**IN THE SUPERIOR COURT OF THE DISTRICT OF COLUMBIA**
**CIVIL DIVISION**

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| ORGANIC CONSUMERS ASSOCIATION, *et al.*, | ) | |
| Plaintiffs, | ) | Case No. 2019 CA 004547 B |
| v. | ) | Judge William M. Jackson |
| TYSON FOODS, INC., | ) | |
| Defendant. | ) | |

**ORDER DENYING MOTION TO DISMISS**

This matter is now before the Court on Defendant Tyson Foods Inc.'s Motion to Dismiss. In the motion, the defendant moves to dismiss the case on grounds including the Complaint failed to state a claim entitling them to relief under the D.C. Consumer Protection Procedures Act ("D.C. CPPA") and that the plaintiffs lack standing to bring the lawsuit. The plaintiff filed an opposition to the motion, and a reply brief was filed by the defendant. On January 15, 2021, the Court held a motion hearing where the parties presented arguments on the instant motion. Upon consideration of the motion, the opposition, the reply, and arguments made during the January 15, 2021 hearing, the Court denies the motion to dismiss.

## I. FACTUAL AND PROCEDURAL BACKGROUND

On July 10, 2019, the plaintiff Food & Water Watch Inc. and Organic Consumers Association brought the instant action for violations of the D.C. CPPA against defendant Tyson Foods, Inc. Specifically, the plaintiffs allege that the defendant was deceptive in their marketing by claiming their chicken products are produced in an environmentally responsible way when it was not the case. *See* Compl. at ¶¶ 1-6. The case was removed to the United States District Court for the District of Columbia on September 19, 2019 by way of a notice of removal filed by the

defendant. Ultimately the case was remanded back to the D.C. Superior Court and before this Court on May 14, 2020. On August 3, 2020, the defendant filed the instant motion to dismiss. In the motion, the defendant contends that the Complaint fails to state a claim under the D.C. CPPA and that the speech at issue is not actionable under the statute; that the plaintiffs do not have standing to bring the instant action; and that the speech at issue is protected by the First Amendment of the Constitution. *See* Def.'s Mot. to Dismiss at 1. After an extension of time, the plaintiffs filed an opposition on October 9, 2020, and after another extension, the defendant filed their reply brief on October 23, 2020. The Court then conducted a motion hearing on January 15, 2021, where both parties presented arguments on the instant motion to dismiss.

## II. LEGAL STANDARD

Dismissal under Rule 12(b)(6) is warranted "where the complaint fails to allege the elements of a legally viable claim." *Greenpeace, Inc. v. Dow Chem. Co.*, 97 A.3d 1053, 1060 (D.C. 2014) (quoting *Chamberlain v. Am. Honda Fin. Corp.*, 931 A.2d 1018, 1023 (D.C. 2007); citing *Potomac Dev. Co. v. District of Columbia*, 28 A.3d 531, 543 (D.C. 2011)). In deciding a Rule 12(b)(6) motion this court must accept "all of the allegations in the complaint as true" and "construe all facts and inferences in favor of the plaintiff." *Greenpeace, Inc. v. Dow Chem. Co.*, 97 A.3d at 1060 (quoting *Murray v. Wells Fargo Home Mortg.*, 953 A.2d 308, 316 (D.C. 2008)). Nevertheless, to survive a motion to dismiss a claim must have facial plausibility, that is, "factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Potomac,* 28 A.3d at 544 (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 677 (2009)). Conclusory pleadings are not entitled to an assumption of truth and will not sustain a complaint. *Grimes v. District of Columbia*, 89 A.3d 107, 112 (D.C. 2014) (internal citations omitted).

## III. ANALYSIS

In the Complaint, the plaintiffs allege that the defendant violated the D.C. CPPA when they advertised and marketed their chicken products with terms such as "environmental stewardship," "sustainability," "protecting and respecting natural resources," etc. Compl. at ¶ 183. According to the plaintiffs, those statements are false and misleading because the defendant is the second largest polluter in the United States and "routinely emits hazardous pollutants in violation of environmental laws." *Id.* Further, plaintiffs allege that the defendant further violated the D.C. CPPA by advertising their products as a humane choice and having committed to "excellence in animal welfare" when the defendant raised the chickens through abusive and inhumane conditions. *Id.* at ¶ 184. With respect to standing, the plaintiffs claim that the D.C. CPPA permits non-profit organizational standing and public interest organizational standing under D.C. Code § 28-3905(k)(1)(C) and § 28-3905(k)(1)(D)(i).

a. Standing

First, the defendant claims that the plaintiffs do not have standing to proceed with the instant lawsuit, and this includes tester standing, non-profit organizational standing, and public interest organizational standing. *See* Def.'s Mot. to Dismiss Memo at 6-9. The Court finds that, while a very close call, the plaintiffs do have standing to bring the instant suit.

The U.S. Supreme Court has held that "[i]njury in fact is a constitutional requirement, and [i]t is settled that Congress cannot erase Article III's standing requirements by statutorily granting the right to sue to a plaintiff who would not otherwise have standing.'" *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547-48 (2016) (quoting *Raines v. Byrd*, 521 U.S. 811, 820 (1997)). Thus, to establish injury in fact, a plaintiff must show that he or she suffered "an invasion of a legally protected interest" that is "concrete and particularized" and "actual or imminent, not

conjectural or hypothetical." *Id.* at 1548 (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992)). Under the D.C. CPPA, specifically D.C. Code § 28-3905(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." Further, under D.C. Code § 28-3905(k)(1)(D)(i), "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," but the case "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."

With respect to public interest organizational standing, the defendants contend that the plaintiffs have failed to allege any injury, such as how any D.C. consumer was harmed by the Challenged Statements that gives the consumers standing to sue. Defs.' Mot. at 13. In response, plaintiffs contend that the instant case is precisely the type of harm the D.C. CPPA intended to address and that plaintiffs qualify as a "public interest organization" under the statute with a "sufficient nexus to the interest involved of the consumer or class to adequately represent those interests." Pls.' Opp'n at 5-6. The Court finds that plaintiff has sufficient standing under D.C. Code § 28-3905(k)(1)(D), as it is a "public interest organization" that has a "sufficient nexus" to the interests of consumers in the District of Columbia.

Plaintiff Food & Water Watch is a non-profit that "champions healthy food and clean water for all by standing up to corporations that put profits before people and advocating for a democracy that improves people's lives and protects the environment." Compl. ¶ 159. It engages in "grassroots organizing, policy advocacy, research, communications, and litigation […] and works to increase transparency about how factory farms operate, where they are located, and the pollutants they emit into communities and waterways, as well as towards reducing that pollution and improving regulation of animal agribusinesses." *Id.* Plaintiff Organic Consumers Association is a non-profit that focuses on "crucial issues of truth in advertising, accurate food labeling, food safety, children's health, corporate accountability, and environmental sustainability." *Id*. ¶ 164. 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.* ¶ 167. 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.

Historically, this Court has interpreted the D.C. CPPA more broadly to allow standing based on a statutory violation. *See, e.g.*, *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) [*13] (Edelman, J.) ("The Court of Appeals has interpreted the CPPA broadly and has found that violations of the statute can by themselves confer standing on the affected consumers, regardless of whether the

consumers suffer further injury.") Thus, while a close issue, the Court finds that plaintiffs have standing to bring the instant case as public interest organizations.[1]

b. Failure to State a Claim

Defendants contend that the plaintiffs' claims under the D.C. CPPA fails on the merits because no reasonable consumer would be misled by the defendants' website statements and corporate communications. Defs.' Mot. at 15. Specifically, the defendants contend that the statements are issue were merely opinions, predictions, and aspirations at best where no reasonable consumer will rely upon the materials. *Id.* at 16-17. It is true that puffery is generally not actionable, as they are "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). However, the challenged statements, such as that defendant's products are a humane choice and the defendants are committed to "excellence in animal welfare," are detailed and concrete enough to be actionable under the D.C. CPPA. The Complaint cites sources stating that animal welfare is an issue of significant concern to consumers and cites studies supporting plaintiff's claims that a "reasonable consumer" would "pay more for products that they believe come from humanely treated animals." *See* Compl. ¶¶ 148-49. The Complaint also cited sources regarding consumer's concern of environmental stewardship and studies indicating consumer are influenced by whether the brand they are buying from are doing social or environmental good. *Id.* ¶ 152-53. Therefore, the Court disagrees and finds that plaintiffs' claims are actionable under the CPPA as the allegations about consumer understanding are plausible.

[1] Having found standing exists under the D.C. Code § 28-3905(k)(1)(D), the Court takes no position on the parties' contentions regarding tester standing or organizational standing.

c. First Amendment

Lastly, the defendants contend that plaintiffs are seeking to suppress the defendants' speech on issues of public concern, therefore the case is in violation of the First Amendment. Defs.' Mot. at 25-26. The defendants primarily contend that the challenged statements are not commercial speech, but the Court disagrees. The challenged statements have classic characteristics of commercial speech and not simply promotional materials. It is speech that proposes a commercial transaction. *See* C*entral Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557, 562 (1980). Per the Complaint, the defendants have made said statements not only on the company website, but also through social media sites, which, as it states very clearly in the defendants' own exhibit, plays a key role in the defendant's "labeling and marketing strategy." *See* Defs' Mot. at Ex. A. Here, plaintiffs' allegations that defendants' challenged statements violate the D.C. CPPA do not raise any First Amendment issues. The First Amendment affords no protection for statements that are misleading and deceptive, as alleged in the Complaint. Commercial speech is only protected if it is not misleading. See C*entral Hudson*, 447 U.S. at 566. 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 (D.D.C. 2011). Therefore, the Court denies the defendants' motion to dismiss.

Accordingly, on this **31st Day of March, 2021**, it is hereby

**ORDERED** that the Defendant Tyson Foods Inc.'s Motion to Dismiss is **DENIED**.

**SO ORDERED**.

**William M. Jackson**
**Associate Judge**
**(Signed in Chambers)**

Copies to:

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