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

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| **FOOD & WATER WATCH**,<br><br>Plaintiff,<br><br>v.<br><br>**SMITHFIELD FOODS, INC.**,<br><br>Defendant. | Case No.: 2021 CA 002020 B<br>Judge Heidi M. Pasichow<br><br>Next Court Date: Aug. 5, 2022<br>Event: Initial Scheduling Conference |

**PLAINTIFF FOOD & WATER WATCH'S OPPOSITION TO DEFENDANT SMITHFIELD'S MOTION TO DISMISS**


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## INTRODUCTION

Throughout the COVID-19 pandemic, Smithfield has misled—and continues to mislead—consumers in the District of Columbia about the state of the national meat supply chain and the company's workplace safety practices. Specifically, Smithfield misled consumers into believing its workers were sacrificing their lives for the country when they were really sacrificing their lives for Smithfield's profit margins. Try as it might, Smithfield cannot brush aside its unlawful, deceptive trade practices as a thing of the past when it continues to publish misleading advertisements and refuses to correct its past misleading claims. This lawsuit, which was delayed a year because of Smithfield's meritless removal to federal court, challenges Smithfield's past and ongoing trade practices as unlawful under the District of Columbia Consumer Protection Procedures Act (CPPA).

Smithfield attempts to defend the veracity of its claims about an imminent meat shortage and worker safety conditions, but these factual disputes are not grounds for a motion to dismiss. At this stage, the appropriate inquiry is whether Food & Water Watch (FWW) has provided sufficient factual material, taken as true, to state a plausible claim that Smithfield engaged in unfair and deceptive trade practices. It has.

There is also ample reason to believe that discovery will further substantiate FWW's claims. Indeed, just last month, the Select Subcommittee on the Coronavirus Crisis released the findings of its investigation into the meatpacking industry's response to the coronavirus pandemic. Staff Report at 2.[1] After reviewing more than 150,000 pages of documents and conducting over a dozen interviews, the congressional committee found that "[m]eatpacking companies knew the

[1] Staff of Select Subcomm. on the Coronavirus Crisis, 117th Cong., *"Now to Get Rid of Those Pesky Health Departments!"*: How the Trump Administration Helped the Meatpacking Industry Block Pandemic Worker Protections (2022) ["Staff Report"], https://coronavirus.house.gov/sites/democrats.coronavirus house.gov/ files/2022.5.12%20-%20SSCC%20report% 20Meatpacking%20FINAL.pdf.

risk posed by the coronavirus to their workers and knew it wasn't a risk that the country needed them to take." *Id.* at 32. Specifically, the report found that "in an attempt to justify operating meatpacking plants under dangerous conditions," Smithfield made "baseless" claims "that reduced operations and worker absenteeism would cause an imminent meat shortage." *Id.* at 1. Industry representatives even described Smithfield's Chief Executive Officer Ken Sullivan as "intentionally scaring people." *Id.* To be clear, the complaint's allegations alone suffice to establish a plausible claim, but the report further underscores why Smithfield's factual claims throughout its brief should not be given any weight. FWW's claims are plausible and it should be given an opportunity to prove them.

Smithfield's motion to dismiss rests on a series of fundamental legal errors. **First,** FWW has standing to seek both injunctive relief and damages. Smithfield improperly grafts Article III standing requirements for injunctive relief onto FWW's § 28-3905(k)(1)(D) claim even though Article III does not apply to (k)(1)(D) claims. And even if it did, FWW has standing to seek injunctive relief because Smithfield's unlawful conduct is ongoing, and because corrective advertising is necessary to remedy past violations. FWW also has standing to seek damages on behalf of itself because it satisfies the broad definition of consumer under the statute.

**Second,** Smithfield's argument that FWW failed to state a claim is premised on a misreading of the statute. Smithfield claims that the CPPA only governs direct sales or transactions, but the text of the statute says it applies to any act providing information about a consumer good or service. Indeed, courts have applied the CPPA to similar marketing campaigns. Smithfield also argues that FWW must show that the misleading information actually caused consumers to purchase Smithfield products, but the statute provides that trade practices can violate

the CPPA "whether or not any consumer is in fact misled, deceived, or damaged thereby." D.C. Code § 28-3904.

**Third,** Smithfield's constitutional challenges have no merit. Because Smithfield's First Amendment argument is an affirmative defense, it can only be grounds for dismissal if it is clearly established on the face of the complaint. To the contrary, the complaint establishes that Smithfield was engaged in misleading commercial speech, which is not entitled to any protection under the First Amendment. Smithfield's argument also rests on factual questions that, at best, cannot be determined at this stage of the litigation. Finally, no court has found that a consumer protection statute like the CPPA, that regulates conduct within the state, violates the Dormant Commerce Clause. For these reasons, the Court should deny Smithfield's motion to dismiss and allow this case to proceed to discovery.

## FACTUAL ALLEGATIONS

Smithfield—the largest pork processing company in the world—has mounted an aggressive campaign to leverage the COVID-19 pandemic to increase its profits. Through advertisements, social media statements, and website representations, Smithfield has misled and continues to mislead consumers about the state of the nation's meat supply and about worker safety at its plants. Compl. ¶ 3.

First, Smithfield told consumers that the nation was "perilously close to the edge in terms of [its] meat supply" and repeatedly pushed the message that having its workers operate in dangerous conditions was necessary to sustain the nation's food supply. *Id.* ¶¶ 29, 31, 34. That message was outright false. Far from a meat shortage, in 2020 Smithfield's exports of surplus pork reached a record high and the cold storage inventory of red meat and poultry products increased. *Id.* ¶¶ 40-45. The cold storage of pork alone could supply grocery stores at current stocking rates for up to 14 months. *Id.* ¶ 45. "Americans were never at risk of a severe meat shortage." *Id.* ¶ 39.

Smithfield's meat shortage myth exploited consumer fear to protect the company's bottom line. By sounding the alarm on a dwindling food supply, Smithfield artificially stoked consumer demand and kept the company's operations and revenues high during a time when many consumers were cutting back on other purchases due to financial insecurities caused by the pandemic. *Id.* ¶¶ 36-37, 47.

Second, Smithfield made, and continues to make, misleading claims about its worker safety practices. The company promises consumers that it is "doing everything in [its] power to help protect [its] team members from COVID-19 in the workplace," yet it refused to slow down production line speeds, implement social distancing measures, or provide workers with protective masks. *Id.* ¶¶ 35, 52-53, 64-68, 71. Smithfield's slaughterhouses are epicenters for COVID-19 outbreaks, including one of the largest workplace COVID-19 outbreaks in the country that resulted in four employees dying from the virus. *Id.* ¶¶ 7, 53, 55, 61, 68.

Smithfield also made a series of specific representations to consumers regarding its Personal Protective Equipment (PPE) policies, social distancing protocols, attendance and leave policies, and its cooperation with state and local health authorities – all of which were misleading or outright false. *Id.* ¶¶ 63-89. For example, Smithfield advertised that every employee involved in handling of its products wears masks, but reports from workers on the ground and state regulators say otherwise. *Id.* ¶¶ 63-69. Smithfield also lied to consumers by telling them social distancing was impossible, when really it just did not want to reduce its plant line speeds because it would be bad for business. *Id.* ¶¶ 70-73. Smithfield claimed it had eliminated any punitive effect of missing work due to COVID-19, but in actuality Smithfield imposed a variety of policies that deterred workers from taking time off due to COVID-19. *Id.* ¶¶ 74-82. Finally, Smithfield assured consumers that it was working collaboratively with local and state authorities and ensuring all data

regarding COVID-19 cases was correctly and transparently disclosed, *id.* ¶ 84, when in fact, Smithfield subverted and undermined state and local regulators and significantly underreported case counts. *Id.* ¶¶ 85-89. Smithfield continues to make these misleading claims, denying consumers' the truth about its workplace safety practices. *Id.* ¶ 49.

By making these misleading claims to consumers, Smithfield engaged in unfair and deceptive trade practices in violation of the CPPA. *Id.* ¶ 110. FWW seeks relief on behalf of itself, as well as on behalf of the general public and in the interests of District consumers pursuant to D.C. Code § 28-3905(k)(1)(C) and (k)(1)(D). *Id.* ¶¶ 113-17. Specifically, FWW seeks injunctive relief, $1,500 in statutory damages, punitive damages, declaratory relief, costs and fees, and any other relief the Court may deem proper. *Id.* ¶ 118.

## LEGAL STANDARD

To survive a motion to dismiss for failure to state a claim, a complaint need only satisfy Rule 8(a), which requires a "short and plain statement" of the claim for relief that is "plausible on its face" and "allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Potomac Dev. Corp. v. D.C.*, 28 A.3d 531, 543-44 (D.C. 2011) (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 677-78 (2009)). The Court must construe the complaint in the light most favorable to the plaintiff and accept the facts alleged in the complaint as true. *Id.* at 544.

## ARGUMENT

### I. FWW Has Standing to Seek Both Injunctive Relief and Damages

#### A. FWW can seek injunctive relief to stop and remedy Smithfield's unlawful conduct.

FWW has standing to enjoin Smithfield's ongoing misleading marketing campaign and to request corrective advertising. Smithfield claims that all of its misconduct occurred entirely in the past, during the early stages of the pandemic, and that FWW therefore cannot seek forward-

looking injunctive relief. *See* MTD at 9. Not only does this argument attempt to impose inapplicable Article III standing requirements, but it also fails to recognize that Smithfield's CPPA violations are ongoing. And even if those violations were not ongoing, FWW could seek an injunction based on Smithfield's past violations.

**i. Limits on Article III standing do not apply to FWW's (k)(1)(D) claim for injunctive relief.**

Smithfield's argument that FWW cannot seek injunctive relief is premised on Article III standing requirements that do not apply to FWW's § 28-3905(k)(1)(D) claim. Smithfield claims that to seek "forward-looking relief, such as an injunction," a plaintiff "must allege facts showing that the injunction is *necessary* to prevent injury *otherwise likely to happen* in the future." MTD at 9 (quoting *Equal Rights Ctr. v. Properties Int'l*, 110 A.3d 599, 603 (D.C. 2015)). But all of the cases Smithfield cites articulating this standard are discussing *federal* Article III standing requirements. *See* MTD at 9-10. The D.C. Court of Appeals recently clarified that (k)(1)(D) "conveys a clear legislative intent to modify Article III's strictures with a statutory test governing public interest organizations' standing to bring a CPPA claim," and that so long as an organization "meets that statutory test, it has standing to sue without regard to whether it also satisfies traditional Article III standing requirements." *Animal Legal Def. Fund v. Hormel Foods Corp.*, 258 A.3d 174, 179 (D.C. 2021).

Under the applicable statutory test, FWW has standing to sue for injunctive relief. The CPPA expressly provides that "any claim . . . may recover or obtain the following remedies," including "[a]n injunction against the use of the unlawful trade practice" and "[a]ny other relief which the court determines proper." D.C. Code § 28-3905(k)(2)(D), (F). Acting on behalf of the general public, FWW seeks an injunction to halt Smithfield's ongoing misrepresentations and to provide corrective advertising. Such relief is necessary to vindicate consumers' "right to truthful

information from merchants about consumer goods and services." *Id.* § 28-3901(c). Thus, FWW has standing to seek injunctive relief under (k)(1)(D), regardless of whether it meets federal standing requirements.

Compounding this error is Smithfield's contention that future effects from past violations are not enough to confer standing to seek an injunction. *See* MTD at 10 (citing *Fair Emp. Council of Greater Washington, Inc. v. BMC Mktg. Corp.*, 28 F.3d 1268, 1273 (D.C. Cir. 1994)). This principle derives from *City of Los Angeles v. Lyons*, a seminal Article III standing case, where the plaintiff's fear that he would suffer a fatal chokehold in a future encounter with police was not enough to confer Article III standing to seek an injunction against the police department's chokehold policy. *See Fair Emp. Council*, 28 F.3d at 1273 (discussing *City of Los Angeles v. Lyons*, 461 U.S. 95, 107 (1983)). But the Supreme Court in *Lyons* made it abundantly clear that this limitation *does not* apply to state courts, explaining "the state courts need not impose the same standing or remedial requirements that govern federal court proceedings. The individual states may permit their courts to use injunctions to oversee the conduct of law enforcement authorities on a continuing basis." *Lyons*, 461 U.S. at 113; *see also Grayson v. AT & T Corp.*, 15 A.3d 219, 261 (D.C. 2011) (Ruiz, J., concurring in part and dissenting in part) (explaining that federal standing requirements do not apply to injunctive relief available under the CPPA). Thus, Smithfield's argument that FWW cannot seek injunctive relief is premised entirely on an Article III principle that does not apply to claims for injunctive relief under (k)(1)(D).

**ii. FWW also has standing to seek injunctive relief because Smithfield's CPPA violations are ongoing.**

Smithfield's argument is not only premised on inapplicable Article III principles but also on an inaccurate reading of FWW's allegations. Even applying federal standing requirements, injunctive relief is appropriate when the plaintiff "is suffering an ongoing injury or faces an

immediate threat of injury." *Dearth v. Holder*, 641 F.3d 499, 501 (D.C. Cir. 2011). There must be a "cognizable danger of recurrent violation" that is "more than mere possibility." *Mbakpuo v. Ekeanyanwu*, 738 A.2d 776, 782 (D.C. 1999). Here, FWW easily satisfies this standard because Smithfield "continues to mislead consumers." Compl. ¶ 1. "Smithfield has *consistently* put out consumer messaging during the pandemic that has sowed fear about the domestic meat supply," and "has made—and *continues to make*—express and specific statements about the company's workplace safety practices" that mislead consumers. *Id.* ¶¶ 28, 49 (emphases added).

Smithfield argues that conditions on the ground have changed since the early months of the pandemic, pointing to the emergence of vaccines, its new workplace policies, and a long string of cases where courts dismissed claims seeking injunctions on large group gatherings. *See* MTD at 11-13. But Smithfield cannot move to dismiss based on facts beyond the four corners of the complaint. *See Nat'l Consumers League v. Gerber Prods. Co.*, No. 2014 CA 008202 B, 2018 WL 1030281, at *1 n.1 (D.C. Super. Ct. Feb. 21, 2018) (rejecting defendant's argument that plaintiff was not entitled to injunctive relief, as defendant had stopped running the advertisements at issue, because the argument relied on facts outside the complaint).

Nor is there anything stale about FWW's allegations. FWW challenges as misleading statements that remained live on Smithfield's website at the time of filing and other statements made in the month before filing. *See, e.g.*, Compl. ¶¶ 32-35, 56-59. FWW alleges that these statements are part of an ongoing, misleading marketing campaign. *Id.* Smithfield cannot just assert—contrary to the complaint—that its workplaces are now safe and consistent with its representations to consumers. "For purposes of ruling on a motion to dismiss for want of standing," the court "must accept as true all material allegations of the complaint, and must construe the complaint in favor of the complaining party." *See Grayson*, 15 A.3d at 232.

The cases Smithfield relies on to support its argument about changed circumstances are also inapposite. *See* MTD at 11-12. Smithfield relies on cases about whether challenges to expired emergency lockdown orders should be dismissed as moot, but those decisions relied on factual and legal developments that made reinstatement of lockdown orders extremely unlikely. *See, e.g.*, *Lighthouse Fellowship Church v. Northam*, 20 F.4th 157, 163-64 (4th Cir. 2021) (holding challenge to expired order restricting religious gatherings was moot because Governor's legal authority to issue a new order had expired). No such change in circumstance applies here. As Smithfield concedes, the pandemic rages on, with new variants and new outbreaks, and the federal guidance for meatpacking plants continues to recommend the same safety measures required early in the pandemic, including masking and social distancing.[2] Finally, even if it turns out, after discovery, that workplace conditions at Smithfield have changed, FWW would still have standing to enjoin Smithfield from continuing to make misleading, self-promotional advertisements about its *past* conduct.[3] Because Smithfield's misleading messaging campaign is ongoing, injunctive relief is justified.

**iii. FWW can seek injunctive relief based on Smithfield's past violations.**

Smithfield's unfair and deceptive trade practices are ongoing, but even if Smithfield only made misleading claims in the past, FWW would *still* be entitled to injunctive relief. First, FWW seeks corrective advertising to remedy the ongoing harm caused by Smithfield's past misleading statements. *See Wayne-Dalton Corp. v. Amarr Co.*, No. 5:06CV01768, 2008 WL 11383502, at *9 n.11 (N.D. Ohio Jan. 23, 2008) (holding claim for injunctive relief was not moot because, even

[2] *See* OSHA, *Protecting Workers: Guidance on Mitigating and Preventing the Spread of COVID-19 in the Workplace* (last updated Aug. 13, 2021), https://www.osha.gov/coronavirus/safework.

[3] For example, Smithfield's website currently features a video entitled "Good Is What We Do" that is about Smithfield's response to the pandemic "in 2020." *See Worker Health & Safety*, Smithfield Foods, https://www.smithfieldfoods.com/worker-health-and-safety (last visited on June 3, 2022).

if advertising had stopped, plaintiff sought corrective advertising); *see also Sanofi-Aventis U.S. LLC v. Novo Nordisk, Inc.*, No. CV 06-1369 (MLC), 2006 WL 8457950, at *8 (D.N.J. June 23, 2006) (same); *accord Krumm v. Kittrich Corp.*, No. 4:19 CV 182 CDP, 2019 WL 6876059, at *3 (E.D. Mo. Dec. 17, 2019) (offer of payment did not moot claim for corrective advertising).

Contrary to Smithfield's argument (MTD at 10), Smithfield's misrepresentations aimed to promote Smithfield's brand and image, thereby affecting consumer purchasing behavior. *See* Compl. ¶¶ 5, 24, 26, 31, 37, 50-51, 60. Deception to promote a company's image does not "go stale" in the same way other deceptive practices might. For example, if a company lied and claimed it donated $5 billion to the Red Cross in the wake of a natural disaster to build goodwill with consumers, consumers might continue to favor that company for years, long after the purported donation has taken place. Courts have recognized that corrective advertising is necessary after a deceptive trade practice creates a "false association" with a company's brand or image that continues to taint the marketplace. *See PODS Enters., LLC v. U-Haul Int'l, Inc.*, 126 F. Supp. 3d 1263, 1282 (M.D. Fla. 2015).

Additionally, injunctive relief is warranted because Smithfield is likely to push the same misleading messaging again in the future, creating a "cognizable danger of recurrent violation." *Mbakpuo*, 738 A.2d at 782. Smithfield has historically managed COVID-19 surges and outbreaks by raising the false specter of scarcity if forced to slow production, while simultaneously assuaging consumer concern for the health and safety of plant workers who continue to face serious risk at work. *See* Compl. ¶¶ 29-31, 52-55. The fundamental public health conditions that gave rise to these past violations still exist, making future violations reasonably likely. As Smithfield concedes, the pandemic is not over. *See* MTD at 11. It is therefore likely that as new variants emerge, Smithfield will continue to experience COVID-19 surges, unsafe working

conditions, and the prospect of production slowdowns. These are the exact circumstances that prompted Smithfield's CPPA violations in the past and will likely prompt them again.

**B. FWW can seek damages on behalf of itself.**

Contrary to Smithfield's argument, FWW may seek statutory and punitive damages "payable to the consumer" under D.C. Code § 28-3905(k)(2) because it is a "consumer" under the statute. Smithfield wrongly assumes that to be a "consumer" FWW needs to prove it will purchase a Smithfield product in the immediate future. MTD at 16. But FWW need only show that it satisfies the broad definition of "consumer" in the statute, which expressly provides that a trade practice can be unlawful "whether or not any consumer is in fact misled, deceived or damaged thereby." D.C. Code § 28-3904. The D.C. Council explained that its 2012 amendments meant to "explicitly illuminate that the kinds of harm actionable under the CPPA include the provision of untruthful or misleading information, whether or not measurable economic damages demonstrably result to any particular consumer." Council of the District of Columbia, Committee on Public Services and Consumer Affairs, Report on Bill 19-0581, the "Consumer Protection Amendment Act of 2012," at 3 (2019).[4]

FWW is a consumer. The statute defines "consumer" as "a person who . . . does or would purchase . . . or receive consumer goods or services" and includes in its definition of "person" an "organization." D.C. Code § 28-3901(a)(1), (2). Citing no legal authority, Smithfield asserts that FWW cannot be a "consumer" under the statute because it seeks to hold industrial agribusiness companies like Smithfield accountable. *See* MTD at 16. Notwithstanding its organizational mission, however, FWW has staff, members, and volunteers based in Washington, D.C., and, like most organizations, regularly purchases food for meetings and events. *See* Compl. ¶¶ 13-15.

[4] https://lims.dccouncil.us/downloads/LIMS/26337/Committee_Report/B19-0581-CommitteeReport1.pdf.

Additionally, the statute defines "[c]onsumer goods" to include goods that an organization "purchases or receives in order to test or evaluate." D.C. Code § 28-3901(a)(2)(B)(ii). FWW purchases consumer goods, including meat products in particular, to test or evaluate them as part of its public education, litigation, and research efforts on behalf of its members and supporters. *See* Compl. ¶¶ 13-15, 114-16; *see also* Complaint at ¶ 161, *Organic Consumers Ass'n v. Tyson Foods Inc.*, 2021 WL 1267807 (D.C. Super. Ct. July 10, 2019) (No. 2019 CA 004547 B) (complaint alleging FWW purchased Tyson products "to evaluate Tyson's marketing and advertising claims regarding environmental stewardship and humane treatment").

Finally, even if FWW were not a consumer, it could still seek statutory damages. The statute provides that "*[a]ny* claim under this chapter . . . may recover or obtain the following remedies," including "[t]reble damages, or $1,500 per violation, whichever is greater, payable to the consumer." D.C. Code § 28-3905(k)(2) (emphasis added). The phrase "payable to the consumer" does not modify who can "recover or obtain" statutory damages; it limits how that monetary relief can be used. *See Nat'l Consumer's League v. Doctor's Assocs., Inc.*, No. 2013 CA 006549 B, 2014 WL 4589989, at *8 (D.C. Super. Ct. Sep. 12, 2014) (explaining "[t]he mere fact that [statutory] damages must be payable to the consumer does not preclude a public interest organization from recovering them in a suit under the CPPA" and the "language simply specifies that such organizations may not . . . retain those damages for their own benefit"). If FWW does not qualify as a consumer under the statute, it will ensure the limited statutory damages it seeks are paid out to consumers.

Smithfield argues in its motion to dismiss that FWW could not pay any damages to consumers because FWW argued in its motion to remand that it was not bringing a representative suit for damages. *See* MTD at 8-9. But FWW's position in federal court was that it is not bringing

a representative suit for damages that, per *Rotunda v. Marriott Int'l, Inc.*, 123 A.3d 980 (D.C. 2015), would be subject to Rule 23's requirements and removable under the Class Action Fairness Act. FWW is seeking damages on its *own* behalf for a violation of the statute. The fact that the money it might obtain through the lawsuit is earmarked for consumers does not make it a representative suit for damages subject to Rule 23 or CAFA.

## II. FWW Has Plausibly Alleged that Smithfield Violated the CPPA.

### A. Smithfield's statements are actionable trade practices under the CPPA.

Smithfield claims that its statements are not actionable trade practices under the statute, but its arguments fly in the face of the statute's text and District case law.

***First,*** Smithfield argues that its statements are not trade practices because a trade practice is limited to statements providing information about *a sale* of consumer goods or services. *See* MTD at 17. But that is not the statutory definition of the term. The CPPA broadly defines trade practice as "*any act* which does or would create, alter, repair, furnish, make available, *provide information about*, or, directly or indirectly, solicit or offer for or effectuate a sale, lease or transfer, of *consumer goods or services*." D.C. Code § 28-3901(a)(6) (emphases added). Smithfield cherry picks from the definition, highlighting only the second half of the definition about solicitations even though the definition expressly includes such acts "or" "any act which . . . provide[s] information about . . . consumer goods or services." *Id.*

The statutory context further confirms that trade practices include more than just sales. The statute says that it establishes "an enforceable right to truthful information from merchants *about* consumer goods and services that are or *would be* purchased" in the District. *Id.* § 28-3901(c) (emphases added). The CPPA also provides a non-exhaustive list of unfair or deceptive trade practices, which includes misleading sales or transactions, *see id.* § 28-3904(e-1), (w), *as well as*

the provision of misleading information generally, outside the context of a specific sale, *see id.* § 28-3904(e), (f-1). Finally, the statute provides that it "shall be construed and applied liberally to promote its purpose" of "assur[ing] that a just mechanism exists to remedy all improper trade practices." *Id.* § 28-3901(b)(1), (c). Thus, a trade practice is not limited to sales but encompasses any act providing information about a consumer good or service.

Smithfield's various advertisements challenged in the complaint are all trade practices because they provide information about Smithfield's goods. Smithfield's misleading representations to District consumers regarding the imminence of a nationwide meat shortage is a trade practice because it is information about the availability of Smithfield's meat products. *See id.* § 28-3904(a) (listing misrepresentation regarding the "quantit[y]" of a good as a deceptive trade practice); *see also Sihler v. Fulfillment Lab, Inc.*, No. 3:20-CV-01528-H-MSB, 2021 WL 1293839, at *4 (S.D. Cal. Apr. 7, 2021) (falsely claiming a limited supply of a product is misleading and deceptive advertising).

Similarly, Smithfield's misleading statements regarding worker safety protocols are about the "source" of Smithfield goods and the "standard" and "quality" by which they are produced and are thereby actionable under the CPPA. *See* D.C. Code § 28-3904(a), (d) (listing misrepresentations regarding the "source" or "standard" and "quality" of a good as a deceptive trade practice); *see also Tyson Foods*, 2021 WL 1267807, at *1, 3 (holding that misleading claims that "chicken products are produced in an environmentally responsible way" and that "defendants are committed to 'excellence in animal welfare'" are actionable trade practices); *Organic Consumers Ass'n v. Smithfield Foods, Inc*, No. 2020 CA 2566 B, at *1-2, 10-11, 14 (D.C. Super. Ct. Dec. 14, 2020) [Attachment A] (holding that Smithfield's misleading claims that "its products are the 'safest' possible U.S. pork products," that it maintains "extremely hygienic and sanitary

environments," and that its "COVID-19 response complement[s] the extensive safety measures in place" are actionable trade practices); *see also Hormel*, 258 A.3d at 180, 186 (holding that misleading descriptors like "clean," "honest," "higher standards," and "wholesome" are actionable trade practices).

Smithfield's representations are also actionable trade practices because they concern facts directed at consumers that are material to consumers' purchasing decisions. *See* D.C. Code § 28-3904(e), (f)(1) (listing misrepresentation of or ambiguity as to a material fact with tendency to mislead consumers as deceptive trade practice). Market surveys have shown that the state of the national meat supply and working conditions at a company affect consumers' purchasing decisions. Compl. ¶¶ 37, 50-51. D.C. courts have repeatedly held that is sufficient to establish a deceptive trade practice in violation of the CPPA. *See Smithfield Foods, Inc.*, No. 2020 CA 2566 B, at *11 (holding complaint's citation to studies "stating that food safety is an issue of significant concern to consumers" was sufficient to state a claim regarding misrepresentations of food safety); *Tyson Foods*, 2021 WL 1267807, at *3 (holding complaint's citation to studies showing reasonable consumers would "pay more for products that they believe come from humanely treated animals" was sufficient to state a claim as to misrepresentations regarding animal welfare).

Thus, Smithfield's motion to dismiss improperly narrows the definition of trade practice to statements made during a sale, when really it encompasses any statement providing information about a consumer good, including Smithfield's misleading messaging.

***Second***, though in the same vein, Smithfield asserts that the challenged statements must be made in the context of a proposed "consumer transaction" to be actionable under the CPPA. *See* MTD at 17. But that is inconsistent with the definition of trade practice described above. What's more, the cases Smithfield relies on for this argument are readily distinguishable. All of these cases

address whether an individual consumer's purchase was a consumer-merchant transaction as opposed to a merchant-merchant transaction. *See, e.g., Ford v. Chartone, Inc.*, 908 A.2d 72, 81 (D.C. 2006) (contrasting trade practices arising out of "consumer-merchant relationships" with "commercial dealings outside the consumer sphere"). Those cases do not address whether, much less conclude that, CPPA claims need to arise from a specific consumer transaction as opposed to a general brand and marketing strategy like the one FWW challenges here.

To the contrary, District courts have regularly found general marketing campaigns to be actionable trade practices under the CPPA even when they are not linked to specific sales, labeling, or packaging. *See Tyson Foods*, 2021 WL 1267807, at *3 (holding marketing campaign about how products are produced in an environmentally friendly and humane way was actionable; *Smithfield Foods, Inc.* No. 2020 CA 2566 B, at *1-2, 10-11, 14 (holding general statements on Smithfield's "website, in YouTube videos, and on other media" were actionable); *see also Dist. of Columbia v. Facebook, Inc.*, No. 2018 CA 8715 B, 2019 WL 7212642, at *6 (D.C. Super. Ct. May 31, 2019) (holding that Facebook's general promises that it will protect the privacy of consumers' personal information were actionable). Thus, general marketing campaigns—including Smithfield's campaign to push misleading information to consumers about the availability of its products and how they are made—are actionable trade practices under the CPPA.

***Third***, Smithfield argues that its statements regarding an imminent meat shortage cannot be a trade practice because government agencies and the White House made similar claims. *See* MTD at 18. Again, Smithfield impermissibly reaches beyond the four corners of the complaint in an attempt to challenge the plausibility of FWW's allegations. For that reason alone, its argument should be rejected.

Smithfield's argument is also particularly bold in light of the congressional report released just two days before Smithfield filed its motion to dismiss, which *directly* traces the misleading narrative that the nation was "close" to a "substantial protein shortage" back to Smithfield Chief Executive Officer Ken Sullivan. *See* Staff Report at 15-17, 20-21.[5] Sullivan heavily lobbied Secretary of Agriculture Perdue about the need to keep plants open, telling him the country was in a "dire" situation if it "can't stem workforce absenteeism during the next few weeks," and Secretary Perdue passed the message along to the CDC Director and others within the government. *Id.* at 15. The report even cites emails from industry executives, *id.* at 1, stating that "Smithfield has whipped everyone into a frenzy" and that "It comes from Ken Sullivan the CEO. He is directing the panic."[6]

Smithfield cannot evade liability for misleading consumers just because it successfully lobbied a political appointee—with longstanding, extensive connections to Big Agriculture—to repeat its lies. If anything, government statements parroting Smithfield are further evidence of Smithfield's extensive and intentional efforts to gin up panic and mislead consumers into believing the nation was about to run out of meat. Smithfield claims it was engaged in "an active national policy discussion" (MTD at 18), when in reality there was no policy discussion—only corporations leveraging political ties to promote a consumer message and boost their bottom line.

Again, at this motion to dismiss stage, the court should not look beyond the complaint and thus should not even consider Smithfield's arguments about what government officials were saying and when. But if it did, it would find that even just based on the public record, prior to any

[5] As Smithfield recognized in its motion to dismiss, *see* MTD at 5 n.2, the court may take judicial notice of documents provided on official government websites. *See Nat'l Abortion Fed'n v. Ctr. for Med. Progress*, No. 15-CV-03522-WHO, 2018 WL 5879786, at *10 (N.D. Cal. Nov. 7, 2018), *aff'd,* 793 F. App'x 482 (9th Cir. 2019) (taking judicial notice of the existence of a congressional report).

[6] Email from Sarah Little, Vice President of Communications, North American Meat Institute, to Robin Troye, Director of Conference Services and Marketing, North American Meat Institute (Apr. 16, 2020), https://coronavirus house.gov/sites/democrats.coronavirus.house.gov/files/NAMI00071259-60_Redacted.pdf.

discovery, FWW's claims that Smithfield engaged in deceptive or unfair trade practices are more than plausible.

**B. Smithfield's statements are misleading.**

Despite Smithfield's arguments to the contrary, FWW has plausibly alleged that reasonable consumers could be misled by the company's statements about an imminent meat shortage and its worker safety precautions. "[T]he CPPA does not require much by way of pleading to state a claim." *McMullen v. Synchrony Bank*, 164 F. Supp. 3d 77, 94 (D.D.C. 2016). "All that is required is 'an affirmative or implied misrepresentation' that 'a reasonable consumer' would deem misleading." *Id.* at 95 (quoting *Saucier v. Countrywide Home Loans*, 64 A.3d 428, 442-43 (D.C. 2013)). Whether a reasonable consumer would consider a statement material or misleading is "a question of fact for the jury and not a question of law for the court." *Saucier*, 64 A.3d at 445. Thus, a plaintiff has plausibly alleged that a trade practice is misleading if "the allegations, taken as true, *could be reasonably interpreted* by a consumer as misleading." *Facebook*, 2019 WL 7212642, at *13.

Smithfield first argues that it is implausible that consumers would have been misled by Smithfield's statements about an impending meat shortage as opposed to the Trump Administration's statements expressing similar sentiments. *See* MTD at 19. But other entities making similar misleading statements is irrelevant to whether Smithfield's claims about the national meat supply and the necessity of its own plants to the stability of the food supply chain were themselves misleading. Indeed, FWW does not even need to show that Smithfield's misleading information led consumers to purchase Smithfield products that they would not have otherwise purchased; it need only allege that Smithfield pushed misleading information to consumers. *See infra* at 10-11.

Smithfield's argument that the government, not Smithfield, was the more prominent source of the false narrative also, again, relies on facts beyond the complaint. Moreover, it is likely wrong given that (a) Smithfield's misleading messaging was widely circulated in full-page national newspaper ads and on social media, *see* Compl. ¶¶ 30-31, and (b) the government statements were made at Smithfield's direction, *see Bullock v. Philip Morris USA*, Inc., 71 Cal. Rptr. 3d 775, 792 (Cal. Ct. App. 2008) (finding defendant liable for "engag[ing] in a broad-based public campaign to disseminate misleading information and create a false controversy" where "the misinformation reached [plaintiff] indirectly through various means").

Smithfield next argues that no reasonable consumer would be misled by its statements regarding its worker safety practices because consumers knew that no business could eliminate the risk posed to essential workers. *See* MTD at 20. But FWW's argument is not that Smithfield misled consumers into believing no one would get sick; it is that Smithfield claimed it was doing all it could and made specific, misleading representations about its efforts to mitigate the risk of COVID-19. *See infra* at 4. Despite Smithfield's bald assertion to the contrary, FWW *does* allege that Smithfield failed to implement the worker safety processes and protocols it promised to consumers. *See infra* at 4-5. For example, Smithfield advertised that it would provide PPE such as face masks to "every employee involved in the handling, preparing and processing of food," but there was widespread public reporting about PPE lapses at Smithfield plants across the country. This notably included a November 12, 2020 Cal/OSHA citation finding that Smithfield "[f]ail[ed] to provide or ensure the use of face coverings." Compl. ¶ 65. Thus, FWW has plausibly alleged that consumers could be misled by Smithfield's statements about an imminent meat shortage and its workplace safety practices.

## III. The First Amendment Does Not Protect Smithfield's False and Misleading Statements.

### A. Smithfield's First Amendment defense is not grounds for dismissal.

Smithfield argues that enforcing the CPPA here would violate its First Amendment rights, *see* MTD at 22, but as a threshold matter, such an affirmative defense that is not apparent on the face of the complaint is not grounds for dismissal. "Affirmative defenses, such as a First Amendment right to engage in challenged conduct, may be raised in a motion to dismiss" only if "'the facts establishing the defense are clear on the face of the plaintiff's pleadings.'" *Puerto Rico Coffee Roasters LLC v. Pan Am. Grain Mfg. Co.*, No. 3:15–CV–02099, 2015 WL 8551102 at *7 (D.P.R. Dec. 11, 2015) (quoting *Santana–Castro v. Toledo–Davila*, 579 F.3d 109, 113-14 (1st Cir. 2009)); *see also Francis v. Rehman*, 110 A.3d 615, 621 (D.C. 2015) (explaining a motion to dismiss cannot be granted on an affirmative defense unless that defense is "established on the face of the complaint").

FWW's complaint does not come close to establishing that Smithfield's statements are protected by the First Amendment; if anything, it establishes the opposite. Per the complaint, Smithfield's statements are false and misleading trade practices, which are not afforded any protection under the First Amendment. *See Ass'n of Private Sector Colleges & Univs. v. Duncan*, 681 F.3d 427, 457 (D.C. Cir. 2012). Smithfield might contend that its speech is not commercial, but such a determination is "fact-driven, due to the inherent 'difficulty of drawing bright lines that will clearly cabin commercial speech in a distinct category,'" and therefore cannot be determined on the face of the complaint. *Greater Balt. Ctr. for Pregnancy Concerns, Inc. v. Mayor & City Council of Balt.*, 721 F.3d 264, 284 (4th Cir. 2013) (en banc).

Similarly, whether Smithfield's speech was false or misleading—a necessary inquiry in assessing Smithfield's First Amendment defense—is a "question of fact for the jury," and cannot

be determined based on the complaint. *Saucier*, 64 A.3d at 445; *see also Hormel Foods Corp.*, 258 A.3d at 187 n.9. Even if the court found Smithfield's speech were noncommercial, it would still have to assess whether it is misleading. Misleading noncommercial speech, especially if it involves false scaremongering during a public health crisis, may not be protected by the First Amendment. *See United States v. Alvarez*, 567 U.S. 709, 719 (2012) (recognizing that false statements that produce a "legally cognizable harm" are not protected by the First Amendment). Because Smithfield's First Amendment defense rests on the court finding that its speech is noncommercial *and* non-misleading, and neither finding is apparent on the face of the complaint, Smithfield's defense is not grounds for dismissal.

Smithfield does not even argue otherwise. Instead, it mischaracterizes the burden analysis, claiming that FWW must plead facts showing that the challenged statements are *not* protected by the First Amendment. *See* MTD at 22. This is wrong. The case Smithfield relies on involves cross motions for summary judgment. *See All. for Natural Health U.S. v. Sebelius*, 786 F. Supp. 2d 1, 3 (D.D.C. 2011). The case says nothing about "the burden of pleading facts." MTD at 22. Nor do the other two cases Smithfield cites, which were also decided at summary judgment. *See Citizens United v. Federal Election Comm'n*, 558 U.S. 310, 340-43 (2010); *Edenfield v. Fane*, 507 U.S. 761, 770 (1993).[7]

At the motion to dismiss stage, it is Smithfield's burden to show that "the factual allegations in the complaint unambiguously establish all the elements of the defense." *Hyson USA, Inc. v. Hyson 2U, Ltd.*, 821 F.3d 935, 939 (7th Cir. 2016). FWW "was not required to anticipatorily

[7] Smithfield later cites to *N.Y. Public Interest Research Grp., Inc. v. Ins. Info. Inst.*, 554 N.Y.S.2d 590 (N.Y. App. Div. 1990), where plaintiff's claims were dismissed on First Amendment grounds. That case is inapposite because the challenged statement was not "directed at potential purchasers of the advertiser's product," and the defendant was not involved in any consumer transactions with the plaintiff or general public. *Id.* Here, all of Smithfield's messages are directed at potential purchasers of Smithfield products.

negate that defense in [its] pleadings, and thus the Court cannot conclude, as a matter of law, that [FWW] cannot prove any set of facts entitling [it] to relief." *McNamara v. Picken*, 866 F. Supp. 2d 10, 17 (D.D.C. 2012). Because the complaint does not clearly establish that Smithfield had a First Amendment right to make such false and misleading statements, there is no First Amendment grounds for dismissal. *See Puerto Rico Coffee Roasters LLC*, 2015 WL 8551102 at *7 (refusing to dismiss a claim because nothing in complaint clearly established that the defendant had a First Amendment right to engage in its false or misleading advertising).

### B. Smithfield's false and misleading statements are commercial speech and not entitled to any protection under the First Amendment.

Even assuming that Smithfield's First Amendment defense could provide grounds for dismissal, Smithfield's false and misleading statements, promoted through full-page newspaper advertisements, social media posts, consumer-facing webpages, press statements, and product reports, constitute commercial speech and are therefore not entitled to any protection under the First Amendment. Courts in this District have rejected First Amendment challenges at the motion to dismiss stage on the grounds that the speech is commercial and allegedly misleading. *See Smithfield Foods*, No. 2020 CA 2566 B, at *13-14; *Tyson Foods*, 2021 WL 1267807 at *3.

Smithfield claims that commercial speech is "expression related ***solely*** to the economic interests of the speaker and its audience," but as it correctly recognized in a footnote, the definition is not that limited. *See* MTD at 24-25 & n.22. The D.C. Circuit "has added" to that definition "that 'material representations about the efficacy, safety, and quality of the advertiser's product, and other information asserted for the purpose of persuading the public to purchase the product' also can qualify as commercial speech." *Ass'n of Priv. Sector Colleges & Univs.*, 681 F.3d at 455. Smithfield asserts, without any explanation, that "[n]o such statements are at issue here." MTD at

n.22. That's wrong. All of the statements FWW challenges are material representations about Smithfield's products made for the purpose of persuading the public to purchase those products.

Smithfield also mischaracterizes the Supreme Court's guidance on identifying commercial speech. Speech that "cannot be characterized merely as proposals to engage in commercial transactions" may nonetheless be commercial when considering characteristics like whether it amounts to an "advertisement[]," "refer[s] to a specific product," or the speaker "has an economic motivation for it." *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 66-68 (1983). While Smithfield is correct that the combination of all these characteristics is strong support for a finding of commercial speech, *see* MTD at 23, each characteristic is not necessary for speech to be commercial, *see Bolger*, 463 U.S. at 67 & n.14; *see also Handsome Brook Farm, LLC v. Humane Farm Animal Care, Inc.*, 700 F. App'x 251, 257 (4th Cir. 2017) (explaining the *Bolger* factors "are all illustrative, but none are determinative").

Contrary to Smithfield's characterization, the statements at issue in this case satisfy all three indicators of commercial speech. First, they appear in advertisements. The full-page newspaper advertisements, the company's social media posts, its consumer facing webpage, and other material are advertisements because they "call[] public attention to" Smithfield's products and "emphasiz[e] desirable qualities so as to arouse a desire to buy or patronize." *Wash. Legal Found. v. Friedman*, 13 F. Supp. 2d 51, 64 (D.D.C. 1998) (quoting Webster's Ninth New Collegiate Dictionary (1990)). Smithfield's newspaper ads, social media posts, and webpages prominently feature Smithfield's name and logo, "Good Food. Responsibly.," while touting positive attributes of its products and company. *See, e.g.*, Compl. ¶ 31 (newspaper ad stating Smithfield has "been in the business of making 'Good Food. Responsibly'" for 85 years); *see also id.* ¶¶ 30, 52, 56.

Smithfield's statements are also about Smithfield products. As explained above, the statements are about the availability, source, and quality of Smithfield's products, and other facts about how they are made that are material to consumer purchasing decisions. "That a product is referred to generically does not . . . remove it from the realm of commercial speech." *Bolger*, 463 U.S. at 66 n.13; *see also United States v. Philip Morris USA Inc*., 566 F.3d 1095, 1144 (D.C. Cir. 2009) ("The fact that . . . advertisements involve Defendants as a group joined in advertising their common product, discuss cigarettes generically without specific brand names, or link cigarettes to an issue of public debate, does not change the commercial nature of the speech.").

Even when speech does not reference any products *at all*, it may still be commercial if it is promoting a brand. For example, in *Jordan v. Jewel Food Stores, Inc.*, 743 F.3d 509, 512, 517-20 (7th Cir. 2014), the Seventh Circuit found that a grocery store advertisement congratulating Michael Jordan after his induction into the Hall of Fame was commercial speech, even though the ad featured only a tribute to Jordan and the company's logo and slogan and did not refer to any product. *Id.* The court explained "[t]hat it doesn't mention a specific product means only that this is a different genre of advertising. It promotes brand loyalty rather than a specific product, but that doesn't mean it's 'noncommercial."' *Id.* at 519. Here, Smithfield's statements *are* about Smithfield's meat products, but they also promote a brand—"Good Food. Responsibly," and are thus clearly commercial.

Finally, Smithfield's statements have an economic motivation. "[E]conomic motivation is not limited simply to the expectation of a direct commercial transaction with consumers." *Ariix, LLC v. NutriSearch Corp.*, 985 F.3d 1107, 1117 (9th Cir. 2021). "Courts have found commercial speech even when it involves indirect benefits," such as "improvements to a brand's image" or "general exposure of a product." *Id.* "[T]he type of economic motivation is not the focus; rather,

the crux is on whether the speaker had an adequate economic motivation so that the economic benefit was the primary purpose for speaking." *Id.*

Smithfield's statements warning of an imminent meat shortage and touting the company's workplace safety were motivated by a desire to protect and increase its profits. "[F]earmongering creates a revenue-generating feedback loop" that "stokes and exploits consumer panic—juicing demand and sales," Compl. ¶ 4, and the meat shortage myth impacted consumer purchasing behavior, *id.* ¶¶ 36-37. Smithfield's worker safety representations were also made in response to consumer concerns and impact purchasing behavior. *See id.* ¶¶ 50-52. Indeed, "[a] for-profit company" like Smithfield "is often presumed to have primarily economic motivations for its speech." *Handsome Brook Farm, LLC*, 700 F. App'x at 258.

The fact that Smithfield's statements were about the company's labor practices does not negate this economic motivation. In *Kasky v. Nike, Inc.*, 45 P.3d 243 (Cal. 2002), for example, Nike received adverse publicity about labor conditions in its Southeast Asian factories. In response, Nike made affirmative representations positively portraying working conditions in "press releases, in letters to newspapers, in a letter to university presidents and athletic directors, and in other documents distributed for public relations purposes." *Id.* at 248. The court held that these statements were unprotected commercial speech because "[s]peech is commercial in its content if it is likely to influence consumers in their commercial decisions" and "[f]or a significant segment of the buying public, labor practices do matter in making consumer choices." *Id.* at 262. This case is no different. In response to growing consumer concerns about working conditions, Smithfield made representations to make consumers more comfortable purchasing its products.

With respect to each *Bolger* factor, Smithfield makes the same argument: that its speech was not commercial because it pertained to matters of public concern. The Supreme Court has

repeatedly rejected this argument, explaining that "[a]dvertisers should not be permitted to immunize false or misleading product information from government regulation simply by including references to public issues." *Bolger*, 463 U.S. at 67-68 (finding "mailings constitute commercial speech notwithstanding the fact that they contain discussions of important public policy issues such as venereal disease and family planning"); *see Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y.*, 447 U.S. 557, 562 n.5 (1980) (explaining advertising that "links a product to a current public debate" is not thereby entitled to the protections afforded noncommercial speech because "many, if not most, products may be tied to public concerns with the environment, energy, economic policy, or individual health and safety").

Because Smithfield's misleading speech is commercial, it is not entitled to any protection under the First Amendment. "[C]ommercial speech enjoys First Amendment protection only if it . . . is not misleading." *Whitaker v. Thompson*, 353 F.3d 947, 952 (D.C. Cir. 2004); *see also Cent. Hudson*, 447 U.S. at 562-63.

### C. Even if the *Central Hudson* test applied, FWW satisfies it.

Smithfield argues that even if its speech is commercial, the CPPA regulates *potentially* misleading commercial speech and is thus subject to intermediate scrutiny under *Central Hudson*. *See* MTD at 26. This is inconsistent with how every court in this District has evaluated First Amendment challenges to CPPA claims. Courts have held that because the statute regulates misleading speech, the First Amendment does not apply. *See Smithfield Foods*, No. 2020 CA 2566 B, at *13-14 (denying motion to dismiss on First Amendment grounds because defendant's speech was allegedly misleading and thus not protected under the First Amendment); *Tyson Foods*, 2021 WL 1267807, at *3 (same). And regardless of what the statute *could* permit, FWW plausibly alleges that Smithfield's statements are misleading or outright false, not just potentially

misleading. It is well established that "the government may ban forms of [commercial] communication more likely to deceive the public than to inform it." *Central Hudson*, 447 U.S. at 563. With the CPPA, the District of Columbia has done just that.

But even if the *Central Hudson* test did apply, FWW satisfies it here. The *Central Hudson* test requires "the Government not only to identify specifically 'a substantial interest to be achieved by the restriction on commercial speech, but also to prove that the regulation directly advances that interest and is not more extensive than is necessary to serve that interest." *Thompson v. W. States Med. Ctr.*, 535 U.S. 357, 374 (2002) (cleaned up). The Supreme Court has established "there is no question that [the government's] interest in ensuring the accuracy of commercial information in the marketplace is substantial." *Edenfield v. Fane*, 507 U.S. 761, 769 (1993).

Here, enforcing the CPPA directly advances that interest because it provides consumers and enforceable "right to truthful information from merchants about consumer goods and services." D.C. Code § 28-3901(c). The statute is also no more extensive than necessary to serve that interest because it is limited to unfair and deceptive trade practices, which in turn is limited to false statements about one's goods or services or "misrepresent[ing]" of "material facts" that have "a tendency to mislead." *Id.* § 28-3904. A "tendency is to mislead" is not an open-ended, subjective standard. In interpreting the CPPA, a "tendency to mislead" is determined by what a reasonable consumer would deem misleading. *See Saucier*, 64 A.3d at 442.

## IV. FWW's Requested Relief Does Not Implicate the Dormant Commerce Clause

The Dormant Commerce Clause does not prohibit the injunctive relief sought. The Dormant Commerce Clause denies states "the power unjustifiably to discriminate against or burden the interstate flow of articles of commerce." *District of Columbia v. Beretta, U.S.A., Corp.*, 872 A.2d 633, 656 (D.C. 2005). However, courts have narrowly interpreted this constitutional

concern to apply in only two situations: (1) when a state statute "directly regulates or discriminates against interstate commerce" by regulating conduct occurring "wholly outside the boundary of the State," or otherwise "favor[ing] in-state economic interests over out-of-state interests," and (2) when a statute regulates evenhandedly but the indirect "burden on interstate commerce clearly exceeds the local benefits." *Id.* at 656-57. Neither situation applies here.

First, FWW seeks to enforce the CPPA with respect to unfair and deceptive trade practices occurring within the District. Smithfield widely distributes its products throughout the District, Compl. ¶ 2, so "the commerce at issue . . . does not take place wholly outside the borders," *Smithfield Foods*, No. 2020 CA 2566 B, at *12. Smithfield also published its pandemic misrepresentations in the D.C.-based Washington Post "with local circulations that reach hundreds of thousands of District consumers" and issued press releases, social media statements, and website content that are also accessible to District consumers. Compl. ¶¶ 29-35. "[T]here is nothing unusual or unconstitutional per se about a state or county regulating the in-state conduct of an out-of-state entity when the out-of-state entity chooses to engage the state or county through interstate commerce." *See Pharm. Res. and Mfrs. of Am. v. Cty. of Alameda*, 768 F.3d 1037, 1043-44 (9th Cir. 2014), *cert. denied*, 575 U.S. 1034 (2015).

That Smithfield chose to publish many of its misleading statements on "national and international" internet platforms is irrelevant. MTD at 29. This Court has already rejected this argument in *Smithfield Foods, Inc.*, where it held that enforcing the CPPA with respect to statements made on Smithfield's national or international platforms—including its website, YouTube, and other social media—did not violate the Dormant Commerce Clause. No. 2020 CA 2566 B, at *11-13. "The fact that an ordinary commercial transaction happens to occur in cyberspace does not insulate it from otherwise applicable state consumer protection laws."

*SPGGC, LLC v. Blumenthal*, 505 F.3d 183, 195 (2d Cir. 2007). Such an expansive loophole "would lead to absurd results," allowing corporations to "circumvent otherwise constitutional state laws and regulations simply by connecting the transaction to the internet." *Ford Motor Co. v. Texas Dept. of Transp.*, 264 F.3d 493, 505 (5th Cir. 2001).

Smithfield cites *McLemore v. Gumucio*, No. 3:19-cv-00530, 2019 WL 3305131, at *8 (M.D. Tenn. July 23, 2019), for the proposition that a state attempting to "regulate Internet activities" would be "project[ing] its legislation into other States," but the facts of that case are distinguishable. In *McLemore,* the statute imposed state licensing requirements on people conducting online auctions, without any "qualifications or geographic limitations" whatsoever, so it would apply "even if the auctioneer and the products being auctioned are wholly outside the State's borders." *Id.* at 7-8. But here, the CPPA expressly limits its reach to conduct occurring within the District. D.C. Code § 28-3901(c). Because the CPPA does not regulate wholly out-of-state conduct or favor economic interests in the District of Columbia, the Dormant Commerce Clause does not apply.

The second circumstance in which Dormant Commerce Clause concerns may arise does not apply either because any indirect burden on interstate commerce does not clearly exceed the local benefits of the CPPA. In rejecting the very same argument in *Smithfield Foods,* the court explained that the CPPA, a consumer protection statute aimed to protect District residents from unfair and deceptive trade practices, "has significant local benefits," and that Smithfield "has not demonstrated that it imposes an excessive burden on interstate commerce." No. 2020 CA 2566 B, at *1-2. The court distinguished much of the case law Smithfield again cites here as inapposite and unpersuasive, *see id.* at 13 n. 4, and found that Smithfield 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," *id.* at 12 (emphasis added). The court's analysis applies with equal force here. Based on the sound reasoning of *Smithfield Foods*, this court should reject Smithfield's Dormant Commerce Clause challenge.

Federal courts have also routinely rejected Dormant Commerce Clause challenges to consumer protection statutes that, like the CPPA, are designed to protect consumers within the state. *See Online Merchants Guild v. Cameron*, 995 F.3d 540, 544-45 (6th Cir. 2021) (rejecting DCC challenge where Kentucky sought to protect consumers from "price-gouging" during the COVID-19 pandemic); *Minerva Dairy, Inc. v. Harsdorf*, 905 F.3d 1047, 1053-54 (7th Cir. 2017) (rejecting DCC challenge where statute provides "consumers relevant product information that may influence their purchasing decisions"); *SPGGC, LLC*, 505 F.3d at 194 (similar); *Ford Motor Co.*, 264 F.3d at 503–05 (similar); *Clark v. Citizens of Humanity, LLC*, 97 F. Supp. 3d 1199, 1209 (S.D. Cal. 2015) (similar).

Because enforcing the CPPA against Smithfield does not regulate conduct occurring wholly outside the District or impose a burden on interstate commerce that clearly exceeds the CPPA's local benefits, there is no violation of the Dormant Commerce Clause.

## CONCLUSION

For the foregoing reasons, this Court should deny Smithfield's motion to dismiss.

Respectfully submitted,

Date: June 10, 2022

*/s/ Ellen Noble*

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## CERTIFICATE OF SERVICE

I certify that on June 10, 2022, I served the foregoing on all counsel of record via the Court's e-filing service.

*/s/ Ellen Noble*
Ellen Noble [D.C. Bar No. 242053]

*Counsel for Plaintiff Food & Water Watch*

# ATTACHMENT A

**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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