SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
CIVIL DIVISION

FOOD & WATER WATCH, *Plaintiff*,	:	**Case No. 2021 CA 002020 B**
	:	**Judge Heidi M. Pasichow**
v.	:	
SMITHFIELD FOODS, INC., *Defendant*.	:	

ORDER (1) DENYING DEFENDANT'S OPPOSED MOTION TO DISMISS; (2) GRANTING PLAINTIFF'S UNOPPOSED MOTION FOR LEAVE TO FILE OPPOSITION TO MOTION TO DISMISS IN EXCESS OF PAGE LIMIT; (3) GRANTING DEFENDANT'S OPPOSED MOTION FOR LEAVE TO FILE REPLY BRIEF IN EXCESS OF PAGE LIMIT; AND (4) DENYING PLAINTIFF'S OPPOSED MOTION FOR LEAVE TO FILE SURREPLY IN THE EVENT COURT GRANTS SMITHFIELD'S MOTION TO FILE 15-PAGE REPLY

This matter is before the Court based upon (1) Defendant's Opposed Motion to Dismiss, filed on May 13, 2022; (2) Plaintiff's Unopposed Motion for Leave to file Opposition to Motion to Dismiss in Excess of Page Limit, filed on June 10, 2022; (3) Defendant's Opposed Motion for Leave to File Reply Brief in Excess of Page Limit, filed on July 1, 2022; and (4) Plaintiff's Opposed Motion for Leave to File Surreply in the Event Court Grants Smithfield's Motion to File 15-Page Reply, filed on July 8, 2022. All parties are represented by Counsel.

I. Procedural History

On June 16, 2021, Plaintiff filed a Complaint alleging that Defendant, a multinational meatpacking company, has misled and continues to mislead consumers about the state of the national meat supply chain and the company's workplace safety practices during the COVID-19 pandemic.

On June 22, 2021, Plaintiff filed a Praecipe Regarding Rule 7.1 Disclosure Statement. On July 13, 2021, Plaintiff filed a Clarifying Praecipe. On July 14, 2021, Plaintiff filed a Praecipe Re: Affidavit of Service. On July 19, 2021, the parties filed a Joint Stipulation to Extend Time to Respond to Complaint. On July 30, 2021, Defendant filed a Notice of Removal. On December 17, 2021, District of Columbia federal District Court Judge Christopher R. Cooper issued an Order Granting Plaintiff's Motion to Remand.

On December 30, 2021, Defendant filed Praecipe to Withdraw as Counsel - Tiffany H. Riffer. On March 30, Judge Anthony Epstein issued an Order Assigning Case After Remand to Judge Heidi M. Pasichow. On April 13, 2022, Plaintiff filed a Praecipe with Notice of Appearance of Ellen Noble as counsel. On April 22, 2022, the parties filed a Joint Motion to Establish Briefing Schedule. On May 4, 2022, Plaintiff filed a Praecipe to Withdraw Appearance of Randolph Chen. Additionally, on May 4, 2022, Plaintiff filed a Motion to Admit Attorney Emily Miller *Pro Hac Vice*. On May 5, 2022, the undersigned judge issued an Order Granting Joint Motion to Establish Briefing Schedule and *Sua Sponte* Continuing Initial Scheduling Conference. On May 13, 2022, Defendant filed an Unopposed Motion for Leave to File Motion to Dismiss and Memorandum of Points and Authorities in Excess of Page Limit. Additionally, On May 13, 2022, Defendant filed the instant Opposed Motion to Dismiss.

On May 26, 2022, the Court issued an Order (1) Granting Plaintiff's Motion for Special Admission of Emily Miller *Pro Hac Vice* and (2) Granting Defendant's Unopposed Motion for Leave to File Motion to Dismiss and Memorandum of Points and Authorities in Excess of Page Limit. On June 10, 2022, Plaintiff filed an Unopposed Motion to Admit Attorney Valerie L. Collins *Pro Hac Vice* on Behalf of Plaintiff Food and Water Watch. On June 10, 2022, Plaintiff filed an Unopposed Motion to Admit Attorney Joseph C. Hashmall *Pro Hac Vice* on Behalf of Plaintiff Food and Water Watch. On June 10, 2022, Plaintiff filed an Unopposed Motion to Admit Attorney Michelle Drake *Pro Hac Vice* on Behalf of Plaintiff Food and Water Watch. On June 10, 2022, Plaintiff filed an Unopposed Motion to Admit Attorney David H. Seligman *Pro Hac Vice* on Behalf of Plaintiff Food and Water Watch. On June 10, 2022, Plaintiff filed an Unopposed Motion for Leave to file Opposition to Motion to Dismiss in Excess of Page Limit. On June 10, 2022, Plaintiff also filed an Opposition to Defendant's Motion to Dismiss.

On July 1, 2022, Defendant filed an Opposed Motion for Leave to File Reply Brief in Excess of Page Limit. On July 1, 2022, Defendant also filed a Reply in Support of its Opposed Motion to Dismiss Plaintiff's Complaint. On July 8, 2022, the Court issued an Order Granting Four Unopposed Motions to Admit Attorneys Michelle Drake, David H. Seligman, Valerie L. Collins, and Joseph C. Hashmall *Pro Hac Vice* on Behalf of Plaintiff Food and Water Watch. On July 8, 2022, Plaintiff filed an Opposed

Motion for Leave to File Surreply in the Event Court Grants Smithfield's Motion to File 15-Page Reply. On July 12, 2022, Defendant filed an Opposition to Plaintiff Food & Water Watch's Motion for Leave to File Surreply. And on July 12, 2022, Defendant filed a Reply in Support of its Opposed Motion for Leave to File Reply Brief in Excess of Page Limit.

II. Unopposed Motion for Leave to File Opposition to Motion to Dismiss in Excess of Page Limit

Pursuant to Super. Ct. Civ. R. 12-I(a)(1), "the moving party must make a good faith effort to discuss the anticipated motion with other parties in an effort to determine whether there is any opposition to the relief sought." Plaintiff requests leave to submit a brief that "exceeds the Court's general 20 page limit, but is not more than 30 pages . . . ." Mot. at 2. Plaintiff asserts that the "additional space will give [Food and Water Watch ("FWW")] an opportunity to fully address Smithfield's arguments." *Id.* Plaintiff represents they sought Defendant's consent for this Motion, and Defendant "does not oppose it." *Id.* Therefore, as the motion is unopposed, the Court grants Plaintiff's Unopposed Motion for Leave to File Opposition to Motion to Dismiss in Excess of Page Limit.

III. Opposed Motion for Leave to File Reply Brief in Excess of Page Limit

Pursuant to Super. Ct. Civ. R. 12-I(a)(1), "the moving party must make a good faith effort to discuss the anticipated motion with other parties in an effort to determine whether there is any opposition to the relief sought." Furthermore, "[t]he court must consider the motion as a contested matter if the movant certifies in writing that . . . the movant made a good faith effort to discuss the motion as required by Rule 12-I(a)(1) and could not obtain consent." Super. Ct. Civ. R. 12-I(a)(3)(A)(ii).

Defendant notes that Plaintiff filed a 30-page Opposition and requests leave to file a Reply brief longer than five pages in order to "respond[] to FWW's 30-page opposition and synthesiz[e] the issues presented for the Court's resolution . . . ." Mot. at 2. Defendant represents that they sought consent for this motion, but Plaintiff opposes a 15-page Reply. *Id.* at 2–3. Defendant asserts that "the reply brief is concise and no longer than necessary to address the complicated issues presented." *Id.* at 3. The Court therefore grants Defendant's Opposed Motion for Leave to File Reply Brief in Excess of Page Limit.

IV. Opposed Motion for Leave to File Surreply in the Event Court Grants Smithfield's Motion to File 15-Page Reply

In Plaintiff's Opposed Motion for Leave to File Surreply, Plaintiff asserts that Defendant's Reply brief was "3 times the page limit prescribed by the rules" whereas Plaintiff's Opposition brief "was only 1.5 times the page limit." Mot. at 2. Plaintiff argues the Court should "resolve the inequity" in page length by granting Plaintiff leave to file a surreply. *Id.* In addition, Plaintiff asserts that the Court would "benefit" from "additional analysis of the issues" by granting Plaintiff leave to file a surreply. *Id.* at 3. Equity in page length or the benefit of additional analysis are not the standards guiding the Court. "The standard for granting a leave to file a surreply is whether the party making the motion would be unable to contest matters presented to the court for the first time in the opposing party's reply." *Lewis v. Rumsfeld*, 154 F. Supp. 2d 56, 61 (D.D.C. 2001). Plaintiff "fails to address any new matters presented by the [D]efendant's reply" in Plaintiff's Opposed Motion for Leave to File Surreply. *Id.* Therefore, the Court denies Plaintiff's Opposed Motion for Leave to File Surreply.

V. Motion to Dismiss

a. Legal Standard

To survive a Motion to Dismiss, a Complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face. *See Potomac Dev. Corp. v. District of Columbia*, 28 A.3d 531, 543–44 (D.C. 2011); *Ashcroft v. Iqbal*, 556 U.S. 662, 678–79 (2009); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555–56 (2007). Dismissal of a Complaint for failure to state a claim upon which relief can be granted should only be awarded if "it appears beyond doubt that the Plaintiff[s] can prove no set of facts in support of [their] claim which would entitle [them] to relief." *See* Super. Ct. Civ. R. 12(b)(6); *Fingerhut v. Children's Nat'l Med. Ctr.*, 738 A.2d 799, 803 (D.C. 1999).

When considering a Motion to Dismiss, a 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." *Fred Ezra Co. v. Pedas*, 682 A.2d 173, 174 (D.C. 1996). A Court should 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). However, the Court need not accept inferences if such inferences are unsupported by the facts set out in the Complaint. *See Kowal v. MCI Comm. Corp.*, 16 F.3d 1271, 1276 (D.C. Cir. 1994). Nor must the Court accept legal conclusions cast in the form of factual allegations. *Id.*

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*, 556 U.S. at 677–78. To survive a Motion to Dismiss under Super. Ct. Civ. R. 12(b)(6), a Plaintiff must provide "enough facts to state a claim to relief that is plausible on its face." *See Twombly*, 550 U.S. at 570. 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." *Id.*

b. Analysis

Plaintiff alleges Defendant "has misled and continues to mislead" consumers regarding widespread meat shortages and workplace safety protocols at their plants in violation of the D.C. Consumer Protection Procedures Act (CPPA). Compl. ¶¶ 1, 107, and 110. Plaintiff argues that Defendant's statements regarding meat shortages were improper because Defendant's foreign exports were surging at the time. *Id.* ¶ 6. In addition, Plaintiff argues that Defendant's statements were improper because Defendant had plenty of pork in cold storage. *Id.* ¶ 44. Regarding workplace safety, Plaintiff alleges that Defendant's statements misled the public about the company's COVID case count in the early stages of the pandemic. *Id.* ¶ 61. Plaintiff alleges Defendant had lapses in providing workers with protective gear even after CDC updated its guidance on face coverings in April 2020, and despite Defendant's assertions otherwise. *Id.* ¶¶ 63–69. And Plaintiff alleges Defendant misled the public about workplace safety by claiming that social distancing was not possible on production lines, despite CDC guidance specific to social distancing at Defendant's plants. *Id.* ¶¶ 71–73.

In the instant Motion to Dismiss, Defendant argues that Plaintiff is not entitled to injunctive relief because Defendant made the statements at issue "years ago" and they "relate to circumstances that have materially changed." Mot. Memo. at 9. Defendant argues Plaintiff does not show "that anyone will be

harmed by these stale statements in the future." *Id.* Defendant argues that Plaintiff's allegations do not meet the legal standard for injunctive relief because the allegations do not pertain to current statements or current consumer purchases based on past statements. *Id.* at 10. Furthermore, Defendant argues Plaintiff "fails to allege any ongoing harm" that would merit injunctive relief. *Id.* at 13.

Defendant argues that Plaintiff's alleged injury (that Plaintiff is continuing to spend time and money challenging Smithfield's past statements) is "insufficient to support an injunction." *Id.* In addition, Defendant argues that Plaintiff lacks standing to seek statutory or punitive damages because Plaintiff is not a consumer. *Id.* at 16 (citing D.C. Code § 28-3905(k)(2)(A)(i)). Furthermore, Defendant argues Plaintiff "does not identify a single consumer who misinterpreted Smithfield's statements . . . or was harmed by relying on those statements." *Id.* at 17.

Defendant argues Plaintiff fails to allege plausible violations of the CPPA. *Id.* Defendant argues that the challenged statements are not considered trade practices nor were they made in the context of a consumer transaction. *Id.* at 18. Defendant argues the statements were part of "an active national policy discussion" about closure of meat plants during a national health emergency. *Id.* Defendant further argues that "basic common sense" shows that "no reasonable consumer would rely on or be misled by Smithfield's statements," thus making the allegations "implausible" under the statute. *Id.* at 18–19. Defendant argues these allegations are implausible because numerous other government agencies and companies were expressing the same concern about the nation's meat supply. *Id.* at 19. And regarding workplace safety, Defendant argues that the allegation that Defendant failed to implement safety protocols during the pandemic is implausible because "reasonable consumers" would not "deliberately misinterpret Smithfield's measured statements" as Plaintiff does. *Id.* at 20.

Defendant argues that Plaintiff's claims violate Defendant's First amendment rights because Plaintiff "is attempting to use the CPPA to punish Smithfield for its political speech." *Id.* at 22. Defendant further argues that the statements in question are not commercial speech that would be subject to intermediate scrutiny under the Constitution. *Id.* at 23. And even if the challenged statements were considered commercial speech, Defendant argues that Plaintiff does not allege any facts sufficient under

the standard required for government regulation of such speech. *Id.* at 26. Defendant argues that their statements, if considered commercial speech, are "supported by legitimate, credible evidence" and are therefore protected under the First Amendment. *Id.* at 27.

Defendant further argues that Plaintiff's requested injunctive relief violates the Commerce Clause of the Constitution. *Id.* at 28. Defendant asserts that the Dormant Commerce Clause bars Plaintiff's request for injunctive relief because the Court cannot hold Defendant (a Virginia corporation) liable under DC law "for statements that were intended for a national audience." *Id.* at 29. Defendant further argues that Plaintiff's request for injunctive relief "would effectively project the CPPA onto the rest of the nation." *Id.*

In their Opposition, Plaintiff asserts that the CPPA provides them statutory standing, distinct from Article III standing requirements upon which Defendant bases their argument. Opp. at 6–7. Plaintiff argues they may claim injunctive relief because Defendant's CPPA violations are "ongoing" and even if they had ceased, Plaintiff "could seek an injunction based on Smithfield's past violations." *Id.* at 6. Plaintiff supports this by asserting that Defendant "has made—and continues to make—express and specific statements about the company's workplace safety practices" that are misleading. *Id.* at 8. Plaintiff also argues that Defendant's alleged misrepresentations were "aimed to promote Smithfield's brand and image," therefore these allegations are not stale because the Court may require "corrective advertising" to correct a false association with a brand. *Id.* at 10. In addition, Plaintiff argues an injunction is necessary because future violations are "reasonably likely" as the threat of the global pandemic still exists. *Id.* Plaintiff further asserts they have standing to bring suit per the broad definition of "consumer" under the CPPA. *Id.* at 11–12.

Plaintiff argues they have a valid claim pursuant to the CPPA because the statute covers sales and "any act providing information about a consumer good or service." *Id.* at 14. Plaintiff further argues that Defendant's challenged statements violate the CPPA because they are "material to consumers' purchasing decisions." *Id.* at 15. In addition, Plaintiff argues that Defendant's statements are actionable trade practices pursuant to the CPPA because courts do not require such statements to be "linked to specific

sales, labeling, or packaging." *Id.* at 16. Regarding Defendant's claims that other agencies and companies were making similar statements regarding the nation's meat supply, Plaintiff argues that the Court should not look beyond the Complaint and not consider "what government officials were saying and when." *Id.* at 17. Plaintiff also argues they have "plausibly alleged that reasonable consumers could be misled" by Defendant's challenged statements. *Id.* at 18.

Plaintiff notes that the Complaint does not assert any First Amendment issues, therefore any related affirmative defense "is not grounds for dismissal." *Id.* at 20. Plaintiff argues that the question of whether Defendant's statements are commercial speech, or whether Defendant's speech was false or misleading, is a "question of fact for the jury" based upon the Complaint. *Id.* at 20–21. Plaintiff argues that the alleged misleading statements are "material representations" about Defendant's products that "persuad[ed] the public to purchase those products" and therefore they are commercial speech not entitled to First Amendment protection. *Id.* at 22–23. In addition, Plaintiff argues that their claims under the CPPA do not violate the Dormant Commerce Clause because the alleged deceptive trade practices occurred within the District. *Id.* at 28.

In their Reply, Defendant argues Plaintiff does not have standing to request the "extraordinary remedy" of an injunction. Reply at 3. Defendant further argues that Article III standards apply to CPPA claims. *Id.* at 3–4. Defendant argues that Plaintiff does not properly allege violations of CPPA because (1) the Court may take into account the different nature of the pandemic today than in the early stages—even though the Complaint does not mention these changes; (2) Defendant's "decision to leave its past statements on the internet does not constitute [actionable] continuous speech"; and (3) Plaintiff cannot seek an injunction based upon how Defendant might respond to unknown future outbreaks. *Id.* at 5–6.

Defendant further argues that Plaintiff cannot seek injunctive relief based upon "ongoing harm caused by Smithfield's past misleading statements" because (1) Plaintiff does not allege in the Complaint that Defendant's past branding activities will "impact consumers' future purchases"; (2) Plaintiff's allegations of future injuries is "based on an extended chain of contingencies" that is not concrete or particularized; (3) Plaintiff's assertion of "future harm based on past conduct" does not qualify for

injunctive relief; and (4) consumer confusion, as Plaintiff alleges, "is not an irreparable injury." *Id.* at 7–9. Defendant also argues that Plaintiff is ineligible for statutory and punitive damages because (1) Plaintiff did not claim it purchased any of Defendant's products, therefore it is not a consumer; and (2) Plaintiff's argument that it promises to pay out any damages to consumers is "meritless." *Id.* at 9–10.

Defendant argues that Plaintiff failed to allege CPPA violations because (1) a trade practice must involve the sale of a consumer good or service; (2) a CPPA claim must originate out of a consumer transaction; (3) a finding that Defendant's statements violated the CPPA extends the statute "beyond reasonable limits"; (4) Defendant's statements about worker safety do not mention Defendant's products; (5) Plaintiff's assertion that consumers would not have been worried about shortages had they known about the frozen product storage is "fanciful"; and (6) reasonable consumers understood the context in which Defendant's statements were made in the early stages of the pandemic. *Id.* at 10–13.

In addition, Defendant argues that their statements are protected by the First Amendment because (1) this affirmative defense is "fairly incorporated into the Complaint"; (2) even if the statements were false, they are entitled to First Amendment protection; (3) Defendant's statements "did not involve commercial transactions"; (4) Defendant's statements were about "issues of public concern, were directed at a national audience, and did not discuss Smithfield's products"; and (5) even if Defendant's statements are commercial speech, they are subject to intermediate scrutiny by the Court. *Id.* at 13–14. And finally, Defendant reiterates their argument that Plaintiff's claims are a violation of the Dormant Commerce Clause. *Id.* at 15.

It is a long-standing rule in the District of Columbia that Motions to Dismiss test the sufficiency of the Complaint, rather than sufficiency of factual matters. *See Potomac Dev. Corp. v. District of Columbia*, 28 A.3d 531, 544 (D.C. 2011) ("A court should be circumspect in assessing the sufficiency of a complaint in any case where the substantive legal standard requires a fact-intensive inquiry."). The Court finds that Plaintiff has plead sufficient facts in the Complaint to make a plausible claim for relief. *See Twombly*, 550 U.S. at 570. The Court also finds that the issues in dispute are questions for a fact-

finder and may be further developed during the discovery phase. Therefore, the Court denies Defendant's Opposed Motion to Dismiss.

VI. Conclusion

For updates on DC Superior Court's available resources and protocol in handling the ongoing coronavirus please continue to check: https://www.dccourts.gov/coronavirus.

For the foregoing reasons, it is this 22nd day of July 2022,

ORDERED that Defendant's Opposed Motion to Dismiss is **DENIED**; it is,

FURTHER ORDERED that Plaintiff's Unopposed Motion for Leave to file Opposition to Motion to Dismiss in Excess of Page Limit is **GRANTED**; it is,

FURTHER ORDERED that Defendant's Opposed Motion for Leave to File Reply Brief in Excess of Page Limit is **GRANTED**; it is,

FURTHER ORDERED that Plaintiff's Opposed Motion for Leave to File Surreply in the Event Court Grants Smithfield's Motion to File 15-Page Reply is **DENIED**; it is,

FURTHER ORDERED that Defendant **SHALL FILE** an Answer on or before August 12, 2022; it is,

FURTHER ORDERED that the parties' Initial Scheduling Conference, scheduled for August 5, 2022, is **VACATED and RESCHEUDLED** for September 16, 2022 at 9:30 a.m. in Courtroom 516; and it is,

FURTHER ORDERED that, once Defendant files its Answer, the Court ***strongly encourages*** the parties to file a Praecipe for a Scheduling Order under Superior Court Civil Rule 16(b)(2)(A) on or before September 9, 2022.

Heidi M. Pasichow

Heidi M. Pasichow
Associate Judge
(Signed in Chambers)

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