defendant next argues that Plaintiffs have failed to establish standing because they have not alleged that the product they purchased actually tested positive for glyphosate. According to Defendant, because Plaintiffs merely alleged that tests were conducted without connecting those tests to the product they purchased, and because Plaintiffs cannot say with certainty that the glyphosate revealed in those tests was present on the oats or on some other ingredient, Plaintiffs claims must fail. Defendant relies for this assertion on *Wallace v. Con Agra Foods*, in which the

[6] As noted *supra*, the Court views this issue as one better resolved at a later juncture—when considering whether the record supports class certification or the continuation of some other representational action by Plaintiffs—than on the pleadings. The Court understands that Defendant may view this ruling as creating the possibility of open-ended discovery on a yet-to-be-defined claim involving an unknown number of its products. However, given that Plaintiffs have raised identical mislabeling claims in relation to numerous similar products, the Court does not anticipate that discovery will prove much more burdensome than it would had the Court limited the case to the one variety of product actually purchased by Plaintiffs. *See Morgan v. Wallaby Yogurt, Co.*, 2014 U.S. Dist. LEXIS 34548, at *27 (N.D. Cal. March 13, 2014). Should the Court's prediction prove incorrect, further action can be taken to manage discovery.

United States Court of Appeals for the Eighth Circuit dismissed the plaintiffs' suit because they did not allege that they had purchased products produced by the defendant manufacturer that exhibited the defects on which the plaintiffs based their claims. 747 F.3d 1025, 1030 (8th Cir. 2014). Plaintiffs here, however, *have* alleged that all of the products at issue contain glyphosate. *See* Compl. ¶ 4 ("The oat products at issue . . . contain the chemical glyphosate."); *id.* at ¶¶ 6–7 (listing Products then stating "tests . . . revealed . . . glyphosate"); *id.* at ¶ 8 ("[G]lyphosate is present in the [p]roducts."); *id.* at ¶ 9 (describing "glyphosate in these oat products"); *id.* at ¶ 13 (asserting that Defendant "conceals the presence of glyphosate" across all products). *Wallace* is thus inapposite, and Plaintiffs allegations are sufficient at this juncture.

Moreover, Plaintiffs arguably have connected the test conducted to the product they purchased: they assert that "[t]ests [were] conducted . . . [that] revealed the amount of glyphosate in *the Nature Valley* to be 0.45 ppm." *Id.* at ¶ 7 (emphasis added). Earlier in the Complaint, Plaintiffs define "Nature Valley" to mean "Defendant's Nature Valley granola products." It is true that Plaintiffs have not stated explicitly that they tested the particular products they purchased—the phrasing leaves open the possibility that the tests were conducted prior to their purchase of any products—but at this juncture, a reasonable inference may be drawn that products have been tested and all of them (necessarily including the variety purchased by Plaintiffs) contain glyphosate.

iii. Injunctive Relief

Finally, Defendant argues that Plaintiffs "have failed to establish their constitutional standing to seek an injunction based upon possible future purchases of Nature Valley products." Def.'s Mot. 8. Defendant cites broad language from a few federal cases stating that in order to justify an injunction, harm must be imminent, and that allegations of possible future injury are

insufficient. *See id.* (citing *Food & Water Watch, Inc. v. Vilsack*, 79 F. Supp. 3d 174, 188 (D.D.C. 2015); *Whitmore v. Ark.*, 495 U.S. 149, 158 (1990)).

Defendant misapprehends the nature of Plaintiffs' claims. Plaintiffs do not seek injunctive relief based upon possible future purchases of Defendant's products; rather, having procured standing by the purchase of one such product, they seek injunctive relief against practices that they allege to be unlawful under the CPPA. By its explicit terms, the CPPA permits parties to sue on behalf of others for violations of the Act, including those related to consumer goods and services, *see* D.C. Code §§ 28-3905(k)(1)(B)–(D), and it permits injunctive relief, *see id.* at § 28-3905(k)(2)(D). Our Court of Appeals has made explicit the connection between those provisions, holding in *Grayson* that a plaintiff-purchaser had standing to seek an injunction based upon past purchases of defendant's phone card product "under the principle that the actual or threatened injury required by Art. III [of the Constitution] may exist solely by virtue of statutes creating legal rights, the invasion of which creates standing." 15 A.3d at 224-25 (citing *Warth v. Seldin*, 422 U.S. 490, 500 (1975)) (alteration in original). Adopting Defendant's argument would discard this holding from the Court of Appeals and render large portions of the CPPA superfluous. Accordingly, the argument must be rejected.

B. Primary Jurisdiction

Defendant further contends that the Court should invoke the primary jurisdiction doctrine to either dismiss this case or stay it pending resolution of the Food and Drug Administration's ongoing rulemaking regarding use of the word "natural" on food labels.

The primary jurisdiction doctrine "applies where a claim is originally cognizable in the courts, and comes into play whenever enforcement of the claim requires the resolution of issues which, under a regulatory scheme, have been placed within the special competence of an

administrative body." *Lawlor v. District of Columbia*, 758 A.2d 964, 973 (D.C. 2000). The doctrine "is rooted in teaching that in cases raising issues of fact not within the conventional experience of judges or cases requiring the exercise of administrative discretion, agencies . . . should not be passed over," *D.C. Water & Sewer Auth. v. Delon Hampton & Assocs.*, 851 A.2d 410, 417 (D.C. 2004) (internal citation and quotation omitted), and "advances two important policy objectives: greater uniformity of result and the utilization of the specialized and expert knowledge of the agency," *Mullin v. N. St. Follies Ltd. P'ship.*, 712 A.2d 487, 492 (D.C. 1998) (citing *District of Columbia v. Thompson*, 570 A.2d 277, 287 (D.C. 1990)).

The primary jurisdiction doctrine is a prudential, rather than a jurisdictional, limitation on the judiciary's exercise of its authority. *See, e.g.*, *Jones v. Conagra Foods, Inc.*, 912 F. Supp. 2d 889, 898 (N.D. Cal. 2012). Rather than "negate that the court has jurisdiction[,] it informs the court's determination whether to exercise" that jurisdiction. *District of Columbia v. D.C. PSC*, 963 A.2d 1144, 1153 (D.C. 2009) (citing *Matthews v. District of Columbia*, 875 A.2d 650, 655 (D.C. 2005)).[7] A trial court's "determination whether to defer its authority in favor of an agency's determination applying principles of primary jurisdiction is reviewed for abuse of discretion," *D.C. PSC*, 963 A.2d at 1153, and the doctrine should be "invoked sparingly," *APCC Servs. v. Worldcom, Inc.*, 305 F. Supp. 2d 1, 13 (D.D.C. 2001) (citing *U.S. v. McDonnell Douglas Corp.,* 751 F.2d 220, 224 (8th Cir. 1984)).

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[7] Although not adopted by our Court of Appeals—and, it would seem, never applied or discussed by it—the District's federal courts sometimes employ a four-part test when deciding whether to invoke the primary jurisdiction doctrine, focusing on:

> (1) whether the question at issue is within the conventional experience of judges; (2) whether the question lies peculiarly within the agency's discretion or requires the exercise of agency expertise; (3) whether there exists a danger of inconsistent rulings; and (4) whether a prior application to the agency has been made.

Sandwich Isles Communs., Inc. v. Nat'l Exch. Carrier Ass'n, 799 F. Supp. 2d 44, 54-55 (D.D.C. 2011) (citing *Himmelman v. MCI Commc'ns Corp.*, 104 F. Supp. 2d 1, 3 (D.D.C. 2000)).

The FDA has issued no rule or regulation regarding the use of the word "natural" on food labels, but on November 2, 2015, it published a request for public comment on the issue. *See* 80 FR 69905. Among other things, the FDA asked whether, "if [it] were to revise its policy regarding the use of the term 'natural' or engage in rulemaking to establish a regulatory definition for 'natural . . . ,' certain production practices used in agriculture, for example . . . , the use of pesticides . . . , [should] be a factor in defining 'natural[.]" *Id.* The comment period closed on May 10, 2016, *see* 80 FR 80718, and neither party has represented that the FDA has taken further public action. Under these circumstances, the Court believes that the considerations enumerated above counsel against invoking the primary jurisdiction doctrine to dismiss, or even stay, the instant matter.

To begin with, this dispute strikes the Court as one that falls within the conventional experience of the court system, rather than one "peculiarly within the [FDA's] discretion or requir[ing] the exercise of agency expertise." *Sandwich Isles Communs., Inc. v. Nat'l Exch. Carrier Ass'n*, 799 F. Supp. 2d 44, 54-55 (D.D.C. 2011) (citing *Himmelman v. MCI Commc'ns Corp.*, 104 F. Supp. 2d 1, 3 (D.D.C. 2000)). At its core, this case poses the issue whether Defendant's labeling, marketing, and advertising practices across a range of its products misled consumers in the District of Columbia in violation of the CPPA. Although judges across the country have analyzed the primary jurisdiction doctrine differently in this respect, the Court believes that the question at hand is well within the realm of judicial expertise; resolution of the case's central question does not require—and seems unlikely to benefit from—whatever guidance the federal administrative agency may (or may not) ultimately provide regarding the use of pesticides in products containing the word "natural" on their labels. *See, e.g.*, *Jones*, 912 F. Supp. 2d at 898 ("[T]his case is far less about science than it is about whether a label is

misleading."); *Burton v. Hodgson Mill, Inc.*, 2017 U.S. Dist. LEXIS 53160 at *20–21 (S.D. Ill. April 6, 2017) ("[T]he FDA's eventual formal definition has no bearing on a reasonable consumer's perception at the time this product was advertised and purchased."); *Biffar v. Pinnacle Foods Grp., LLC*, 2016 U.S. Dist. LEXIS 173595, at *4 (S.D. Ill. Dec. 15, 2016) ("[T]his case is about whether [the product's] label deceives the consumers and not how about the FDA defines 'natural' or 'artificial.'"). Plaintiffs do not bring claims alleging violations of FDA regulations; they bring claims alleging violations of the CPPA. The question whether Defendant, by its labeling practices, represented that its products have "characteristics [or] ingredients . . . that they do not have," D.C. Code § 28-3904(a), will not turn on whether the presence of glyphosate renders a product "unnatural" under FDA guidelines.

Additionally, given that the original request for comment was issued by the FDA in November of 2015, and that the period for comment closed in May of 2016, the delay in this matter that would follow from the invocation of the primary jurisdiction doctrine would likely be lengthy and, for now at least, is certainly indefinite. Indeed, it has been over a year since some of the cases cited by Defendant in which courts did stay proceedings pending the FDA rulemaking were ordered stayed. *See, e.g.*, *Viggiano v. Johnson & Johnson*, 2016 U.S. Dist. LEXIS 128425, at *1 (C.D. Cal. June 21, 2016); *Kane v. Chobani, LLC*, 645 F. App'x 593, 594 (9th Cir. 2016). And in at least one of Defendant's cited cases, the FDA actually offered an expected timeline for the issuance of its final guidance on the particular issue being considered. *See Kane*, 645 F. App'x. at 594–595. Here, Defendant has made no representation suggesting that any guidance from the agency is forthcoming, and the Court sees no reason to assume that it will be. *Cf., e.g.*, *In re Frito-Lay N. Am., Inc.*, 2013 U.S. Dist. LEXIS 123824, at *29–30 (E.D.N.Y. Aug. 29, 2013) (declining to stay case involving FDA rulemaking regarding the word

"natural" and noting that similar rulemaking processes had taken the FDA up to nine years to complete); *Martin v. Tradewinds Bev. Co.*, 2017 U.S. Dist. LEXIS 72698 at *9–10 (C.D. Cal. April 27, 2017) (declining to stay case where comment period closed fourteen months prior).

Finally, because some courts have refused to invoke the primary jurisdiction doctrine involving this or similar rulemaking—and because others enacted stays that have expired or may expire prior to any possible FDA guidance on the issue[8]—staying this case will do little to promote regulatory uniformity. Given these considerations, the Court thus believes it inappropriate to dismiss or stay this case under the doctrine of primary jurisdiction.

C. Plausibility under Rule 8

Defendant argues that Plaintiffs' claims should be dismissed pursuant to Superior Court Rule of Civil Procedure 8 because they "fail[] to satisfy the baseline plausibility requirements of *Twombly* and *Iqbal*." Def.'s Mot. 11. Under those cases and our Rules, the Court must conduct a two-pronged inquiry to determine whether a complaint survives a motion to dismiss, examining whether the complaint includes well-pled factual allegations, and whether such allegations plausibly give rise to an entitlement for relief. *Potomac Dev. Corp. v. District of Columbia*, 28 A.3d 531, 544 (D.C. 2011) (quoting *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.* at 543–44.

[8] *See, e.g.*, *Kane*, 645 F. App'x at 594; *In re Gen. Mills, Inc.*, 2016 U.S. Dist. LEXIS 76723, at *1 (D.N.J. June 13, 2016); *In re Hain Celestial Seasonings Prods. Consumer Litig.*, 2016 U.S. Dist. LEXIS 153565, at *1 (C.D. Cal. Aug. 8, 2016).

Here, Plaintiffs have pleaded facts that could lead a reasonable finder of fact to conclude that consumers would be misled by Defendant's packaging in a way that might influence their decision whether to buy Defendant's products. Plaintiffs' claims are more circumspect than those in the cases Defendant cites in support of its contention. For example, Defendant points to a case in which a court reversed the lower court's holding "that the phrase 'odor eliminating' was literally false and therefore violated consumer protections statutes," *Buetow v. A.L.S. Enters., Inc.*, 650 F.3d 1178, 1186 (8th Cir. 2011), and to another case in which Plaintiffs' claims were dismissed as implausible where the lawsuit alleged that because Whole Foods is a provider of natural foods "it should be obligated to guarantee every molecule in every product it sells under its in-house brand is natural," *Gedalia v. Whole Foods Market Servs., Inc.*, 53 F. Supp. 3d 943, 958 (S.D. Tex. 2014).[9] Plaintiffs, by contrast, allege specifically and plausibly that the precise wording Defendant uses on its product labels misleads consumers—i.e., that Defendant's products contain traces of a chemical agent while representing to be made from 100% natural whole grain oats, and that Defendant thus misleads consumers seeking to purchase and consume "natural" foods. Whether Plaintiffs 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.[10]

[9] Defendant cites additional cases to argue that Plaintiffs' claims must fail because it is "implausible that a consumer would reasonably believe that "Made with 100% Natural Whole Grain Oats" means that there is zero residue from any other substance present on the oats." *See* Def.'s Mot. 13. Again, the cases Defendant cites are not persuasive. In those cases, the plaintiffs' claims border on the absurd—e.g., a claim that a plaintiff believed sugar contained in the defendant's products was in its natural state, which, of course, is sugar cane. *See id.* (citing *Ibarrola v. Kind, LLC*, 83 F. Supp. 3d 751, 756–57 (N.D. Ill. 2015)). Here, at least at the pleadings stage, Plaintiffs claims are plausible, meaning only that a reasonable juror could conclude that consumers believe Defendant's labels indicate the absence of any unnatural chemicals, including glyphosate.

[10] In Defendant General Mills, Inc.'s Notice of Supplemental Authority in Support of its Amended Opposed Motion to Dismiss Plaintiff's Complaint, filed on May 9, 2017, Defendant points the Court to an oral order by another judge of this court in *Organic Consumers Association, et al., v. Sioux Honey Association, Cooperative*, Case No. 2016 CA 8012 B. Defendant attached to its supplement the transcript of a hearing at which the trial court dismissed a CPPA lawsuit filed by these Plaintiffs regarding the presence of glyphosate in a food product labeled "natural." *See* Def.'s

D. Preemption

Finally, Defendant argues that "to the extent Plaintiffs are seeking an order that [Defendant] be required to disclose trace glyphosate on the labels of [the Products], that claim is preempted by federal law and should be dismissed." Def.'s Mot. 14. While potentially meritorious, this argument is best not addressed at this early juncture in the litigation. The Court will address questions relating to which (if any) of the several specific forms of relief sought by Plaintiffs will be available at a later stage of the proceedings.

III. Conclusion

As discussed *supra*, Defendant's Motion raises several difficult questions, particularly with respect to standing and to the form of this private attorney general action, that the Court expects will again require attention as this lawsuit proceeds. At this stage, however, after carefully considering the parties' contentions, the Court believes that Plaintiffs should, for now, be permitted to proceed on their Complaint in its entirety. Accordingly, it is this 6th day of July, 2017, hereby

ORDERED that Defendant's Motion is DENIED; and it is

FURTHER ORDERED that Defendant's Motion to Stay Discovery is DENIED AS MOOT.

Supp. Ex. A at 39. To the extent that the ruling in that case can be construed—and has been construed by Defendant—as grafting some type of physical harm requirement onto the CPPA, the Court notes that such a standard appears too high under the statute. The CPPA—by its terms and according to our Court of Appeals's interpretation of them—makes clear that a plaintiff can demonstrate actual injury by showing merely that "she is a consumer of the defendant's service(s) and that the defendant has misrepresented material facts about the service . . . ." *Floyd*, 70 A.3d at 251 (citing *Grayson*, 15 A.3d at 248–49 (citation and internal quotation marks omitted). No other harm, physical or otherwise, is required. *Id.* at 250 n.6. The court's conclusion in *Organic Consumers Association, et al., v. Sioux Honey Association, Cooperative* that "it has to be some more," Def.'s Supp. Ex. A at 39, after finding that "there's been no demonstrable allegation of any harm to anyone of its miniscule, infinitesimal amount [of glyphosate],"*id.* at 38–39, imposes too high a burden for plaintiffs in CPPA cases.

Todd E. Edelman
Associate Judge
(Signed in Chambers)

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