IN THE SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
CIVIL DIVISION

THE HUMANE SOCIETY OF THE UNITED STATES, **Plaintiff,** **v.** **SMITHFIELD FOODS, INC.,** **Defendant.**	**2021 CA 003777 B** **Judge Yvonne Williams**

ORDER DENYING SMITHFIELD FOOD'S INC.'S OPPOSED MOTION TO DISMISS

Before the Court is Defendant Smithfield Foods, Inc.'s ("Defendant") Opposed Motion to Dismiss ("Motion"), filed on July 13, 2022. Plaintiff The Humane Society of the United States ("Plaintiff") filed its Opposition thereto on August 10, 2022, and Defendant filed its Reply on August 24, 2022. For the following reasons, the Motion shall be **DENIED**.

I. BACKGROUND

A. Factual Background

Defendant is a corporation that manufactures, distributes, and markets pork products. (Amended Complaint ¶ 2, 20). Defendant owns approximately 900,000 sows—or mother pigs—in the United States. (*Id*. ¶ 21). Approximately half of these sows live on farms owned by Defendant while the other half live on farms owned by independent farmers who contract with Defendant. (*Id.*). Defendant maintains control over the process of breeding these sows and raising pigs that are processed into pork products, including those that live on the independent farms. (*Id*.). Defendant also purchases some pigs from independent farmers. (*Id*. ¶ 22). Defendant controls each stage of pork production regardless of whether the pigs are owned by Defendant or independently owned. (*Id*. ¶ 23).

This matter arises from Defendant's marketing and sale of pork products in the District of Columbia. (*Id.* ¶ 1). Plaintiff—a non-profit organization headquartered in the District of Columbia—alleges that Defendant's marketing and sale of the pork products at issue violated the District of Columbia Consumer Protection Procedures Act ("CPPA"), D.C. Code §§ 28-3901 *et seq*. (*Id*.). Specifically, Plaintiff alleges that Defendant violated the CPPA by falsely marketing to consumers that (i) neither Defendant nor its suppliers confine pigs in narrow individual crates and (i) Defendant's pigs were traceable to farm of origin. (*Id.* ¶ 2, 6).

Plaintiff alleges that some pork producers confine sows in different "crates" depending on the stage of a sow's pregnancy. (*Id.* ¶ 32-33). Such producers place sows in "gestation crates" during impregnation and while the sow is pregnant and "farrowing crates" beginning a few days before the piglets are born and during the approximately three-to-four-week nursing period. (*Id.* ¶ 33). According to Plaintiff, both types of crates are "so small and restrictive that sows are unable to turn around within them, with the only major difference being that farrowing crates have a separate area for piglets when they are not nursing." (*Id.* ¶ 34). Plaintiff alleges that housing sows in these crates causes them to "suffer from boredom, frustration, and psychological trauma." (*Id.* ¶ 36). Plaintiff further alleges that the psychological effects of housing the sows in these crates "manifests in abnormal behavior," such as the sows biting the bars of the crates until the bars and the floor beneath are covered in blood. (*Id.* ¶ 1, 37). Moreover, Plaintiff alleges that "[t]ight confinement of high numbers of pigs also poses disease risks, to both people and animals." (*Id.* ¶ 39).

According to the Amended Complaint, "[i]n recent decades, largely driven by consumer pressures related to the serious animal welfare concerns described above, dozens of companies have publicly committed to phasing gestation creates out in their supply chains." (*Id.* ¶ 44). On

January 25, 2007, Defendant issued a press release announcing that it was "beginning the process of phasing out individual gestation stalls at all of its company-owned sow farms" and "replacing them with pens—or group housing—over the next 10 years." (*Id.* ¶ 45). Plaintiff alleges that Defendant's announcement was widely reported by media outlets. (*Id.* ¶ 46). In January 2009, however, Defendant announced that it would delay its project of phasing out gestation crates. (*Id.* ¶ 52). Defendant then announced in 2011 that it would re-commit to its original 2007 commitment. (*Id.* ¶ 54).

Defendant has made numerous public statements regarding its use of group housing for sows on company-owned farms, including, but not limited to:

- Stating in a 2012 Integrated Report that it has "been working on a number of issues that are important to [its] customers and to other stakeholders, such as eliminating the use of gestation stall for pregnant sows on company-owned farms," (*Id.* ¶ 58);
- Stating in a January 2018 press release that "[Defendant] delivers on decade-old promises to eliminate pregnant sow stalls in US," (*Id.* ¶ 64);
- Stating in a 2018 Sustainability Report that it has "successful[ly] transition[ed] . . . all pregnant sows on company-owned farms to group housing systems" and that "[a]ll pregnant sows on company-owned farms . . . are housed in groups," (*Id.* ¶ 71);
- Stating in a 2019 Sustainability Report that it has "successful[ly] transition[ed] . . . all pregnant sows on company-owned farms to group housing systems globally," (*Id.* ¶ 72); and
- Stating in a 2020 Sustainability Report that it "[m]aintain[s] group housing for all pregnant sows on company-owned farms globally" and that its "open housing systems allow for social interaction between animals and room for exercise," (*Id.* ¶ 73-75).

In 2014, Defendant made a separate commitment to have its contract growers convert to group housing systems by 2022. (*Id.* ¶ 86).

Despite making these and other statements, Plaintiff contends that Defendant still uses individual gestation crates. (*Id.* ¶ 98-99). According to Plaintiff, Defendant "devised its own cyclical system for confining breeding sows on its farms and devised its own deceptive jargon for

each step in the process." (*Id*. ¶ 99). Specifically, Plaintiff alleges that Defendant defines the first phase in its sow breeding process as "Breeding & Pregnancy Confirmation," the second as "Gestation," and the third as "Farrowing and Nursing." (*Id*.). During the Breeding & Pregnancy Confirmation phase, sows are kept in individual stalls but are placed in group housing during the Gestation Period. (*Id*. ¶ 100-101). According to Plaintiff, Defendant's splitting of the breeding process into thirds allows Defendant to "avoid[ ] describing the crates it uses during the first six weeks of pregnancy and the last week of pregnancy through birth and weaning as 'gestation creates' or 'gestation stalls,' even though they are the same confinement devices . . . as what they themselves and the pork industry has called for decades 'gestation creates' or 'gestation stalls.'" (*Id*.).

Defendant also made numerous public statements regarding the traceability of its pigs to their farms of origin, including, but not limited to:

- Stating in a 2015 Sustainability Report that "[a]ll hogs [it] process[es], whether company-owned or not, are traceable to farm of origin, including nursery and finishing" and that "[r]ecords are maintained to support this [tracing]," (*Id*. ¶ 124);
- Stating in a 2018 Sustainability Report that "[c]onsumers want to know where their food comes from and how it's made" and that it "takes pride in [its] ongoing commitment to transparency from farm to facility to fork," (*Id*. ¶ 119);
- Stating in a 2019 Sustainability Report that it "can trace [its] entire value chain from farm to facility to store" and that "all pigs are traceable to farm of origin and are raised in the United States," (*Id*. ¶ 120); and
- Stating in a 2020 Sustainability Report that "[t]hanks to [its] vertically integrated research, [it] can literally trace the genetic lines across [its] entire pork chain, from breeding to farms to the final product," (*Id*. ¶ 121).

Despite these statements, Plaintiff alleges that "consumer tracing of [Defendant's] products is impossible because Defendant is the only source for that type of information, and it does not disclose that information." (*Id*. ¶ 125).

B. Procedural Background

On January 17, 2022, Plaintiff filed its First Amended Complaint. Through the First Amended Complaint, Plaintiff asserted the following three claims against Defendant:

- Count I asserts that Defendant violated D.C. Code §§ 28-3904(a), (d), (f), (f-1), and (h) by falsely and misleadingly advertising pork products as (i) traceable to their farms of origin; (ii) derived from pigs that Defendant ensures are safe, comfortable, and healthy; (iii) originating from facilities that do not use gestation crates; and (iv) being from a company on track to eliminate gestation crates from its supply chain and fully convert its systems to group housing, (*Id*. ¶171).
- Count II asserts that Defendant violated D.C. Code §§ 28-3904(a), (b), (e), and (f-1) by selling pork products that are falsely and deceptively advertised as coming from pigs raised using housing practices that are endorsed, approved, or otherwise connected or affiliated with Plaintiff, (*Id*. ¶ 176-177).
- Count III asserts that Defendant violated D.C. Code § 28-3904(x) by selling a consumer good in a condition or manner not consistent with that warranted by federal law, (*Id*. ¶ 181-183).

In terms of relief, Plaintiff requests: (i) a declaratory judgment that Defendant's acts as alleged violate applicable provisions of the CPPA; (ii) appropriate injunctive relief, including an Order that Defendant permanently cease and desist from unlawful trade practices, namely the producing, distributing, selling, and marketing of falsely and misleadingly advertised pork products; (iii) an Order granting Plaintiff costs and disbursements, including reasonable attorney's and expert's fees; and (iv) such other relief as the Court deems proper. (*Id*. 85).

On July 13, 2022, Defendant filed the instant Motion. Plaintiff filed its Opposition thereto on August 10, 2022, and Defendant filed it Reply on August 24, 2022.

II. LEGAL STANDARD

A complaint must be dismissed under Rule 12(b)(6) if it does not satisfy the requirement established by Rule 8(a) that a pleading contain a "short and plain statement of the claim showing that the pleader is entitled to relief." Super. Ct. R. Civ. P. 12(b). Specifically, "[t]o survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to state a

claim to relief that is plausible on its face." *Potomac Development Corp. v. District of Columbia*, 28 A.3d 531, 544 (D.C. 2011) (quotation and citations omitted). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* (quotation and citations omitted). When considering a motion to dismiss, the Court should "draw all inferences from the factual allegations of the complaint in the plaintiff's favor." *Carlyle Investment Management, LLC v. Ace American Insurance Co.*, 131 A.3d 886, 894 (D.C. 2016) (quotations and citations omitted). However, legal conclusions "are not entitled to the assumption of truth," *Potomac Development Corp.*, 28 A.3d at 544 (quotation and citation omitted), so "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Sundberg v. TTR Realty, LLC*, 109 A.3d 1123, 1128-29 (D.C. 2015) (quotation omitted).

III. DISCUSSION

Defendant makes three principal arguments in favor of the Motion. First, Defendant argues that the Amended Complaint fails to state a viable claim under the CPPA insofar as it is premised on mischaracterizations of Defendants' written statements. (Motion 3). Second, Defendant argues that Plaintiff's claims are outside of the applicable statute of limitations for CPPA claims. (*Id.*). Third, Defendant argues that Plaintiff seeks relief that is preempted by federal law and is not available under the CPPA. (*Id.*). Each of these arguments will be discussed in turn.

A. Failure to State a Claim

As a preliminary matter, the Court must address a general argument advanced by Defendant in the Motion. Throughout much of its brief in support of the Motion, Defendant points to statements it made regarding its continued use of individual crates to prove that the statements Plaintiff identifies in the Complaint—when viewed in a wider context—were not misleading. The

Court declines to consider these additional statements to determine the sufficiency of the Complaint, as it must "accept the allegations of the complaint as true, and construe all facts and inferences in favor of [Plaintiff]." *Solers, Inc. v. Doe*, 977 A.2d 941, 947 (D.C. 2009). Defendant will be free to use the additional statements as part of its merits defense at a later stage in these proceedings.

As discussed above, Plaintiff asserts three claims against Defendant in the Amended Complaint. The Court will now address whether Plaintiff has plead sufficient facts to state each of these claims.

a. Count I

Through Count I, Plaintiff asserts that Defendant violated D.C. Code §§ 28-3904(a), (d), (f), (f-1), and (h) by falsely and misleadingly advertising pork products as (i) traceable to their farms of origin; (ii) derived from pigs that Defendant ensures are safe, comfortable, and healthy; (iii) originating from facilities that do not use gestation crates; and (iv) being from a company on track to eliminate gestation crates from its supply chain and fully convert its systems to group housing. (*Id*. ¶171). Because Plaintiff offers several bases for Defendant's liability regarding Count I, the Court determines that Plaintiff's sufficient pleading of any of these bases will allow Count I to go forward.

Under subsection (f) of D.C. Code § 28-3904, a person may not "fail to state a material fact if such failure tends to mislead." D.C. Code § 28-3904(f). "[A] person bringing suit under [section (f)] need not allege or prove intentional misrepresentation or failure to disclose to prevail on a claimed violation . . . ." *Wetzel v. Capital City Real Estate, LLC*, 73 A.3d 1000, 1005 (D.C. 2013) (quoting *Grayson v. AT&T Corp.*, 15 A.3d 219, 247-49 (D.C. 2011) (en banc)). To survive a motion to dismiss, a party "must allege a material fact that tends to mislead." *Id*. Moreover, "the

Court must determine whether the allegations, taken as true, could be reasonably interpreted by a consumer as misleading, and if so, the pleading standard set forth in Rule 8(a) is satisfied." *D.C. v. Facebook, Inc.*, 2019 D.C. Super. LEXIS 72, at *37 (D.C. Super. Ct. Dec. 20, 2019) (emphasis omitted).

The Court concludes that Plaintiff has successfully stated a claim for Count I. As outlined above, Plaintiff has identified several statements of Defendant's regarding its use of group housing for sows, such as the statements in Defendant's 2020 Sustainability Report that it "[m]aintain[s] group housing for all pregnant sows on company-owned farms globally" and that its "open housing systems allow for social interaction between animals and room for exercise." (Amended Complaint ¶ 73-75). These statements are arguably inconsistent with Defendant's admitted continual use of individual crates during portions of the breeding process.[1] Additionally, the Court finds that these statements could be reasonably interpreted by a consumer as misleading. The Court also finds that such statements are likely material given Plaintiff's assertions in the Amended Complaint regarding the growing consumer aversion to the use of individual crates. Accordingly, the Court finds that Plaintiff has successfully plead a claim under Count I.

b. Count II

Through Count II, Plaintiff asserts that Defendant violated D.C. Code §§ 28-3904(a), (b), (e), and (f-1) by selling pork products that are falsely and deceptively advertised as coming from pigs raised using housing practices that are endorsed, approved, or otherwise connected or affiliated with Plaintiff. (*Id*. ¶ 176-177). As the basis for Count II, Plaintiff identifies statements Defendant made on its website in 2007 regarding "praise" it had received from Plaintiff for

[1] Indeed, Defendant admits that "[m]ost sows are housed in individual stalls throughout the reproductive process" and that "its new housing model would not eliminate the use of individual stalls entirely." (Motion 1).

promising to stop using gestational crates. (*Id*. ¶ 69). According to Plaintiff, Defendant "deceptively omit[ted] that [Plaintiff] has repeatedly criticized [Defendant] for its missteps and deficiencies in its promise to completely transition away from gestation crates." (*Id*. ¶ 70).

Under subsection (e) of D.C. Code § 28-3904, a person may not "misrepresent as to a material fact which has a tendency to mislead. D.C. Code § 28-3904(e). "[T]he CPPA does not require much by way of pleading to state a claim under [subsection (e)]." *McMullen v. Synchrony Bank,* 164 F. Supp. 3d 77, 94 (D. D.C. 2016) (citing *Wetzel*, 73 A.3d at 1005). "All that is required is an 'affirmative or implied misrepresentation' that 'a reasonable consumer' would deem misleading." *Id*. (quoting *Saucier v. Countrywide Home Loans*, 64 A.3d 428, 442-43 (D.C. 2013)).

The Court concludes that Plaintiff has successfully stated a claim for Count II. The statements by Defendant that Plaintiff identifies regarding its "praise" of Defendant could be interpreted as an endorsement of Defendant's breeding practices. Given that Plaintiff opposes the use of individual crates, the statements could mislead a reasonable consumer to believe that Defendant no longer uses such crates during the breeding process which it admittedly still does. Accordingly, the Court finds that Plaintiff has successfully plead a claim under Count II.

c. Count III

Through Count III, Plaintiff asserts that Defendant violated D.C. Code § 28-3904(x). (*Id*. ¶ 181-183). Under subsection (x) of the CPPA, a person may not "sell consumer goods in a condition or manner not consistent with . . . or by operation or requirement of federal law." D.C. Code § 28-3904(x). Plaintiff identifies 15 U.S.C. § 45(a)(1) as the applicable provision of federal law, which prohibits "[u]nfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce . . . ."

The Court concludes that Plaintiff has successfully stated a claim for Count III. Applicable federal law defines an "unfair" practice as one that "causes or is likely to cause substantial injury to consumers which is not reasonably avoidable by consumers themselves and not outweighed by countervailing benefits to consumers or to competition." 15 U.S.C. § 45(n). Federal courts construing the statute have held that "a 'substantial injury' is generally a financial one . . . ." *See, e.g., Consumer Fin. Prot. Bureau v. NDG Fin. Corp.*, 2016 U.S. Dist. LEXIS 177756, at *38 (S.D.N.Y. Dec. 2, 2016). Defendant's allegedly misleading statements regarding its non-use of individual crates could have caused consumers to purchase Defendant's products on the false and material assumption that no individual crates were used during production, thus suffering a financial injury. Moreover, the Court does not conclude—at least at this stage of the proceedings—that there is any evidence that such injury would be reasonably avoidable by consumers or outweighed by countervailing benefits to consumers or competition. Accordingly, the Court finds that Plaintiff has successfully plead a claim under Count III.

B. Statute of Limitations

Defendant next argues that Plaintiff's claims are outside of the applicable statute of limitations. A three-year statute of limitations applies to CPPA claims. *Murray v. Wells Fargo Home Mortg.*, 953 A.2d 308, 232 (D.C. 2008). Defendant argues that because most of the statements Plaintiff challenges were published more than three years before the Complaint was filed, Plaintiff's claims are barred to the extent they are based on statements Defendant published before October 18, 2018. (Brief in Support of Motion 25-27).

As federal courts in the District of Columbia have noted, "[t]here is an inherent problem in using a motion to dismiss for purposes of raising a statute of limitations defense." *Hall v. South River Restoration, Inc.*, 270 F.Supp. 3d 117, 123 (D. D.C. 2017). Indeed, a court "can certainly

grant a motion to dismiss on statute of limitations grounds, but to do so, the factual allegations in the complaint must clearly demonstrate all elements of the statute of limitations and that the plaintiff has no viable response to the defense." *Id*. (quoting *United States ex rel. Landis v. Tailwind Sports Corp.*, 51 F. Supp. 3d 9, 38 (D. D.C. 2014)). Where a plaintiff alleges a continuing violation of the CPPA, courts have been reticent to grant a motion to dismiss on statute of limitations grounds. *Id.*

The Court declines to dismiss Plaintiff's claims on statute of limitations grounds. Plaintiff appears to allege a continuing violation of the CPPA which presents a question of fact as to when the claims accrued. Thus, a determination of exactly when the claims accrued is inappropriate at this stage. Accordingly, the Court will not dismiss Plaintiff's claims on statute of limitations grounds at this time.

C. Federal Preemption

Defendant next argues that Plaintiff's requested injunction prohibiting Defendant from producing, distributing, selling, and marketing falsely and misleadingly advertised pork products is preempted by federal law. (Brief in Support of Motion 27-30). In support, Defendant cites 21 U.S.C. § 678 which provides, in pertinent part, that—

> Requirements within the scope of this Act with respect to premises, facilities and operations of any establishment at which inspection is provided under title I of this Act, which are in addition to, or different that those made under this Act may not be imposed by any State or Territory or the District of Columbia, except that such jurisdiction may impose recordkeeping and other requirements within the scope of section 202 of this Act, if consistent therewith, with respect to any such establishment.

The Court understands Defendant to argue that because federal law does not provide for Plaintiff's requested injunction, it cannot be imposed under the CPPA. Defendant also argues that the CPPA does not authorize Plaintiff's requested injunction. (Brief in Support of Motion 28-30).

Although potentially meritorious, the Court declines to address this argument at this juncture. Consistent with other decisions of this Court, the questions as to which (if any) of the forms of relief sought by Plaintiff are available will be addressed at a later stage of the proceedings. *See Organic Consumers Ass'n v. General Mills, Inc.*, 2017 D.C. Super. LEXIS 4, at *25 (D.C. Super. Ct. July 6, 2017) (declining to address the availability of specific relief at the motion to dismiss stage).

Accordingly, it is on this 24th day of October 2022, hereby,

ORDERED that Defendant Smithfield Foods, Inc.'s Opposed Motion to Dismiss shall be **DENIED**.

IT IS SO ORDERED.

Judge Yvonne Williams

Date: October 24, 2022

Copies to:

Ralph Henry
Matthew Penzer
Peter Brandt
Counsel for Plaintiff

Tyler Young
James Frederick
Martin Demoret
Counsel for Defendants