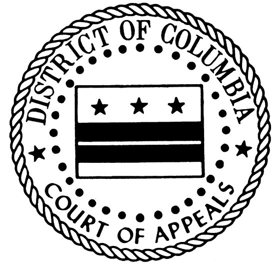

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No. 22-CV-895

IN THE DISTRICT OF COLUMBIA COURT OF APPEALS

EARTH ISLAND INSTITUTE,
APPELLANT,

V.

COCA-COLA COMPANY,
APPELLEE.

ON APPEAL FROM A JUDGMENT OF THE
SUPERIOR COURT OF THE DISTRICT OF COLUMBIA

THE DISTRICT OF COLUMBIA'S BRIEF AS *AMICUS CURIAE* IN SUPPORT OF APPELLANT

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INTRODUCTION AND INTEREST OF AMICUS CURIAE

This case concerns the District of Columbia Consumer Protection Procedures Act ("CPPA"), D.C. Code § 28-3901 et seq., an ambitious law that prohibits all deceptive and unfair trade practices in the District. *See Atwater v. D.C. Dep't of Consumer & Regul. Affs.*, 566 A.2d 462, 465 (D.C. 1989) (deeming the CPPA "ambitious legislation" (quoting *Howard v. Riggs Nat'l Bank*, 432 A.2d 701, 708 (D.C. 1981))). The Act is the cornerstone of the District's consumer protection efforts.

The Office of the Attorney General for the District of Columbia ("OAG") plays a leading role in enforcing the CPPA for the District. If OAG has "reason to believe that any person is using or intends to use any . . . practice in violation of [the CPPA], and if it is in the public interest," OAG can bring an action directly in the Superior Court to enjoin the unlawful practice and obtain restitution, civil penalties, economic damages, and attorney's fees. D.C. Code § 28-3909(a), (b). In crafting the CPPA, the Council specifically intended the District to "forceful[ly]" enforce the law and serve as a watchdog for vulnerable consumers. Council of the District of Columbia, Committee on Public Services and Consumer Affairs, Report on Bill 1-253, "the District of Columbia Consumer Protection Procedures Act," at 8, 9 (Mar. 24, 1976).

Consistent with this mandate, OAG routinely uses its authority to protect District consumers from a broad array of deceptive and unethical business practices—including "greenwashing" practices that conceal corporate environmental harms. *See, e.g.*, *District of Columbia v. Exxon Mobil Corp.*, --- F. Supp. 3d ---, 2022 WL 16901988, at *1 (D.D.C. Nov. 12, 2022). Since 2015, OAG "has secured more than $125 million in penalties, restitution for DC consumers, and other payments through lawsuits and legal action." OAG, *Consumer Protection Victories* (Oct. 3, 2022), https://tinyurl.com/5n8j4njm. These efforts have focused on a "wide variety of misconduct by businesses, including deceptive practices, employment abuses, violations of tenants' rights and civil rights, and conduct that harms the environment." *OAG Testimony on Bill 24-658, "Consumer Protection Procedures Amendment Act of 2022," Before the Comm. of the Whole* (Nov. 3, 2022) (statement of Adam Teitelbaum, Director, Office of Consumer Protection, OAG), https://tinyurl.com/6k929dmp.

Given its role in enforcing the CPPA, the District has a strong interest in ensuring that this comprehensive remedial statute is interpreted correctly. Consistent with the Council's intent to pass a consumer-protection law with an expansive scope, the District urges this Court to reverse the Superior Court's decision in this case. Earth Island stated a CPPA claim against Coca-Cola. It identified a consistent pattern of corporate behavior that contradicts Coca-Cola's

many representations about its sustainability practices. This is sufficient to survive a motion to dismiss. Additionally, the Superior Court invented several novel and categorical limitations on the CPPA that improperly narrow the Act. Endorsing the Superior Court's cramped interpretation would not only violate the Act's text and purpose, but would also immunize broad swaths of deceptive business practices from the CPPA's scope. The Superior Court's reasoning should be rejected.

SUMMARY OF ARGUMENT

1. The CPPA has broad remedial purposes, and its text applies to a wide range of deceptive trade practices. The Council specifically intended to lessen the burden of pleading and proving deception by eliminating several difficult-to-prove elements associated with common-law fraud claims. Thus, a plaintiff suing under the CPPA need not show that an allegedly deceptive trade practice was intentional or that a plaintiff was in fact misled. And because CPPA claims frequently involve factual questions that turn on how a reasonable consumer would view the evidence, courts rarely decide such claims at the pleading stage.

Under the Act's liberal pleading standard, Earth Island stated a CPPA claim against Coca-Cola. Earth Island identifies how Coca-Cola consistently presents itself as a sustainable and environmentally friendly company while in fact causing global plastic pollution, overstating the benefits of recycling, and opposing legislative efforts to actually solve environmental problems. These allegations

plausibly state a CPPA claim. This conclusion accords with the Federal Trade Commission's regulatory guidance on environmental marketing, to which the CPPA requires the Court give due consideration and weight.

2. In addition to erroneously dismissing Earth Island's complaint, the Superior Court crafted three atextual and improper restrictions on the CPPA's scope. First, it held that "forward-looking" or "aspirational" statements can never violate the CPPA. Second, it held that under certain CPPA provisions, misleading statements must appear on product labels to be actionable. And third, it held that multiple statements cannot be viewed in combination to prove an overall misrepresentation.

Each of these per se limitations suffers from serious flaws. For one, the restrictions have no basis in the statute's broad text or in this Court's and other courts' precedent. They would also be illogical given the CPPA's purposes. For another, the Superior Court's cramped interpretation of the statute overlooks the fact-sensitive nature of CPPA claims. Categorical rules are ill-suited to determining whether a given statement tends to mislead a reasonable consumer. Such questions instead turn on the particular circumstances of a case. Even if the Superior Court were correct that no reasonable consumer could be misled by Coca-Cola's statements (which it was not), its adoption of per se restrictions on CPPA claims was wrong and should be rejected.

ARGUMENT

I. Earth Island Stated A Claim Under The CPPA.

A. The CPPA applies broadly to all deceptive trade practices.

The CPPA protects District consumers from being deceived by the unfair trade practices of unscrupulous businesses. It "prohibit[s] a long list of 'unlawful trade practices,'" *Howard*, 432 A.2d at 708 (quoting D.C. Code § 28-3904), and thus "establishes an enforceable right to truthful information from merchants about consumer goods and services," D.C. Code § 28-3901(c).

As this Court has explained, the CPPA has "broad" and "remedial" purposes. *DeBerry v. First Gov't Mortg. & Invs. Corp.*, 743 A.2d 699, 700 (D.C. 1999). The Act itself says as much: its "essential purpose" is to "'assure that a just mechanism exists to remedy *all* improper trade practices'" in the District. *Grayson v. AT&T Corp.*, 15 A.3d 219, 239 (D.C. 2011) (en banc) (quoting D.C. Code § 28-3901(b)(1)) (emphasis added); *see also Sharps v. United States*, 246 A.3d 1141, 1149 (D.C. 2021) (explaining that the term "all" has an expansive meaning). Additionally, it seeks to "promote, through effective enforcement, fair business practices throughout the community." D.C. Code § 28-3901(b)(2). To serve the CPPA's broad, remedial goals, the Council has explicitly directed that the statute "be construed and applied liberally to promote its purpose." *Id.* § 28-3901(c).

The CPPA's substantive provisions match its ambitious purposes. The statute makes it unlawful for "any person to engage in an unfair or deceptive trade practice."

Id. § 28-3904. It defines "trade practice" expansively 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." *Id.* § 28-3901(a)(6). "Goods and services," in turn, are defined as "*any* and *all* parts of the economic output of society, at *any* stage or related or necessary point in the economic process." *Id.* § 28-3901(a)(7) (emphasis added).

Section 28-3904 goes on to enumerate 41 representative examples of unfair or deceptive trade practices. The examples are broadly defined and occasionally overlap. They include the practices at issue in this case: "represent[ing] that goods or services have . . . characteristics that they do not have," *id.* § 28-3904(a), "represent[ing] that goods or services are of a particular standard, quality, grade, style, or model, if in fact they are of another," *id.* § 28-3904(d), "misrepresent[ing] as to a material fact which has a tendency to mislead," *id.* § 28-3904(e), "fail[ing] to state a material fact if such failure tends to mislead," *id.* § 28-3904(f), "us[ing] innuendo or ambiguity as to a material fact, which has a tendency to mislead," *id.* § 28-3904(f-1), and "advertis[ing] or offer[ing] goods or services . . . without the intent to sell them as advertised or offered," *id.* § 28-3904(h). They also include a range of other practices such as negotiating unconscionable transactions, passing off goods as those of another, and failing to inform consumers about data breaches. *Id.*

§ 28-3904(r), (s), (kk). Notably, these examples are nonexclusive. *Id.* § 28-3904 ("It shall be a violation of this chapter for any person to engage in an unfair or deceptive trade practice, . . . *including to*: . . . ." (emphasis added)).

Recognizing the broad scope of the CPPA's text, this Court has repeatedly confirmed the statute's comprehensive scope. For example, the Court considered the statute's reach in *DeBerry*, 743 A.2d 699. There, the question was whether the CPPA's prohibition against "unconscionable terms or provisions of sales" covered unconscionable real estate mortgage financing. *Id.* at 699. The Court answered yes, emphasizing the statute's "broad remedial" purpose and explaining that holding otherwise would "ignore[] the sweep with which the Council in the CPPA defined the subject matter of 'trade practices.'" *Id.* at 702-03 (quoting D.C. Code § 28-3901(a)(7)); *see also, e.g.*, *Center for Inquiry Inc. v. Walmart, Inc.*, 283 A.3d 109, 118 (D.C. 2022) (explaining that the CPPA covers not only words or statements, but also acts); *Dist. Cablevision Ltd. P'ship v. Bassin*, 828 A.2d 714, 717 (D.C. 2003) (identifying the CPPA's "panoply of strong remedies"); *Atwater*, 566 A.2d at 465 ("The [CPPA] is a comprehensive statute designed to provide procedures and remedies for a broad spectrum of practices which injure consumers."); *Howard*, 432 A.2d at 708 ("The [CPPA] is[,] to say the least, an ambitious piece of legislation . . . ." (citation omitted)).

Importantly, the CPPA was specifically intended to make it easy to state unfair trade practice claims. Like other state consumer protection laws, it was "intended to overcome the pleadings problem associated with common law fraud claims." *Fort Lincoln Civic Ass'n, Inc. v. Fort Lincoln New Town Corp.*, 944 A.2d 1055, 1073 n.20 (D.C. 2008). Under the common law, plaintiffs struggled to plead elements like intent to deceive, scienter, and reliance. *Id.* The CPPA streamlines a plaintiff's path to discovery by eliminating those elements. To succeed on a CPPA claim, a plaintiff need not prove that an allegedly deceptive trade practice was intentional. *See Grayson*, 15 A.3d at 251. Nor does it matter whether a plaintiff was "in fact misled, deceived, or damaged" by the trade practice. D.C. Code § 28-3904. To survive a motion to dismiss, a plaintiff need only plausibly allege the limited elements required by statute. For example, to state a CPPA claim for material misrepresentation under Subsection 28-3904(e)—one of the central claims at issue here—a plaintiff must plausibly allege only a misrepresentation about a material fact that tends to mislead a consumer.

Similarly, whether a trade practice is deceptive or unfair depends on "how the practice would be viewed and understood by a reasonable consumer." *Pearson v. Chung*, 961 A.2d 1067, 1075 (D.C. 2008). Especially in material misrepresentation claims like the ones Earth Island has alleged, this Court's cases indicate that the main inquiry is whether a reasonable, unsophisticated consumer would deem the

representation important in determining a course of action in a transaction. *See Frankeny v. Dist. Hosp. Partners, LP*, 225 A.3d 999, 1005 (D.C. 2020); *Saucier v. Countrywide Home Loans*, 64 A.3d 428, 442 (D.C. 2013) (citing *Green v. H&R Block, Inc.*, 735 A.2d 1039, 1059 (Md. 1999)). This inquiry is typically "a question of fact for the jury and not a question of law for the court." *Saucier*, 64 A.3d at 445 (quoting *Green*, 735 A.2d at 1059) (internal quotation marks omitted); *see also Frankeny*, 225 A.3d at 1005 ("Ordinarily materiality is a question for the factfinder.").

Because unfair trade practice claims often turn on a jury's assessment of the facts, courts hesitate to decide such claims at the pleading stage. At this stage, courts "need only determine whether the complaint's allegations make it plausible that, on a full factual record, a factfinder could reasonably regard the [representation] as having the capacity to mislead." *Dumont v. Reily Foods Co.*, 934 F.3d 35, 40 (1st Cir. 2019) (cited by *Walmart*, 283 A.3d at 120); *see Walmart*, 283 A.3d at 118 (explaining that consumer protection laws across the country share common principles and that this Court looks to how other states interpret their laws in construing the CPPA). That is why, in *Walmart*, this Court held that a plaintiff's allegations that certain signage and product placement in retail stores misled consumers survived a motion to dismiss. 283 A.3d at 123. The Court reasoned that

the plaintiff's claims could "be answered only with evidence" and were "not [] inherently implausible assertion[s] that can be dismissed out of hand." *Id.* at 121.

This Court's instruction is thus clear. As long as a plaintiff's "interpretation of a challenged statement is *not* facially illogical, implausible, or fanciful," the plaintiff's claims should proceed to discovery. *Bell v. Publix Super Mkts., Inc.*, 982 F.3d 468, 493 (7th Cir. 2020) (Kanne, J., concurring) (quoted by *Walmart*, 283 A.3d at 120); *cf. Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007) (establishing the plausibility standard for motions to dismiss). Only in "rare" CPPA cases should courts grant a motion to dismiss. *Williams v. Gerber Prods. Co.*, 552 F.3d 934, 939 (9th Cir. 2008) (cited by *Walmart*, 283 A.3d at 120).

B. Earth Island's complaint should survive a motion to dismiss.

Under the CPPA's lenient pleading standard, Earth Island stated a claim that Coca-Cola engaged in unfair trade practices. Earth Island first pinpoints over a dozen concrete and public statements by Coca-Cola portraying a corporation steadfastly committed to sustainability and decreasing plastic pollution. On its website, Coca-Cola touts that it "act[s] in ways to create a more sustainable . . . future," "work[s] to reduce ocean pollution," "take[s] a leadership position" on the "global challenges of packaging waste," and will "[m]ake 100% of [its] packaging recyclable globally by 2025." Compl. at 7, 10, 12, 16. On Twitter, it proclaims that

sustainability "is a focus." Compl. at 8. And on investor reports, it claims that it is "fundamentally rethinking" how to get its products to consumers. Compl. at 18.

Earth Island then explains why this portrait is deceptive and misleading to consumers. It alleges that far from being an environmental leader, Coca-Cola is the world's leading plastic polluter. Compl. at 18. It identifies Coca-Cola's long history of failing to reach its public sustainability goals and its active opposition to legislative efforts to improve recycling rates. Compl. at 24, 29. And it claims that Coca-Cola misrepresents its contributions to improving recycling processes and overstates the effect that recycling actually has on plastic pollution. Compl. at 24. These detailed allegations directly contradict Coca-Cola's professed dedication to reducing plastic waste. Further, Earth Island alleges that consumers tend to rely on Coca-Cola's statements about sustainability in deciding whether to buy Coca-Cola products. Compl. at 30. Earth Island cites to surveys about consumers who desire products that they perceive as environmentally friendly. Compl. at 30. And although unnecessary under the CPPA, it states that consumers were *in fact* deceived by Coca-Cola's representations. Compl. at 30, 34.

Earth Island's allegations thus plausibly state a CPPA claim, at the very least under the provisions on material misrepresentation. *See* D.C. Code § 28-3904(c),

(f), (f-1).[1] Earth Island's allegations, which the Court must accept at true at the pleading stage, *see Murray v. Wells Fargo Home Mortg.*, 953 A.2d 308, 316 (D.C. 2008), support the inference that through their representations, Coca-Cola misleads consumers into believing that its practices are more environmentally sustainable than they are, which causes more consumers to buy its products. Indeed, the detailed allegations here are no less plausible than complaints that this Court has held state a CPPA claim. *See, e.g.*, *Walmart*, 283 A.3d at 121-23 (reversing the dismissal of a claim alleging that a retailer's product placement on its shelves falsely presented homeopathic products as equivalent to science-based medicines).

The viability of Earth Island's allegations also finds support in the Federal Trade Commission's regulatory guidance on environmental marketing. The CPPA itself provides that "[i]n construing the term 'unfair or deceptive trade practice[,]' due consideration and weight shall be given to the [term's] interpretation by the [FTC]." D.C. Code § 28-3901(d); *see also Walmart*, 283 A.3d at 122 (citing FTC statements in deciding a CPPA case). And the FTC, in interpreting "unfair or deceptive," warns against "[o]verstat[ing] . . . an environmental attribute or benefit"

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[1] Earth Island also alleges claims under Subsections 28-3904(a), (d), and (h), *see* Compl. at 5, but the bulk of its complaint fits most naturally under Subsections 28-3904(e), (f), and (f-1), which encompass material misrepresentation-type claims. *See* Compl. at 30. Accordingly, although Coca-Cola may have violated other CPPA provisions, this brief focuses on the CPPA provisions that address material misrepresentation.

and "imply[ing] environmental benefits if the benefits are negligible." 16 C.F.R. § 260.3(c). It also deems claims of recyclability deceptive if those claims are not accompanied by adequate disclosures of the limited availability of recycling. *Id.* § 260.12(b). This conduct is part of what Earth Island alleges.

Accordingly, Earth Island has stated a CPPA claim and should be permitted to proceed to discovery. Discovery could uncover concrete evidence buttressing the complaint's specific factual allegations and thus show that Coca-Cola's statements are insincere or highly likely to mislead consumers. Discovery could also reveal the opposite and therefore merit summary judgment in Coca-Cola's favor. Either way, the Superior Court's dismissal should be reversed.

II. The Superior Court's Categorical Restrictions On The CPPA's Scope Contradict The Statute's Text And Purpose.

In addition to dismissing Earth Island's complaint, the Superior Court created three novel and per se restrictions on the CPPA's scope. First, it held that "aspirational" or "forward-looking" statements are categorically immune from the CPPA. JA 194. Next, it concluded that under certain subsections of the CPPA that prohibit misrepresenting products, the representations must appear "on the product label." JA 196. And third, it held that the CPPA forbids combining statements to prove a "mosaic of misrepresentations." JA 197. Instead, the court believed each statement must independently mislead consumers.

Each of these categorical restrictions is wrong. They contradict the CPPA's text, overlook this Court's and other courts' precedent, and threaten the District's consumer protection efforts. Moreover, they conflict with the CPPA's broad, remedial goals and violate the requirement that the statute "be construed and applied liberally to promote its purpose." D.C. Code § 28-3901(c). In addition, per se limitations on the CPPA contravene the bedrock principle that whether a representation misleads reasonable consumers is a question for the jury. Thus, even if the Superior Court were correct that no reasonable consumer could be misled by Coca-Cola's representations (which it was not), these per se restrictions should be explicitly rejected.

A. Aspirational or forward-looking statements can violate the CPPA.

The Superior Court first held that, as a matter of law, "forward-looking" or "aspirational" statements can never constitute misrepresentations. JA 194. The court reasoned that such statements lack the "promises or measurable datapoints" necessary to test them for misleading qualities. JA 192.

This holding has no basis in the CPPA's text, which does not contain an "aspirational or forward-looking statement" exception. The text requires only a material misrepresentation that tends to mislead consumers. *See* D.C. Code § 28-3904(e).

Nor is such a restriction necessary as a matter of logic. Of course, the CPPA should not be construed to discourage businesses from publicly setting ambitious goals. Businesses should not expect to face discovery on a CPPA claim only for announcing honestly held plans to the public. Nor should they face CPPA liability for failing to fulfill those plans when sincerely pursued. That is why, as a general matter, "a prophecy or prediction of something which [] is merely hoped or expected will occur in the future is not actionable upon its nonoccurrence." *Bennett v. Kiggins*, 377 A.2d 57, 61 (D.C. 1977). Thus, this Court has rejected a common-law fraudulent misrepresentation suit when the complained-of representations were merely "[o]pinions or predictions" of how a third party might perform in the future. *Howard*, 432 A.2d at 706.

But the Superior Court's suggestion that forward-looking and aspirational statements can *never* constitute material misrepresentations overlooks the fact-dependent nature of CPPA cases. Whether a future-oriented statement violates the CPPA may depend on context and, under certain circumstances, should be a question for the trier of fact. *See Hagedorn v. Taggart*, 114 A.2d 430, 431 (D.C. 1955) (explaining that whether a statement constitutes a warranty or amounts to mere "puffing" is a question of fact); *see also Thacker v. Menard, Inc.*, 105 F.3d 382, 386 (7th Cir. 1997) (noting that distinguishing between fraud and "puffing" about the future turns on context). Future-oriented statements that could violate the CPPA are

easy to envision: for instance, a future goal that is objectively unreasonable or impossible to achieve, or a public pledge that the pledge-taker takes no steps toward satisfying or actively subverts. Or imagine a case where the pledge-maker is intentionally lying from the get-go. *Cf. Va. Bankshares, Inc. v. Sandberg*, 501 U.S. 1083, 1092 (1991) (explaining that opinions can constitute material misrepresentations in the context of securities fraud if they are not honestly held); *Bennett*, 377 A.2d at 61 ("When a person positively states that something is to be done or is to occur, *when he knows the contrary to be true*, the statement will support an action in fraud." (emphasis added)). The Superior Court's per se limitation would insulate these obvious CPPA violations from judicial sanction.

Other consumer protection cases have thus rightly refused to adopt the Superior Court's rigid conclusion. For instance, one court applying California's unfair competition law confronted advertising couched in aspirational language, including statements that the business provided "best in class" safety, which it was "committed to improving." *See L.A. Taxi Coop., Inc. v. Uber Techs., Inc.*, 114 F. Supp. 3d 852, 862-63 (N.D. Cal. 2015). The court rejected an argument that "'aspirational statements' . . . are immune from liability under the false advertising laws." *Id.* Because the statements included "plausibly measurable factual claims," they were actionable. *Id.*

Likewise, a court applying District law on common-law fraudulent misrepresentation rejected an argument that future predictions are per se immune. *See Boomer Dev., LLC v. Nat'l Ass'n of Home Builders*, 258 F. Supp. 3d 1 (D.D.C. 2017). There, a nonprofit group extolled the "soundness," "integrity[,] and safety" of certain loan programs that it was promoting. *Id.* at 14. The court held that these opinion-like statements about the loans' future performance were actionable because the nonprofit represented that they were based on fact. *Id.* at 15. The court thus rightly departed from the Superior Court's rule immunizing aspirational statements from liability.

The Superior Court's per se rule, if taken literally, could threaten a number of the District's enforcement actions. Indeed, the District's CPPA enforcement efforts often center around proving that promises about the future were inaccurate or misleading. *See, e.g.*, Compl. at 7, *District of Columbia v. Pro-Football Inc.*, No. 2022-CA-5270-B (D.C. Super. Ct. Nov. 17, 2022), https://tinyurl.com/4tb76ya4 (alleging that the Commanders failed to timely return security deposits despite promising to do so); *District of Columbia v. Equity Residential Mgmt.*, No. 2017-CA-8334-B, 2021 D.C. Super. LEXIS 18 (D.C. Super. Ct. Apr. 23, 2021) (Attachment A) (holding landlord liable for falsely promising tenants that their rent increases would be within the limits of rent control). This Court should clarify that

a forward-looking or aspirational statement is actionable if it can be proven to be false or deceptive.

To be sure, in some circumstances, "experience and common sense" might mean that a CPPA complaint fails to state a claim. *Walmart*, 283 A.3d at 121 n.12. For example, a plaintiff might claim that a company's publicly stated future goals are false or misleading but allege no facts to contradict them. Or a plaintiff might sue a company for anodyne future-oriented puffery that clearly would not deceive any reasonable consumer. *See Pearson*, 961 A.2d at 1076 (holding that a "Satisfaction Guaranteed" sign did not violate the CPPA). But these examples can be addressed on a case-by-case basis and do not warrant the Superior Court's categorical rule excluding all forward-looking and aspirational statements.

Nor is this case such an example. Earth Island alleges in detail that Coca-Cola's public aspirations contradict its actual practices. Compl. at 24, 29. And Coca-Cola's statements that it "*act[s]* . . . to create a more sustainable . . . future" and "*work[s]* to reduce ocean pollution" are unlike a banal "Satisfaction Guaranteed" sign. Compl. at 7, 10 (emphasis added). Although they may be aspirational or forward-looking, they make a specific claim of fact about Coca-Cola's actions and can thus be proved true or false.

B. Representations need not appear on products themselves for the CPPA to apply.

The Superior Court next concluded that under Subsections 28-3904(a), (d), and (h), which together prohibit falsely "advertis[ing]" or "represent[ing]" goods or services, the relevant statements must appear on the product itself—not on "external sources." JA 195. Here, Coca-Cola's product was "the beverage sold," while its statements were on its "website, Twitter, and Business & Sustainability report." JA 195. That mismatch, in the court's view, precluded Earth Island's CPPA claim.

Subsections 28-3904(a), (d), and (h) are not limited to statements on product labels. They require only a "represent[ation]" or "advertise[ment]" about "goods or services" and do not mention product labels at all. D.C. Code § 28-3904(a), (d), (h). Moreover, the provisions at issue apply to "goods *and services*." *Id.* § 28-3904(a), (d), (h) (emphasis added). Given that services like gyms and salons lack product labels altogether, requiring statements to appear on "product labels" for "services" makes no sense at all.

The Superior Court did not cite a single case to support its conclusion that representations must appear on product labels. In fact, this Court has already rejected a similar categorical rule. In *Walmart*, a plaintiff brought CPPA claims against retail stores—including under Subsections 28-3904(a) and (d)—for allegedly deceptive "product placement and associated signage" presenting homeopathic drugs as equivalent to FDA-approved medications. 283 A.3d at 118.

The Court rejected an argument that the word "represent" in Subsections 28-3904(a) and (d) is limited to words and statements, holding that "the placement of a product can be a representation within the [CPPA]." *Id.* Focusing broadly on the CPPA's definition of "trade practice" as "any act which . . . provide[s] information about . . . consumer goods or services," the Court concluded that all acts—including those that "convey information by implication"—constitute representations. *Id.* (quoting D.C. Code § 28-3901(a)(6)); *see also, e.g.*, *Thompson Med. Co. v. FTC*, 791 F.2d 189, 191, 197 (D.C. Cir. 1986) (holding that television advertising about a product could serve as the basis of a federal unfair trade practice action).

Moreover, the Superior Court's conclusion that representations must appear on product labels would undercut the CPPA's efficacy. To escape CPPA liability, businesses seeking to deceive consumers could use every marketing and advertising tool available to them—social media, websites, television, radio, billboards, flyers, and in-store signage—while keeping deceptive representations off the product labels themselves. This result is absurd. It would also threaten the District's CPPA enforcement efforts, which routinely take aim at advertisements and representations that do not involve product labels. *See, e.g.*, *District of Columbia v. Polymer80, Inc.*, No. CA-2878-B, 2022 D.C. Super. LEXIS 36, at *13 (D.C. Super. Ct. Aug. 10, 2022) (Attachment B) (granting the District partial summary judgment on claims against a ghost gun manufacturer for lying about its products on its website); *District of*

Columbia v. Beech-Nut Nutrition Co., No. 2021-CA-1292, 2021 D.C. Super. LEXIS 43, at *14 (D.C. Super. Ct. Sept. 21, 2021) (Attachment C) (denying a motion to dismiss in a lawsuit against Beech-Nut for misrepresenting the safety of its baby food products on its website).

In any event, the Superior Court's conclusion was unnecessary. As explained above, the CPPA prohibits all "unfair or deceptive trade practice[s]," D.C. Code § 28-3904, and Section 28-3904 provides only representative examples of what constitutes an unfair trade practice. Accordingly, plaintiffs can state a CPPA claim and survive a motion to dismiss by alleging conduct that satisfies any—or even none—of the Section 28-3904 subsections.

At the very least, Earth Island stated a CPPA claim under Subsections 28-3904(e), (f) or (f-1). Under those provisions, a representation need not involve a product at all, let alone appear on its label. Subsection 28-3904(e), for example, lists "misrepresent[ing] as to a material fact which has a tendency to mislead." And Subsection 28-3904(f-1) prohibits "us[ing] innuendo or ambiguity as to a material fact, which has a tendency to mislead." These subsections not only cover statements about products and on product labels, but also encompass statements about a company's broader beliefs and practices. Such statements could induce consumers into purchasing a company's products and, in turn, constitute "act[s] which . . . effectuate a sale . . . of consumer goods." *Id.* § 28-3901(a)(6) (defining a "trade

practice"); *see also Massachusetts v. Exxon Mobil Corp.*, No. 1984-CV-03333-BLS1, 2021 WL 3493456, at *13 (Mass. Super. Ct. June 22, 2021) (rejecting the argument that a plaintiff must tie a representation about the business to a particular sale). The Superior Court did not suggest otherwise. Given that Earth Island stated a claim under Subsections 28-3904(e), (f), or (f-1), the Superior Court's holding that representations must appear on product labels for liability under Subsections 28-3904(a), (d), and (h) was not only incorrect, but superfluous.

C. Multiple statements viewed together can establish CPPA liability.

Finally, the Superior Court opined that the CPPA provides a cause of action only for "a misleading 'material fact,' not a bun[d]le of different statements." JA 197. In its view, Earth Island's complaint stitches together a "mosaic of representations" that create merely a "general impression" that cannot be actionable under the CPPA. JA 197.

Nothing in the text of the Act supports the Superior Court's limitation. *See* D.C. Code § 28-3904(e) (requiring that a plaintiff allege only a "misrepresentation" without regard for how many acts or statements constitute the misrepresentation). And far from endorsing the Superior Court's approach of isolating individual statements and examining their misleading qualities in a vacuum, this Court has taken the opposite approach. In *Wetzel v. Capital City Real Estate, LLC*, 73 A.3d 1000 (D.C. 2013), the plaintiff claimed that a real property developer had

misrepresented several aspects of a property that the plaintiff later purchased. *Id.* at 1004. The plaintiff alleged "no fewer than 98 misrepresentations." *Id.* Those included claims that the defendant "misrepresented the approval, certification, and characteristics of the basement walls; concealed previous long-term and extensive, uncorrected water damage; represented that the basement and walls were of a quality and grade that they were not; . . . and misrepresented that the exterior masonry had a life of 50 or more years." *Id.* (internal quotation marks omitted). Faced with an array of representations at the motion to dismiss stage, this Court did not parse the statements and consider whether each statement, independent of the others, constituted a separate CPPA violation. Instead, the Court recognized that in total, the representations were sufficient to withstand a motion to dismiss. *Id.* at 1005; *see also, e.g.*, *Eastman Chem. Co. v. Plastipure, Inc.*, 775 F.3d 230, 241 (5th Cir. 2014) (in a false statement case, upholding jury instructions that "amalgamated" eighteen separate statements into a single representation).

Consistent with what this Court and others have held, plaintiffs—including the District—regularly reference multiple statements when they bring material misrepresentation claims under the CPPA. *See* Compl. at 4-6, *District of Columbia v. Express Homebuyers DC LLC*, No. 2021-CA-4682-B (D.C. Super. Ct. Dec. 21, 2021), https://tinyurl.com/khvbxz3p (resolved by consent order on Dec. 22, 2022) (identifying several statements made in mass mailers and other letters); Compl. at

11-18, *District of Columbia v. JUUL Labs, Inc.*, No. 2019-CA-7795-B (D.C. Super. Ct. Nov. 26, 2019), https://tinyurl.com/bddhts9u (identifying various e-cigarette marketing campaigns over several years as misrepresentations). Although such statements could constitute misrepresentations standing alone, common sense indicates that they can be more broadly deceptive when viewed together. Nothing in the CPPA precludes plaintiffs from presenting such a broader picture.

The Superior Court's rule, by contrast, would incentivize companies to atomize their public statements such that they would individually lack sufficient context to constitute a misrepresentation, but taken together would deceive consumers. Such a framework opens a loophole in the CPPA that defies logic and would disrupt the District's settled CPPA practice.

In addition, as with its other categorical rules, the Superior Court's conclusion that different statements together cannot constitute a misrepresentation usurps the central role of the jury in applying the reasonable-consumer standard. *See Walmart*, 283 A.3d at 120 (collecting cases that explain that juries decide whether a particular trade practice is deceptive). In deciding whether a statement is misleading, juries must consider the totality of the circumstances surrounding the statement, including any other relevant representations. True, courts will sometimes encounter a collection of statements that no jury could find deceptive, like, for example, when decades divide the statements at issue such that a reasonable consumer is unlikely to

have viewed them collectively. Dismissals may well be appropriate in such circumstances. But the Superior Court's categorical rule that separate statements can, when taken together, *never* constitute a false representation or deceptive trade practice is wrong.

In any event, the Superior Court misunderstood Earth Island's claim. Earth Island does not rely on a combination of different statements to state a CPPA claim. It identifies several different statements—most from a short three-year span between 2019 and 2021—each of which, given the context of Coca-Cola's actual sustainability practices, could mislead a reasonable consumer. For instance, Earth Island points to several statements on Coca-Cola's website from 2021 extolling the company's sustainability, including a statement that the company was "fundamentally rethinking how [to] get [its] products to consumers." Compl. at 13, 16, 18. It also flags Tweets from 2019 and 2020 in which Coca-Cola emphasized that sustainability was its "focus." Compl. at 8. The Superior Court unfairly penalized Earth Island for referencing several misrepresentations as opposed to just one. That penalty should be rejected.

CONCLUSION

The Court should reverse the Superior Court's judgment.

Respectfully submitted,

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March 2023

REDACTION CERTIFICATE DISCLOSURE FORM

I certify that I have reviewed the guidelines outlined in Administrative Order No. M-274-21 and Super. Ct. Civ. R. 5.2, and removed the following information from my brief:

1. All information listed in Super. Ct. Civ. R. 5.2(a); including:
   - An individual's social-security number
   - Taxpayer-identification number
   - Driver's license or non-driver's' license identification card number
   - Birth date
   - The name of an individual known to be a minor
   - Financial account numbers, except that a party or nonparty making the filing may include the following:
     (1) the acronym "SS#" where the individual's social-security number would have been included;
     (2) the acronym "TID#" where the individual's taxpayeridentification number would have been included;
     (3) the acronym "DL#" or "NDL#" where the individual's driver's license or non-driver's license identification card number would have been included;
     (4) the year of the individual's birth;
     (5) the minor's initials; and
     (6) the last four digits of the financial-account number.

2. Any information revealing the identity of an individual receiving mental-health services.

3. Any information revealing the identity of an individual receiving or under evaluation for substance-use-disorder services.

4. Information about protection orders, restraining orders, and injunctions that "would be likely to publicly reveal the identity or location of the protected party," 18 U.S.C. § 2265(d)(3) (prohibiting public disclosure on the internet of such information); see also 18 U.S.C. § 2266(5) (defining "protection order" to include, among other things, civil and criminal orders for the

purpose of preventing violent or threatening acts, harassment, sexual violence, contact, communication, or proximity) (both provisions attached).

5. Any names of victims of sexual offenses except the brief may use initials when referring to victims of sexual offenses.

6. Any other information required by law to be kept confidential or protected from public disclosure.

/s/ Arjun P. Ogale
Signature

22-CV-895
Case Number

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March 21, 2023
Date

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CERTIFICATE OF SERVICE

I certify that on March 21, 2023, this brief was served through this Court's electronic filing system to:

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Miranda A. Dore

Kevin Opoku-Gyamfi

Jane Metcalf

/s/ Arjun P. Ogale
ARJUN P. OGALE

Attachments

Attachment A

District of Columbia v. Equity Residential Mgmt., L.L.C.

Superior Court of the District of Columbia, Civil Division

April 23, 2021, Decided

2017 CA 008334 B

Reporter

2021 D.C. Super. LEXIS 18 *

DISTRICT OF COLUMBIA, Plaintiff, v. EQUITY RESIDENTIAL MANAGEMENT, L.L.C., et al., Defendants.

Prior History: District of Columbia v. Equity Residential Mgmt., L.L.C., 2018 D.C. Super. LEXIS 3 (Feb. 26, 2018)

Counsel: [*1] For Plaintiff: James Graham Lake, Ben Wiseman, Gary M. Tan.

For Defendants: Carey S. Busen, John Letchinger, Robert C. Gill II.

Judges: Yvonne Williams, Judge.

Opinion by: Yvonne Williams

Opinion

ORDER

Before the Court is Plaintiff District of Columbia's (the "District") Third Amended Complaint against Defendants Equity Residential Management, L.L.C. and Smith Properties Holdings Van Ness, L.P. (collectively, "Equity"[1]), filed February 24, 2020. This matter appeared before the Court for a non-jury trial from December 7, 2020 through December 16, 2020. Thereafter, the District and Equity filed their respective Post-Trial Briefs on January 29, 2021. The Court makes the following findings of fact and conclusions of law.

I. BACKGROUND

This matter concerns the District's allegations that Equity's advertising and leasing practices regarding a rental apartment property located at 3003 Van Ness Street, NW, Washington, DC 20008 ("Property") are in violation of the Consumer Protection Procedures Act ("CPPA"). *See generally* Third Amended Complaint ("TAC"). Equity has owned, operated, and managed the Property since February 28, 2013 and is responsible for leasing all apartment units. *Id.* ¶ 2. The Property was built prior to 1975 [*2] and is subject to District of Columbia rent control laws. PTX385 ¶ 3; *see* D.C. Code §§ 42-3501, *et seq.*

A. EQUITY'S BUSINESS PRACTICES

From February 2013 to February 2019, Equity leased apartments using a pricing structure where it offered monthly concessions, or recurring discounts, subtracted from the total monthly rent on the lease.[2] *See, e.g.*, DTX264 at 1. Prospective and existing tenants of the Property had various understandings of apartment pricing that arose out of communications and representations from Equity at distinct stages of the leasing process—spanning from initial engagement online, to signing a first lease at the Property, to lease renewals.

Many prospective tenants' initial engagement with the Property was through online advertisements on Equity's website, Craigslist, and third-party websites such as apartments.com and hotpads.com. *See* PTX390 ¶¶ 13, 55, 56; PTX372 at 2; 12/9/20 AM Tr. at 89:6-19 (Makinde discussing online apartment search). Equity's website advertised monthly apartment rents with a concession applied, if any, but did not indicate which quoted rents had a concession applied or the concession amount. *See* PTX390 ¶ 15; *see also* PTX001; PTX054; PTX060.A. From February 28, 2013 to May [*3] 16, 2015, there was no disclosure regarding

[1] The parties have stipulated that "for the limited purposes of this trial," Smith Properties Holdings Van Ness, L.P. and Equity Residential Management, L.L.C. may be referred to jointly or singularly as "Equity," and distinguishing between the affiliates is not necessary in this instance. PTX385 ¶ 1.

[2] Equity discontinued the use of rent concessions in February 2019. DTX005 at 2.

a concession at all. *See* DTX005 ¶ 2(a); PTX350. A disclosure first appeared on Equity's website on May 20, 2015, that read, "Quoted rent may include a concession. Contact the community for more information." DTX005 ¶ 2(a); PTX327 at 30. This disclosure was located near the end of the website and below the listed apartment results. *See* PTX327 at 19-32. This disclosure was also in "one of the lower [font sizes] within legibility for a human." *See* 12/9/20 PM Tr. at 73:8-12. In July 2017, the disclosure was updated to read, "Actual rental rates may be higher than the amounts quoted. Quoted amounts may reflect your rental payment after a concession, if one has been applied." PTX390 ¶ 24. The updated disclosure was moved higher on the website to the beginning of the section listing available apartments. PTX327 at 49-57.

On Craigslist, Equity posted approximately seven apartment advertisements per day. PTX390 ¶ 56. The Craigslist advertisements quoted the post-concession price as the "rent," but did not disclose the existence or amount of any concession at least until July 2017. *Id.* ¶¶ 57-59; *compare* PTX003 (Craigslist ad from May 23, 2017 with no [*4] disclosure), *with* PTX004 (Craigslist ad from November 19, 2018 with a concession disclosure). Equity posted similar apartment advertisements on third-party websites such as apartments.com and hotpads.com with post-concession rent prices, but tenants testified there was no concession disclosure. *See, e.g.*, 12/9/20 AM Tr. at 89:6-19.

After seeing online advertisements, some prospective tenants chose to visit the Property for in-person tours. During the tours, Equity's employees explained that the Property was rent controlled. 12/7/20 AM Tr. at 77:1-4; 12/8/20 PM Tr. at 8:9-13. Employees also quoted the post-concession apartment prices to tenants, but did not always indicate that the building used rent concessions or that the quoted price included a concession. *See, e.g.*, 12/7/20 AM Tr. at 76:13-25; 12/7/20 PM 90:2-10; 12/8/20 AM Tr. at 20:22-21:14. Thus, at the time prospective tenants chose to apply for an apartment, they were aware that the quoted rent "may reflect your rental payment after a concession, if one has been applied," based on online advertisements, but regularly did not receive any further information about the concession. *See* PTX327 at 49-57 (Equity's website).

If prospective [*5] tenants chose to take the next steps in leasing at the Property, they submitted online or paper rental applications. PTX064 (online application); PTX060.F (online application); PTX372 (paper application). The application listed a "Monthly Apartment Rent." *Id.* Neither the online or paper applications included information about rental concessions, nor did they indicate whether a concession was included in the monthly rent of the apartment a tenant was applying for. *See id.* Prospective tenants were required to pay a non-refundable application fee of $75.00 and a holding fee of $200.00 when submitting the application. PTX064.

Once Equity approved an application, it provided tenants with the lease, comprised of a Term Sheet and Additional Lease Addenda. *See, e.g.*, DTX264. The Term Sheet detailed the "Total Monthly Rent" and any monthly recurring concession. *Id.* at 1. Upon receiving the lease, or through contemporaneous emails, some tenants learned for the first time the pre-concession rent, listed as "Total Monthly Rent," and the concession amount. *See id.*; PTX370 at 1; 12/9/20 AM Tr. at 94:4-7. Attached to the lease was a Concession Addendum which stated: "You have been granted a monthly [*6] recurring concession as reflected on the Term Sheet. The monthly recurring concession will expire and be of no further force and effect as of the Expiration Date Shown on the Term Sheet." DTX264 at 19.

Sixty to ninety days before the end of a tenant's lease term, Equity sent a RAD Form 8 entitled "Housing Provider's Notice to Tenants of Adjustments in Rent Charged," and a cover letter. *E.g.*, PTX106. The cover letter explained that the amount listed on the RAD Form 8 reflects the Monthly Apartment Rent and excludes any concessions offered during the previous lease term. *Id.* at 1. The cover letter also stated, "Separate from this formal notice, you will receive another communication that further details any concession that may be available for your continued residence with us, and that also confirms your Monthly Apartment Rent." *Id.* The RAD Form 8 notified the tenant of the increase in rent for the following year if they decided to renew. *Id.* at 2. The form explained, "the increase in rent charged is based on the increase in the Consumer Price Index (CPI-W)," and that for most tenants, the maximum percentage increase in rent charged is the CPI-W plus 2%. *Id.* Equity applied this calculation [*7] to the pre-concession Monthly Apartment Rent, and not the post-concession amount actually paid by the tenant during the previous year. *Id.; see* PTX104; PTX105. Thereafter, tenants could contact Equity's leasing office and engage in a negotiation process to receive a new concession for their renewal lease. *See, e.g.*, 12/7/20 PM Tr. At 53:17-54:25.

B. PRIOR PROCEEDINGS AGAINST EQUITY REGARDING "RENT CHARGED"

In six different proceedings between 2013 and 2017 against Equity[3] as the housing provider, the Office of Administrative Hearings ("OAH") addressed allegations that Equity impermissibly increased rent above the amount allowed under the Rental Housing Act ("RHA"). *See generally* DTX074 (*Spiegel v. Equity Residential Mgmt., L.L.C.*, No. 2016 DHCD-TP 30,780 (D.C. OAH Aug. 9, 2017)); DTX070 (*Fineman v. Smith Prop. Holdings Van Ness L.P.*, No. 2016 DHCD-TP 30,842 (D.C. OAH Mar. 16, 2017)) (hereinafter "*Fineman I*"); DTX001 (*Gural v. Equity Residential Mgmt.*, No. 2016 DHCD-TP 30,855 (D.C. OAH Apr. 12, 2017)); DTX069 (*Maxwell v. Equity Residential Mgmt., L.L.C.*, No. 2015 DHCD-TP 30,704 (D.C. OAH Apr. 22, 2016)); DTX068 (*Pope v. Equity Residential Mgmt.*, No. 2014 DHCD-TP 30,612 (D.C. OAH Mar. 25, [*8] 2016)); DTX073 (*Jenkins v. Equity Residential Mgmt., L.L.C.*, No. 2012 DHCD-TP 30,191 (D.C. OAH May 15, 2013)). At all times during this period, Equity used the Total Monthly Rent, i.e. the pre-concession rent, as the "rent charged" basis for calculating increases, instead of using the amount the tenant paid, i.e. the post-concession rent. *See generally id.* These OAH decisions all found in favor of the housing provider, and determined that Equity's use of the pre-concession rent for "rent charged" was appropriate as long as it did not exceed the maximum allowable rent. *See generally id.* In *Fineman I*, the OAH stated that the housing provider could interpret the term "current rent charged" to mean the maximum legally authorized rent, but could also interpret the term to mean the amount a tenant is actually paying each month. DTX070 at 15.

On appeal from *Fineman I*, the Rental Housing Commission ("RHC") reversed the OAH's decision on how "rent charged" was to be interpreted. *See* PTX056 (*Fineman v. Smith*, No. 2016 DHCD-TP 30,842 (D.C. RHC Jan. 18, 2018)) (hereinafter "*Fineman II*"). In *Fineman II*, the RHC concluded that the RHA contained no express definition for the term "rent charged," and [*9] the RHA's plain language and inconsistent uses of the term rendered it ambiguous; further explaining:

> some uses of the phrase lend themselves to the Housing Provider's view that it refers to a maximum legal limit; some uses are mixed, appearing to refer, even within a single sentence, to both the actual rent and a maximum legal limit; and some uses provide no immediate, contextual suggestion that the phrase refers to a maximum legal limit, rather than the actual rent.

PTX056 at 22. The RHC then looked to the legislative history and purpose of the RHA to illuminate the meaning of "rent charged." *Id.* at 26-31. The RHC determined that the definition of "rent charged" most consistent with the RHA's legislative history and purpose was the "entire amount of money. . .that is *actually* demanded, received, or charged by a housing provider as a condition of occupancy or use of a rental unit." *Id.* at 31 (emphasis in original).

On March 13, 2019, the District of Columbia passed the Rent Charged Definition Clarification Amendment Act of 2018 (hereinafter "2019 Act") to add an express definition for "rent charged" in the RHA. The 2019 Act defined "rent charged" as: "the entire amount of money, money's worth, benefit, bonus, or gratuity a tenant must actually [*10] pay to a housing provider as a condition of occupancy or use of a rental unit, its related services, and its related facilities, pursuant to the Rent Stabilization Program." D.C. Code § 42-3501.03(29A).

C. PROCEDURAL HISTORY

The District initiated this lawsuit on December 13, 2017; filed its Second Amended Complaint on October 5, 2018; and filed its Third Amended Complaint ("TAC") on February 24, 2020. In the TAC, the District alleges that Equity's advertising and leasing practices deprive consumers of "the right to stable and predictable rent increases in both future renewal leases and month-to-month tenancies," in violation of the CPPA. *See* D.C. Code §§ 28-3901, *et seq.; see generally* TAC. Specifically, Claims 1 through 5 allege that Equity has made misrepresentations or failed to disclose material facts about rental prices, the permanence and source concessions, and how Equity calculates future rent increases. *See* TAC ¶¶ 27-36. Claim 6 of the TAC alleges that Defendants engaged in unlawful trade practices under the CPPA by raising rent prices above the maximum permitted under RHA (hereinafter "*Bassin* claim"). See TAC ¶¶ 38-49. The non-jury trial in this matter commenced on December 7, 2020 and concluded on December 16, 2020. Both the

[3] These proceedings were either against Equity Residential Management, L.L.C. only, Smith Properties Holdings Van Ness, L.P. only, or Defendants collectively.

District [*11] and Equity filed respective Post-Trial Briefs on January 29, 2021.

II. DISCUSSION

A. CLAIMS 1-5: CPPA VIOLATIONS

The District's TAC alleges that Equity engaged in unfair or deceptive trade practices in violation of the CPPA; with specific violations occurring under D.C. Code sections 28-3904(a), (b), (e), (f), and (l). *See* TAC ¶¶ 27-36. Under the CPPA, it is a violation to "(a) represent that goods or services have a source, sponsorship, approval, certification . . . that they do not have;" "(b) represent that the person has a sponsorship, approval, status, affiliation, or certification that the person does not have;" "(e) misrepresent as to a material fact which has a tendency to mislead;" "(f) fail to state a material fact if such a failure tends to mislead;" and (l) "falsely state the reasons for offering or supplying goods or services at sale or discount prices." D.C. Code §§ 28-3904(a), (b), (e), (f), (l). The CPPA finds it is a violation to engage in such unfair or deceptive trade practices, whether or not any consumer is in fact, misled, deceived, or damaged thereby. *See* D.C. Code § 28-3904. Because the CPPA is a remedial statute, it must be construed and applied liberally to promote its purpose. *See* D.C. Code § 28-3901(c); *Saucier v. Countrywide Home Loans*, 64 A.3d 428, 442 (D.C. 2013).

Upon review of the evidence presented at trial and the record in its [*12] entirety, the Court finds substantial evidence to establish Equity violated D.C. Code sections 28-3904(e) and (f), but does not find sufficient evidence to establish a violation of D.C. Code sections 28-3904(a), (b), or (l). The Court will address the sections in turn.

1. Equity's Alleged Violations of D.C. Code sections 28-3904(e) and (f)

The District alleges that Equity violated the CPPA by misrepresenting and/or failing to disclose material facts during the leasing and renewal processes. *See generally* TAC. The CPPA makes it unlawful to engage in an unfair or deceptive trade practice, including to: "(e) misrepresent as to a material fact which has a tendency to mislead;" or "(f) fail to state a material fact if such a failure tends to mislead." §§ 28-3904(e), (f). The District of Columbia Court of Appeals has established that an alleged trade practice is considered in terms of how the practice would be viewed and understood by a reasonable consumer. *See Saucier*, 64 A.3d at 442. To prevail on a claim under sections 28-3904(e) and (f), a plaintiff must establish that the defendant made a material misrepresentation or failed to disclose a material fact, but does not need prove the misrepresentation or failure to disclose was intentional. *Id.* A misrepresentation or failure to disclose is "material" if "a reasonable man [or woman] would attach [*13] importance to its existence or nonexistence in determining his [or her] choice of action in the transaction in question;" or if "the maker of the representation knows or has reason to know" that the recipient likely "regard[s] the matter as important in determining his or her choice of action." *Id.* (quoting The Restatement of the Law (Second) Torts § 538(2)).

i. Equity's Misrepresentations and Failures to Disclose

The evidence of Equity's misrepresentations and omissions is largely interwoven; therefore, the two will be analyzed together. The Court finds Equity made several misrepresentations and failures to disclose, beginning on Equity's website. While not all apartments at the Property had a rent concession, it was Equity's policy to advertise those apartments with rent concessions at the post-concession rent price. PTX390 ¶ 13. Up until May 2015, Equity entirely omitted any indication about its use of concessions on the website. *See* DTX005 ¶ 2(a); PTX350. Beginning on May 20, 2015, Equity's website included a disclosure that read, "Quoted rent may include a concession. Contact the community for more information." DTX005 ¶ 2(a); PTX327 at 30. Equity's corporate representative, Kristen Miller, testified at trial that this disclosure [*14] was in "one of the lower [font sizes] within legibility for a human." *See* 12/9/20 PM Tr. at 73:8-12. Further, this disclosure was placed near the bottom of the website, and could only be seen after scrolling through multiple apartment listings. *See* PTX327 at 19-32. In July 2017, the disclosure was moved higher on the website and updated to read, "Actual rental rates may be higher than the amounts quoted. Quoted amounts may reflect your rental payment after a concession, if one has been applied." PTX327 at 49-57; PTX390 ¶ 24.

It is possible that a disclosure, if seen by prospective tenants, may have put them on alert of a possible

concession. But the Court views that prior to the 2017 change on Equity's website, the small font of the disclosure located at the bottom of the website would likely not have been easily noticeable to a reasonable consumer searching for apartment information. Indeed, most of the tenants called at trial testified that they did not see the disclosure when they viewed the website during their apartment search. *See, e.g.*, 12/7/20 AM Tr. at 75:7-13 (Stevens); 12/7/20 PM Tr. at 28:11-29:6 (Rosenfeld), 86:5-87:3, 89:19-90:1 (Sanderlin); 12/8/20 AM Tr. at 33:5-34:10 [*15] (Serinsky); 12/8/20 PM Tr. at 21:4-24 (Pennisi), 61:1-12, 62:3-15 (Giertych), 76:13-17 (Rogers); 12/9/20 AM Tr. at 35:20-36:2 (Shavelson), 89:14-20 (Makinde); 12/9/20 PM Tr. at 12:9-16 (Pettet); 12/10/20 AM Tr. at 40:2-40:10 (Janzen).[4]

In 2017, Equity increased the likelihood of a prospective tenant noticing the disclosure by moving it closer to the top of the website, and increased the disclosure's effectiveness by including the additional information, "Actual rental rates may be higher than the amounts quoted." PTX327 at 49-57; PTX390 ¶ 24. Notwithstanding this improvement, none of the versions of the website provided any further information regarding the "actual rent" amount, whether a concession had been applied to an apartment listing, and if so, the concession amount.

With this information, or lack thereof, prospective tenants toured the Property in-person, where Equity's employees continued to make similar misrepresentations and omissions. Leasing agents quoted the post-concession amount as the "rent" for the apartment viewed, without disclosing whether this amount included a concession, or the pre-concession rent amount which would appear on the lease. *See, e.g.*, 12/7/20 PM Tr. [*16] at 90:2-10 (Stevens); 12/9/20 AM Tr. at 91:18-92:5 (Makinde). Amy Shavelson, a former tenant, testified that she toured the Property in early 2014 to view a specific unit. 12/9/20 AM Tr. at 36:9-14. The leasing agent discussed the price on the website, $1,700, as the monthly rent for the unit. *Id.* at 37:18-19. At the time of the tour, the leasing agent did not discuss any information about concessions, and Ms. Shavelson was not aware that the quoted price was after a concession. *Id.* at 37:20-38:3. Katie Pettet, another former tenant, testified that she visited the Property in 2015 before leasing. *See* 12/9/20 PM Tr. at 11:11-14:6. She was told that the monthly rent listed on the website for her unit was the same, $1,770. *Id.* at 13:14-18. Similarly, the Equity leasing agent only quoted this number, without indicating that it was a post-concession rent price. *Id.* at 13:19-14:6.

In addition, leasing agents discussed rent control as a feature of the Property. They explained to prospective tenants that any future rent increases would be within the limits permitted under D.C. rent control law. *See, e.g., id.* at 13:7-11 (Pettet). Since the rent control discussion occurred where prospective [*17] tenants were only aware of the post-concession rent amount, because Equity represented the post-concession amount as the "rent" while omitting information about the pre-concession rent, prospective tenants inferred that rent control increases would be applied to the post-concession amount. Ms. Shavelson explained that after her tour, her understanding of how rent control applied to her rent was "that two or two-and-a-half percent maximum increase would be applied to the $1,700, but that there was a chance maybe there wouldn't be an increase at all." 12/9/20 AM Tr. at 38:22-39:3. This appeared to be the common understanding among tenants shortly after their tours. *See, e.g.*, 12/7/20 AM Tr. at 77:5-10 (Stevens explaining that he understood the first-year monthly rent was $1,975, and would thereafter increase according to D.C. rent control rules based on the $1,975); 12/7/20 PM Tr. at 93:5-9 (Sanderlin stating he understood rent increases would be calculated based off what he was paying). As such, due to Equity misrepresenting the post-concession rent as if it was the actual rent for a given apartment and omitting key information about the application of concessions, tenants were not [*18] aware that Equity used the higher pre-concession rent when calculating the increase under rent control laws.

Equity's application also omitted information about the applicability of concessions related to the apartment for which a prospective tenant applied. *See* PTX064 (online application); PTX060.F (online application); PTX372 (paper application). The applications only included a "Monthly Apartment Rent," and did not include information if the monthly rent for the specific apartment included a concession. *See id.* After approval, a tenant received the apartment lease, and learned the monthly rent and concession amounts for the first time. *See, e.g.*, 12/10/20 Tr. at 121:5-13 (Sparveri); 12/9/20 AM Tr. at 94:4-7 (Makinde). When tenants sought clarification about the higher rent number from leasing agents, Equity continued to mislead by stating "don't worry about it," informing them that the higher amount was for

[4] These former or current tenants all viewed Equity's website prior to the July 2017 updates to the disclosure.

only "internal accounting." *See* 12/10/20 Tr. at 121:16-20 (Sparveri); 12/9/20 AM Tr. at 94:8-22 (Makinde).

The result of these misrepresentations and omissions is that they create a net impression in prospective tenants' minds of what their monthly rent payment will be, and that [*19] any increases will be within the applicable rent control limits. Based on this impression, a reasonable consumer would apply for an apartment at the Property and incur a non-refundable application fee, but have no idea what the actual rent is for the applied for apartment. At this stage, reasonable consumers who have applied to become tenants do not know that future rent increases will be based on a higher pre-concession rent of which they are not aware and not based on the post-concession rent told to them at the time they submitted an application to lease the apartment.

The Court acknowledges that the record contains no evidence of a tenant paying more than the advertised post-concession rent for an initial lease term. However, the issue here lies with the dearth of information a tenant has on the front-end when searching, applying, and signing the lease at the Property; and the resulting confusion when that tenant receives a renewal lease and significantly higher rent that does not align with his or her understanding of how Equity calculated increases. For these reasons, the Court finds substantial evidence to establish that Equity made misrepresentations and omissions in its communications [*20] with prospective tenants.

ii. The Misrepresentations and Failures to Disclose Were Material

The next step of the Court's analysis is to determine whether a reasonable consumer would view Equity's misrepresentations and omissions as "material." *Saucier*, 64 A.3d at 442. As provided above, a misrepresentation or failure to disclose is material under the CPPA if a reasonable consumer would attach importance to its existence or nonexistence in determining his or her choice of action in the transaction in question; or if the maker of the representation knows or has reason to know that the recipient likely regards the matter as important in determining his or her choice of action. *Id.*

In *Saucier*, the District of Columbia Court of Appeals provided guidance on what constitutes a material omission in violation of section 28-3904(f), as this is less evident than a material misrepresentation in violation of section 28-3904(e). *See Saucier*, 64 A.3d at 442-45. In this case, defendants failed to disclose a notice which was intended to make a potential condominium unit purchaser aware of possible financing choices. *Id.* at 444. The Court of Appeals found this notice "material" because "a significant number of unsophisticated consumers could find the information in the notice important in determining [*21] a course of action." *Id.* at 444-45.

Here, the trial evidence illustrates that prospective tenants considered the misrepresentations and omissions involving price to be material, and demonstrates that a reasonable consumer would consider the misrepresentations and omissions similarly. At trial, tenant after tenant testified that price was an important factor in determining where to lease an apartment. To many tenants, price was one of the most important factors considered when choosing their apartment. *See, e.g.*, 12/8/20 PM Tr. at 61:25-62:2 (Giertych voicing that rental price was her "number one priority"); 12/7/20 PM Tr. at 37:5-6 (Rosenfeld recalling that "price was paramount" when picking his place to live); 12/8/20 AM Tr. At 69:13-20 (Sanderlin recalling that pet accommodation, location, and price were the most important factors in his search). Since price was an important factor, some tenants filtered their online apartment searches by price to eliminate apartment search results outside of their desired range. *See, e.g.*, 12/8/20 PM Tr. at 18:11-22 (Pennisi explaining that budget was "probably the biggest concern," so he refined search results for a rent that was feasible with his income); 12/9/20 [*22] AM Tr. at 89:11-15 (Makinde explaining that she filtered the search results on apartments.com to hide apartments outside of her maximum budget). The Court believes that a reasonable consumer looking for an apartment would surely consider price to be an important factor in determining whether and where to sign a lease.

Equity was also aware that a tenant was likely to regard pricing and concession information as important in determining whether to lease at the Property. *See Saucier*, 64 A.3d at 442. During trial, the District asked Equity's corporate representative, Kristen Miller, why the concession disclosure was not right next to each of the listed prices or at least in close proximity to the listed prices. *See* 12/9/20 PM Tr. at 78:5-7. Ms. Miller responded that she "certainly could have," but did not want to "put anything on the site that may make [prospective tenants]. . . not have a conversation if the

property meets the lifestyle and price point they can afford." *Id.* at 78:8-20.

A reasonable consumer could also attach importance to a clear understanding of how the rental price is expected to increase in future leases. As shown at trial and discussed above, many prospective tenants discussed rent control [*23] with leasing agents and were told that the price could only increase a certain percentage per year. *See* 12/8/20 PM Tr. at 8:9-13 (leasing agent testifying that she "always mentioned to everyone that [the Property] was rent controlled"). Former tenant Zachary Rosenfeld stated, "knowing that the rent would not be increased significantly year over year was important" during his search, so he valued a rent controlled building. 12/7/20 PM Tr. at 37:5-11; *see also* 12/8/20 PM Tr. at 79:6-12 (Rogers testifying that, at the time of the tour, his understanding of how rent would be calculated was "very important" to his decision to apply); 12/7/20 PM Tr. at 93:5-9 (Sanderlin). The emphasis placed on rent control shows that tenants attached importance not only to whether the initial lease would be within their budget, but also to the predictability of rental increases remaining within rent control limits to ensure that future leases *stay* within their budget.

During trial, Equity emphasized that the turnover at the Property is approximately 30% to support its assertion that prospective tenants are concerned with the immediate term, not the price at an undetermined time in the future; meaning any [*24] representations about future pricing were immaterial. Def.'s Br. at 16-17. On the contrary, the Court views this evidence to more concretely establish that approximately 70% of tenants are, in fact, concerned with future pricing of their units beyond the "immediate term." Indeed, a tenant seeking to lease only for the immediate term would not be concerned about whether the subsequent leases at the Property were rent-controlled if they did not intend to enter a subsequent lease.

The Court recognizes Equity's argument that the testifying witnesses considered a range of factors other than price when choosing where to lease, but still ultimately decided to lease at Equity's Property. However, the Court disagrees that this fact renders any misrepresentations or omissions involving price immaterial. The liberally-construed CPPA only requires that a reasonable consumer would "attach importance" to the existence or nonexistence of a fact in determining a choice of action; not that the fact is the most important part of the determination. *See Saucier*, 64 A.3d at 442. Accordingly, the Court determines that a reasonable consumer would attach importance to knowing the actual rent and concession information of an apartment [*25] prior to paying the application fee, as the actual rent is the amount Equity used to determine future increases within rent control laws.

iii. The Misrepresentations and Failures to Disclose Tended to Mislead

The Court also finds that Equity's misrepresentations and omissions had the tendency to mislead a reasonable consumer into applying for an apartment with inaccurate information and expectations. The record does not contain sufficient evidence to establish that prospective tenants were informed of the higher pre-concession rent at any point before submitting an application and paying the application fee. *See* 12/9/20 AM Tr. at 94:4-7 (Makinde testifying that she first learned about her higher pre-concession rent after she applied and was "about to sign [her] lease"); 12/10/20 Tr. at 121:5-13 (Sparveri). Accordingly, the operative, and only, rent figure in a prospective tenant's mind during the application process was the post-concession rent listed in advertisements and discussed during tours. A reasonable consumer considering a lower post-concession rent that fits within their desired budget may decide to submit an apartment application and pay fees. *See, e.g.*, 12/9/20 AM Tr. At [*26] 92:21-23 (Makinde explaining that she ultimately decided to apply for an apartment at the Property because the listed price fit within her budget).

Not only does a consumer not know that the actual rent may be over their budget, the consumer also does not know that rent increases in a subsequent year's lease, if no concession is applied at Equity's discretion, may be well over their budget. Even after a future tenant receives the lease and sees the higher pre-concession rent, Equity continued to mislead the tenant by stating "don't worry about it," informing them that the higher amount is for "internal accounting." *See* 12/10/20 Tr. at 121:16-20 (Sparveri); 12/9/20 AM Tr. at 94:8-22 (Makinde). On the contrary, this pre-concession amount is significant because it was used as the base amount for future rent increases.

On former tenant Matthew Sparveri's initial lease, the pre-concession Monthly Rent was $4,198, and post-concession rent was $2,525. *See* DTX115. At all times

prior to receiving his lease, Equity employees only discussed the post-concession rent, and he was unaware of the larger number until after receiving the lease. 12/10/20 Tr. at 121:5-11. Mr. Sparveri asked about the $4,198, [*27] and the Equity employee gave him the impression that he did not need to worry about it since he would be paying the post-concession rent. *See id.* at 121:10-13, 16-19. He "did not know the impact would affect [him] in a year." *Id.* at 121:19-20. A year later, Equity informed Mr. Sparveri that the Monthly Rent on his renewed lease would be $4,345, causing him to feel "shock, anger as well," explaining "My rent should be, you know, maybe $100 more than what I was paying, but not $2,000 more than what I was paying." *Id.* at 122:1-13.

Similarly, when Equity provided a renewal lease to Adeola Makinde, it contained a rent amount that was significantly higher than what she expected, and budgeted for, based on her communications when signing her initial lease. *See* 12/9/20 AM Tr. at 114:1-15. Even after Equity applied a concession to the second year rent amount, the new post-concession rent was higher than what she understood would have been her rent if Equity applied the rent control percentage to the post-concession rent she paid during the first year. *Id.* at 113:23-114:5; *see also* 12/8/20 PM Tr. at 84:9-13 (Rogers testifying that the renewal letter stated a monthly rent of $3,000 which "was [*28] shocking to [him] because it was significantly more than [he] could afford or were [sic] promised that [he] would have to afford."). These tenants were all mislead by Equity's misrepresentations and omissions during the initial lease signing, and noticed the impact of the misrepresentations and omissions a year later at the time of renewal. The Court believes that a reasonable consumer would be similarly misled if Equity presented them with the same misrepresentations and omissions prior to signing a lease at the Property.

During apartment searches, tours, and applications, Equity made material misrepresentations and omissions to prospective tenants, creating a net impression which was incomplete and excluded concession and pricing information. A reasonable consumer could find this information to be important in determining where to lease an apartment, particularly if they are concerned with both initial and future rent amounts. Accordingly, the Court finds Equity liable for violations of D.C. Code sections 28-3904(e) and (f), and enters judgment in favor of the District on these claims.

2. Equity's Alleged Violations under D.C. Code sections 28-3904(a), (b) and (l)

The District's Complaint alleges that Equity violated the CPPA by representing that the [*29] concessions had certain characteristics and sources they did not have. *See* TAC ¶¶ 31,32, 35. Pursuant to the CPPA, it is a violation to "(a) represent that goods or services have a source, sponsorship, approval, certification . . . that they do not have;" "(b) represent that the person has a sponsorship, approval, status, affiliation, or certification that the person does not have;" and (l) "falsely state the reasons for offering or supplying goods or services at sale or discount prices." §§ 28-3904(a), (b), (l).

This Court has recognized that falsely stating a connection to the government or government agencies is a deceptive practice in violation of the CPPA. *See District of Columbia v. Student Aid Center, Inc.*, No. 2016 CA 003768 B, 2017 D.C. Super. LEXIS 18, at *6-7 (D.C. Super. Ct. Sept. 8, 2017). In *Student Aid Center, Inc.*, the evidence demonstrated that defendants repeatedly conveyed to consumers that their services were connected to the United States Department of Education and that their organization had a special relationship with the United States government. *Id.* These misrepresentations supported the court's decision to sustain claims under CPPA sections 28-3904(a) and (b). *Id.*

Here, the District's Third Amended Complaint alleges a host of deceptive and unlawful trade practices in connection to the District of Columbia government. TAC ¶¶ 31, 32, 35. The [*30] District specifically alleges:

- In violation of section 28-3904(a), Equity represented that a rent concession would be available to tenants in subsequent lease renewals, when they did not have that characteristic; and represented that concessions were subsidized or provided by the District government, when they were not. *Id.* ¶ 31(a), (c), (d).

- In violation of section 28-3904(b), Equity represented that it was affiliated with, connected to, or sponsored by the District government when it represented to prospective tenants that the government provided Equity with subsidies in order to provide tenants with concessions, when they were not. *Id.* ¶ 32.

- In violation of section 28-3904(l), Equity falsely

> stated that the reason it offered apartment units with rent concessions is that the District government provided the concession in order to subsidize tenants' rental payments. *Id.* ¶ 35.

The only evidence presented by the District during trial in support these allegations was excerpts of former tenant Eser Yildirim's deposition testimony from January 8, 2019. PTX394. When Mr. Yildirim received his lease and did not understand the rent and concession amounts, he contacted an Equity leasing agent, Julie Jackson, by phone and email. *Id.* at 19:2-9. In [*31] the deposition, he recalled Ms. Jackson stating that a District of Columbia agency provided funds to Equity to offset the cost of rent and make the apartments more affordable. *Id.* at 20:1-19. In the contemporaneous emails, Ms. Jackson indicated that the higher pre-concession rent was the "price that is calculated by the city," and the price "the city calculated that [Equity] could charge." PTX052 at 1, 2. Based on the context in the emails, the Court infers that Ms. Jackson may have been explaining the CPI-W plus 2% calculation as provided under District of Columbia rent control laws. *See id.* No other witness testified that Equity made similar representations connecting the concessions to the District of Columbia government.

Mr. Yildirim's deposition testimony alone is insufficient for the Court to find that Equity violated CPPA sections 28-3904(a), (b) and (l). The District did not otherwise address its claims under sections 28-3904(a), (b) and (l) during trial, and its Post-Trial Brief wholly excludes discussion about these sections or violations. Based on this limited evidence, the Court is unable to determine whether this conversation was an isolated misunderstanding or an unlawful trade practice. As such, the District has failed to [*32] establish that Equity violated sections 28-3904(a), (b), and (l), and the Court enters judgement in favor of Equity on these claims.

B. Claim 6: Bassin Claim

The District's TAC alleges that Equity violated the CPPA each time it charged rent increases in amounts that exceeded what was permissible under the RHA. *See* TAC ¶¶ 37-49. The District asserts that at all relevant times before the 2019 Act, the RHA limited rent increases based on the amount actually charged. *Id.* ¶ 42. Equity argues that it reasonably relied on the OAH decisions which found that as long as "rent charged" does not exceed the legally allowable amount, the RHA does not prohibit the use of concessions to lower tenants' actual payment amounts.

"The CPPA is a comprehensive statute designed to provide procedures and remedies for a broad spectrum of practices which injure consumers." *Atwater v. District of Columbia Dep't of Consumer & Reg. Affairs*, 566 A.2d 462, 465 (D.C. 1989). Although the CPPA enumerates a number of specific unlawful trade practices, this list is not exclusive. *Dist. Cablevision Ltd. P'ship v. Bassin*, 828 A.2d 714, 723 (D.C. 2003) (citing D.C. Code § 28-3904). Thus, courts have repeatedly held that trade practices which violate other laws in the District of Columbia also fall within the purview of the CPPA. *Id.* (citing *Atwater*, 566 A.2d at 465-66); *see also Osbourne v. Capital City Mortg. Corp.*, 727 A.2d 322, 325-26 (D.C. 1999) ("[T]he CPPA's extensive enforcement mechanisms apply not only to the unlawful [*33] trade practices proscribed by § 28-3904, but to all other statutory and common law prohibitions.").

Price increases of rental housing in the District of Columbia are regulated under the Rental Housing Act of 1985 ("RHA"). *See* D.C. Code §§ 42-3501.01, *et seq.* The RHA provides that an adjustment in the amount of rent charged "shall not exceed the current allowable amount of rent charged for the unit, plus the adjustment of general applicability plus 2%, taken as a percentage of the current allowable amount of rent charged; provided, that the total adjustment shall not exceed 10%." D.C. Code § 42-3502.08(h)(2)(A). Housing providers commonly refer to this adjustment to "rent charged" as "CPI-W plus 2%." *See id.* At issue is the appropriate figure to be used as "rent charged" in this adjustment calculation.

1. *Fineman II* Constituted a Legislative Rule and Does Not Apply Retroactively

i. RHC's Decision in Fineman II *Constituted Legislative Rulemaking*

The Court finds that the RHC's interpretation of "rent charged" in *Fineman II* constituted legislative rulemaking, effecting a change of law. When an agency rule "merely describes the effect of an existing [statute,] rule or regulation, it does not fall within the DCAPA definition of 'rule' and the procedural formalities of the APA are unnecessary." [*34] *Andrews v. D.C. Police & Firefighters Ret. & Relief Bd.*, 991 A.2d 763, 770 (D.C.

2010) (internal quotations omitted). Such a rule is referred to as an "interpretive" rule. *Id.* (citing *Rosetti v. Shalala*, 12 F.3d 1216, 1222 n.15 (3d Cir. 1993) ("Interpretive rules . . . merely clarify or explain existing law or regulations.")). An interpretive rule "serves an advisory function explaining the meaning given by the agency to a particular word or phrase in a statute or rule it administers." *Id.* at 771.

In contrast, when an agency exercises its authority to "to supplement [a statute], not simply to construe it," it makes new law and thereby engages in "substantive" or "legislative" rulemaking." *Id.* Substantive or legislative rules do more than simply clarify or explain a statutory or regulatory term; but are "self-imposed controls over the manner and circumstances in which the agency will exercise its plenary power." *Id.* Legislative rules "grant rights, impose obligations, produce other significant effects on private interests, or . . . effect a change in existing law or policy." *Ciox Health, LLC v. Azar*, 435 F. Supp. 3d 30, 66 (D.D.C. 2020) (elaborating that a rule is legislative when it "changes the law or effectively amends a prior legislative rule."). Whereas an agency action that "merely clarifies the agency's interpretation of the legal landscape" and "neither binds the agency nor creates a new [*35] burden on regulated entities" is not a legislative rule. *Id.*

When an agency "announces a new statutory interpretation—and thus engages in interpretive rulemaking—it may do so through adjudication, and (in many cases) may give retroactive effect to the interpretation in the case in which the new interpretation is announced, because the agency is not really effecting a change in the law." *Andrews*, 991 A.2d at 771. But when an agency supplements a statute, such as by adopting new requirements or limits or imposing new obligations, the rule is invalid unless it has been adopted through notice-and-comment rulemaking and published in compliance with the DCAPA. *Id.* In distinguishing between interpretive and legislative rules, courts consider "both the actual legal effects of the agency action and the agency's characterization of the action." *Ciox Health*, 435 F. Supp. 3d at 66. Courts have articulated that "sometimes, the line between an adjudicative determination and a 'rule' under the DCAPA is a thin one." *Andrews*, 991 A.2d at 772.

In *Andrews*, the Police and Firefighters Retirement and Relief Board (the "Board") denied plaintiff's survivor's benefit claim because it was untimely filed. *See* 991 A.2d at 767. The relevant statute provided that if a member of the police department died, his [*36] survivors or beneficiary must file with the Board to receive the automatic survivor's benefit and submit evidence of eligibility. *Id.* The parties agreed that the neither the relevant act nor implementing regulations established a deadline by which a survivor must file a claim for benefits. *Id.* at 768. Additionally, while the legislative history of the act could suggest that a deadline may or may not be consistent with the statutory purpose, no definitive guidance could be drawn either way. *Id.* The court settled that the Board was effectively imposing an additional requirement where one did not previously exist. *Id.* at 772-73. The Board did not purport interpret a phrase in the statute or regulations, "but instead contemplate[d] supplementing the statute and regulations with a new substantive rule of general application." *Id.* at 773 (citing *United States v. Articles of Drug*, 634 F. Supp. 435, 457 (N.D. Ill. 1985) ("policies that 'create precise, objective limitations where none previously existed' are substantive rules."). Accordingly, the court concluded that the Board's imposition of a new requirement constituted a legislative rule. *Id.*

In *Ciox Health*, the Department of Health and Human Services ("HHS") issued a Guidance document to supplement the "Privacy Rule," a rule falling under the [*37] Health Insurance Portability and Accountability Act ("HIPAA"). *See Ciox Health*, 435 F. Supp. 3d at 38-39, 42. In the Guidance, HHS concluded that a certain fee was to be applied to additional third-party directives. *See id.* at 42. The Guidance made the fee unequivocally applicable to third-party directives where the legislation and regulations had not done so, and the Court of Appeals determined that this change could not be sourced to an existing body of law. *Id.* For these reasons, the court held that the Guidance was a legislative rule because it worked a change in the law. *Id.* at 66.

Whereas the determinations in the above cases were more clear-cut, the determination in present case as to whether *Fineman II* constituted an interpretive or legislative rule is a close call. Similar to the relevant statutes in *Ciox Health* and *Andrews*, the RHA on its face did not provide definitive guidance on how to interpret "rent charged" at the time.[5] *See Ciox Health*,

[5] The RHA has since been amended to include an explicit definition of "rent charged" as the amount a tenant "must actually pay" as a condition of occupancy or use of a rental unit. *See* D.C. Code § 42-3501.03(29A).

435 F. Supp. 3d at 66; *Andrews*, 991 A.2d at 768; PTX056 at 22 (establishing that the meaning of "rent charged" in the RHA's plain language was ambiguous). But unlike the HHS in *Ciox Health* and the Board in *Andrews*, the RHC in *Fineman II* was interpreting a term found in the RHA, "rent charged," and could look to the legislative history and purpose of the RHA for guidance. *Compare Ciox Health*, 435 F. Supp. 3d at 66, *and Andrews*, 991 A.2d at 773 (explaining that [*38] rules could not be sourced to the legislative history), *with* PTX056 at 26-30 (discussing the RHA's legislative history). These factors would generally be an indication that *Fineman II* was merely an interpretive decision.

However, the Court must also analyze the actual legal effects of the RHC's definition of "rent charged." *See Ciox Health*, 435 F. Supp. 3d at 66. The OAH retains jurisdiction over tenant petitions arising under the RHA. *See* PTX056 at 1 n. 1. Before *Fineman II*, the OAH repeatedly upheld that Equity's use of the pre-concession rent as "rent charged" to calculate adjustments was not prohibited under the RHA, so long as the amount did not exceed the maximum legal rent. *See* DTX070 at 11 ("There are no statutory or regulatory provisions that define the terms on the RAD forms to preclude using the maximum legal rent as the 'current rent charged' and 'prior rent'"); *see generally* DTX074; DTX001; DTX069; DTX068; DTX073. After *Fineman II*, Equity's same practice of using the pre-concession rent to calculate increases was illegal. *See* DTX056 at 37 (defining "rent charged" as the post-concession rent the tenant actually pays, not the pre-concession rent). Thus, while the RHC purported to clarify the previously [*39] ambiguous definition of "rent charged," the effect of the clarification was a change in how housing providers could legally interpret and report "rent charged." The decision in *Fineman II* was essentially a change in law because it "created precise limitations where none previously existed," and made a previously permitted industry practice an illegal method to calculate rent adjustments. *See Andrews*, 991 A.2d at 773. For this reason, the Court determines that *Fineman II* constituted legislative rulemaking which was invalid without the formalities of the DCAPA.

ii. Fineman II Does Not Apply Retroactively

To the extent that *Fineman II* constituted a change in law, the Court declines to apply this interpretation to Equity retroactively.[6] When an agency engages in adjudicative rulemaking, the rules normally apply prospectively because they usually effect a change in settled law. *Reichley v. D.C. Dep't of Empl't Servs.*, 531 A.2d 244, 247 (D.C. 1987). "A fundamental unfairness would inevitably result if new regulations were applied to parties who had previously established their legal positions in reliance upon the former regulations." *Id.* at 248. Courts should apply four factors when determining if an agency's adjudicative rule should be applied retroactively or prospectively:

> (1) whether the decision [*40] is a clear break with the past precedent or was foreshadowed by trends in the law; (2) the extent to which the party against whom the new decision is invoked reasonably relied upon the old rule, including the nature and degree of the burden a retroactive decision would impose on that party; (3) the importance of rewarding the real party in interest, if any, who initiated the agency's changed decision; and (4) whether administering both the new and the old rules for some period of time would pose a severe administrative burden or otherwise interfere with a significant statutory interest.

Id. at 251.

Here, *Fineman II* defined rent charged as the amount of money a tenant must actually pay to a housing provider as a condition of occupancy or use of a rental unit. *See* PTX056 at 31. With respect to the first factor, this decision is a clear break with the past precedent. *Reichley*, 531 A.2d at 251. It is well-settled that OAH decisions are non-precedential and cannot set rules for general applicability. *See* PTX056 at 28 n. 20. However, prior to *Fineman II*, there was no interpretation of the RHA's ambiguous use of "rent charged" other than the OAH decisions. Before *Fineman II*, the OAH repeatedly held that Equity's [*41] use of the pre-concession rent as "rent charged" to calculate adjustments was not prohibited under the RHA, so long as the amount did not exceed the maximum legal rent. *See* DTX070 at 11. Although the decisions were not judicially speaking "precedential," they signaled to Equity that no change in its practice was necessary. The interpretation of "rent charged" in *Fineman II* was a clear break from this

[6] The Court conducts this analysis notwithstanding its above finding that *Fineman II* constituted legislative rulemaking and was invalid without notice-and-comment in compliance with the DCAPA. *See Andrews*, 991 A.2d at 771.

interpretation since Equity's previously permitted practices were made impermissible.

With respect to the second factor, the Court finds that Equity reasonably relied on the OAH's "interpretation of rent charged." Equity was not relying on OAH decisions in the abstract as applied to other parties to guide its own conduct. On the contrary, these six decisions were all against Equity and specifically reviewed how Equity calculated rent charged. *See generally* DTX074; DTX070; DTX001; DTX069; DTX068; DTX073. As noted by the RHC, the plain language of the RHA was ambiguous and could lend itself to multiple interpretations. *See* PTX056 at 22. The OAH continuously upheld a certain interpretation of "rent charged," thereby reaffirming that Equity's use of the pre-concession rent to calculate increases [*42] was not illegal. Without any authority stating otherwise, Equity maintained its interpretation of "rent charged" in line with the OAH's contemporaneous decisions. Thus, the Court finds that Equity reasonably relied on the OAH's interpretation of an ambiguous statute; to find this reliance unreasonable would go against principles of fundamental fairness. Notably, Equity ended the practice of offering concessions shortly before the D.C. Council enacted the 2019 Act, and now uses the amount actually paid by a tenant to calculate adjustments.

The third factor does not apply in this case because neither party in this matter initiated the decision in *Fineman II*. With respect to the fourth factor, applying *Fineman II* retroactively would pose a severe administrative burden. Rent concessions are commonly used in the District of Columbia. *See* DTX068 at 4. A retroactive application in this case would give rise to an onslaught of lawsuits against housing providers who followed similar rental adjustment calculations that were reviewed and permitted at the time. For the aforementioned reasons, the Court will not hold Equity retroactively liable for calculating rent adjustments using the pre-concession [*43] rent. As such, the Court enters judgment in favor of Equity on the *Bassin* claim.[7]

III. CONCLUSION

In sum, the Court finds that Equity violated the CPPA by making material misrepresentations and omissions to prospective tenants which had the tendency to mislead. Equity shall be liable for violations of D.C. Code sections 28-3904(e) and (f), and judgment shall be entered in favor of the District for these claims. However, the Court does not find sufficient evidence to hold Equity liable for violations of D.C. Code sections 28-3904(a), (b), and (l), and enters judgment in favor of Equity on these claims. The Court also does not find Equity liable for violations of the RHA, and enters judgment in favor of Equity on the *Bassin* claim. With these findings, the Court concludes the liability phase of this bifurcated matter. The Parties are hereby ordered to appear before the Court for a virtual Status Hearing on May 17, 2021 at 2:00 p.m. in Courtroom 221 to discuss the damages phase and procedural posture of this case.

Accordingly, it is this 23rd day of April, 2021 hereby,

ORDERED that judgment shall be entered in favor of the District and against Equity with respect to claims under D.C. Code sections 28-3904(e) and (f); and it is further

ORDERED that judgment shall be entered in favor [*44] of Equity and against the District with respect to claims under D.C. Code sections 28-3904(a), (b), and (l); and it is further

ORDERED that judgment shall be entered in favor of Equity and against the District with respect to the *Bassin* claim; and it is further

ORDERED that the parties shall appear virtually for a Status Hearing on **May 17, 2021 at 2:00 p.m. in Courtroom 221**.[8]

IT IS SO ORDERED.

[7] Holding Equity retroactively liable for its interpretation of "rent charged" would also raise due process and fair notice concerns. When the text of regulations administered by an agency is unambiguous, the agency does not need to provide any other notice to regulated entities. *Hosp. of the Univ. of Pa. v. Sebelius*, 847 F. Supp. 2d 125, 135 (D.D.C. 2012). "But when regulations can reasonably be interpreted in a way other than the agency does, the agency must give regulated entities notice before enforcing requirements based on that interpretation." *Id.*; s*ee also Epstein v. D.C. Dep't of Empl. Servs.*, 850 A.2d 1140, 1144 (D.C. 2004) ("when a new rule is established through individual adjudication, due process requires that the agency 'provide notice which is reasonably calculated to inform all those whose legally protected interest may be affected by the new principle.").

[8] Hearing instructions and access code will be emailed to the parties a week before the scheduled hearing.

/s/ Yvonne Williams

Judge Yvonne Williams

Date: April 23, 2021

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Attachment B

District of Columbia v. Polymer80, Inc.

Superior Court of the District of Columbia, Civil Division

August 10, 2022, Decided

Case No. 2020 CA 002878 B

Reporter
2022 D.C. Super. LEXIS 36 *

DISTRICT OF COLUMBIA, Plaintiff, v. POLYMER80, INC., Defendant.

Subsequent History: Motion granted by, in part, Motion denied by, in part Dist. of Columbia v. Polymer80, Inc., 2022 D.C. Super. LEXIS 42 (Sept. 12, 2022)

Counsel: [*1] For Plaintiff: Brendan B. Downes, Esq.

For Plaintiff: Benjamin Wiseman, Esq.

For Plaintiff: Jimmy R. Rock, Esq.

For Plaintiff: Adam R. Teitelbaum, Esq.

For Defendant: Matthew J. Wilkins, Esq.

For Defendant: Sean Nadel, Esq.

Judges: Associate Judge Ebony M. Scott.

Opinion by: Ebony M. Scott

Opinion

ORDER GRANTING IN PART AND DENYING IN PART THE DISTRICT OF COLUMBIA'S MOTION FOR SUMMARY JUDGMENT FOR VIOLATIONS OF THE CONSUMER PROTECTION PROCEDURES ACT

This matter is before the Court on the District of Columbia's Motion for Summary Judgment for Violations of the Consumer Protection Procedures Act ("Plaintiff's Motion for Summary Judgment"), filed on March 21, 2022. Defendant filed a Memorandum of Points and Authorities of Polymer80, Inc. in Opposition to Plaintiff's Motion for Summary Judgment ("Defendant's Opposition") on April 11, 2022, and Plaintiff subsequently filed the District's Reply in Further Support of its Motion for Summary Judgment ("Plaintiff's Reply") on April 22, 2022. Upon consideration of the Motion, the Opposition, the Reply, and the entire record herein, the Court grants in part and denies in part the Motion.

I. FACTUAL BACKGROUND

The instant matter involves an action by the District of Columbia ("the District") [*2] against Polymer80, Inc. ("Polymer80") for violations of section 28-3904 of the Consumer Protection Procedures Act ("CPPA"). *See* D.C. Code §§ 28-3901 *et seq.* In the Complaint, filed on June 24, 2020, the District pled that Polymer80 violated the CPPA by: (1) making misleading representations to District consumers; and (2) violating the District's gun laws. The District alleges that Polymer80 misleadingly advertised and sold illegal "unserialized" handguns and semi-automatic rifles to consumers in the District through a website and network of dealers. *See* Compl. ¶ 1. The District also alleges that Polymer80's webpage contained a Statement and two Frequently Asked Questions ("FAQs") regarding sales in the District and/or to District consumers that were false. *See* Pl.'s Statement of Material Facts Not in Disp. ¶¶ 19, 22, 23. Further, Polymer80's webpage contained no information about the products' legality under state and local law. *See* Compl. at ¶ 30. The District further alleges that through the website and network of dealers, Polymer80 sold a variety of almost complete firearms that consumers can easily finish at home. *Id.*at ¶ 1. These firearms included a variety of "Buy, Build, Shoot" kits with all the parts necessary to create [*3] a fully functioning firearm. *See id.* Additionally, according to the District, Polymer80 sold 19 firearms to District consumers without being licensed in the District to sale firearms, without conducting a background check on consumers, and without the firearms having serial numbers. *See id.* at. ¶ 50; *see also* Pl.'s Statement of Material Facts Not in Disp. ¶ 25.

On March 21, 2022, the District filed its Motion for Summary Judgment seeking summary judgment on Counts I and Count II of the Complaint, the issuance of a permanent injunction, and civil penalties in the amount of $4,038,000.

II. LEGAL STANDARD

Pursuant to Super. Ct. Civ. R. 56(c), summary judgment is granted where the record shows that there is no genuine issue of material fact, and that the moving party is entitled to judgment as a matter of law. *See Osbourne v. Capital City Mortgage Corp.*, 667 A.2d 1321, 1324 (D.C. 1995); *see also Smith v. Washington Metropolitan Area Transit Authority*, 631 A.2d 387, 390 (D.C. 1993). "A genuine issue of material fact exists if the record contains 'some significant probative evidence ... so that a reasonable fact-finder would return a verdict for the non-moving party.'" *Brown v. 1301 K Street Limited Partnership*, 31 A.3d 902, 908 (D.C. 2011) (citing *1836 S Street Tenants Ass'n v. Estate of Battle*, 965 A.2d 832, 836 (D.C. 2009) (footnote omitted)). To determine which facts are "material," a court must look to the substantive law on which each claim rests. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986). The moving party has the burden to establish that there is [*4] no genuine issue of material fact and that it is entitled to judgment as a matter of law. *See Osbourne*, 667 A.2d at 1324. If the moving party carries this burden, the burden shifts to the non-moving party to show the existence of an issue of material fact. *See Bruno v. Western Union Financial Services, Inc.*, 973 A.2d 713, 716 (D.C. 2009) (quotations and citations omitted); *see also Osbourne*, 667 A.2d at 1324. The non-moving party may not carry this burden merely with conclusory allegations, *Greene v. Dalton*, 164 F.3d 671,675, 334 U.S. App. D.C. 92 (D.C. Cir. 1999); rather he or she "must produce at least enough evidence to make out a prima facie case in support of his [or her] position." *Bruno*, 973 A.2d at 717. A motion for summary judgment should be granted only if (1) taking all reasonable inferences in the light most favorable to the nonmoving party, (2) a reasonable juror, acting reasonably, could not find for the nonmoving party, (3) under the appropriate burden of proof. *See Nader v. de Toledano*, 408 A.2d 31, 42 (D.C. 1979), *cert. denied*, 444 U.S. 1078, 100 S. Ct. 1028, 62 L. Ed. 2d 761 (1980).

III. ANALYSIS

A. Firearms

In the Motion, the District contends that Polymer80 sold firearms to District consumers. *See generally* Pl.'s Mot. for Summ. J. The Plaintiff further contends that Polymer80's handgun frames, semi-automatic receivers, and Buy, Build, and Shoot kits are firearms under the District's Firearm Control Regulations Act of 1975 ("FCRA") because they can be, and are designed to be, readily converted [*5] to fully functioning firearms. *See* Pl.'s Mot. for Summ. J. 7.

In Opposition, Polymer80 argues that Polymer80's products are simply not firearms. *See generally* Def.'s Opp'n. Polymer80 argues that the Bureau of Alcohol, Tobacco, Firearms and Explosives ("ATF") has repeatedly found that representative samples of the products at issue are not firearms. *Id.* at 33. Polymer80 also argues that the principal product at issue is Polymer80's unfinished blanks that, with additional machining and fabrication, can become finished frames and receivers. *See id.* at 34. Polymer80 further argues that the FCRA and Gun Control Act of 1968 ("GCA"), reveal that the "readily converted" phraseology does not apply to the "frame or receiver" portion of either definition. Moreover, Polymer80 argues that the FCRA and GCA do not contemplate nor permit any inquiry into whether or not unfinished frames and receiver blanks can be readily converted into finished firearms. *See id.* at 35. Additionally, Polymer80 argues that in the ATF's view, the readily converted test in the introductory portion of the GCA's firearm definition has no application to a frame or receiver. *See id.* Thus, according to Polymer80, an unfinished [*6] frame or receiver blank is not a frame or receiver and hence not a firearm. *See id.* at 36.

In furtherance of their argument, Polymer80 points to the fact that the Omnibus Public Safety and Justice Amendment Act of 2020 ("Omnibus Act"), which became final on April 27, 2021, amended the FCRA to expand the definition of ghost guns to include unfinished frames or receivers. *See id.* 42. According to Polymer80's methodology, if products of the type sold by Polymer80 were plainly firearms under the FCRA, then these amendments would not have been necessary. *See id.* 43. To buttress its argument, Polymer80 also points to the Ghost Gun Clarification Temporary Amendment Act of 2021 ("Clarification Act"), which Polymer80 argues places the duty on the consumer, who completes the manufacture and assembly of components into a functioning gun, to serialize and register the self-manufactured firearm. *See* Def.'s Opp'n. 45.

In its Reply, the District argues, *inter alia*, that updated legislation does not mean that Polymer80's core

products are not and were not readily converted into firearms, in any way, and that the legislation did not change the definition of "readily converted". *See* Pl.'s Reply 8. The District argues that the amended legislation merely expanded the prohibition of ghost guns — a prohibition that [*7] Polymer80 was already subject to — and that the D.C. Council is "free to expand prohibitions on unserialized firearms . . . ." *Id.*

As a preliminary matter, the Court finds that Polymer80's handgun frames, semi-automatic receivers, and Buy, Build, Shoot kits are firearms. Under the GCA, a firearm is defined as "any weapon which will or is designed to or may readily be converted to expel a projectile by the action of an explosive; the frame or receiver of any such weapon; any firearm muffler or firearm silencer; or destructive device." 18 U.S.C. § 921(a)(3). Under the FCRA, a firearm is defined as "any weapon, regardless of operability, which will, or is designed or redesigned, made or remade, readily converted, restored, or repaired, or is intended to expel a projectile or projectiles by the action of an explosive; the frame or receiver of any such device; or any firearm muffler or silencer." D.C. Code § 7-2501.01(9). In the instant case, Polymer80 sold unfinished handgun frames, unfinished semi-automatic receivers, and Buy, Build, Shoot kits to District consumers, and these products are (and were) readily converted into firearms. *See* Pl.'s Mot. for Summ. J. Aff. McFarlin. Polymer80 itself demonstrates just how readily convertible [*8] its unfinished handgun frames, receivers, and Buy, Build, Shoot kits are. On Polymer80's website, they provide instructions to consumers on how to build firearms with these unfinished frames, receivers, and Buy, Build, Shoot kits. *See* Pl.'s Mot. for Summ. J. Ex. 32. Polymer80 also provides links to YouTube videos that provide instructions on how to complete the assembly of the firearms. *See id.* Additionally, the Court is not persuaded by the Defendant's argument that the FCRA and GCA make no mention of unfinished frames or receivers[1] because both the FCRA and GCA include specific language that defines firearms as readily converted weapons,[2] regardless of their operability. *See* D.C. Code § 7-2501.01; *see also* 18 U.S.C. § 921(a)(3). Thus, the Court finds that the unfinished receivers, frames, and Buy, Build, Shoot kits sold by Polymer80 to District consumers are firearms under District law.

B. Count I

In the Motion, the Plaintiff contends that the Defendant violated the CPPA because it falsely and misleadingly advertised illegal firearms to District consumers. The Plaintiff also contends that the Defendant affirmatively misrepresented the legality of its products in the District. *See* Pl.'s Mot. for Summ. J. 7. According to [*9] the Plaintiff, from at least January 16, 2017 through June 24, 2022, Defendant prominently advertised on its homepage and FAQs page that its products were legal. *Id.* at 8.

In the Opposition, the Defendant argues that the company's website is not misleading under the District's "reasonable consumer" standard. *See* Def.'s Opp'n. 20. The Defendant further argues that whether information "has a tendency to mislead" is based on the "reasonable consumer" standard and is usually a question of fact. *Id.* at 21. The Defendant also argues that the Plaintiff has not presented evidence establishing that there was customer deception. *See id.* Additionally, the Defendant argues that no reasonable consumer could have read the Statement on its website to refer to any Company product other than the G150 because the Statement referred to a single product, and because Polymer80 provided a link to the ATF Determination Letter regarding that very product. *See id.* at 23. The Defendant further argues that the ATF Determination Letter as to the G150 does accurately reflect its legality under the GCA. *See id.*

1. False Representations

Here, the Court finds that Polymer80 violated the CPPA with regards to D.C. Code § 28-3904 (a),(b),(e-1). Under [*10] the CPPA, "it is a violation for any person to engage in an unfair or deceptive trade practice, whether or not any consumer is in fact misled, deceived, or damaged. . . ." D.C. Code § 28-3904. Thus, "a consumer need not prove that she was misled,

[1] Polymer80 cites to the ATF's interpretation of the GCA to argue that an unfinished frame or receiver blank is not a firearm. *See* Def.'s Opp'n 33-36. However, this Court is not bound by the ATF's interpretation of the GCA.

[2] Polymer80's argument that the FCRA was amended because the FCRA did not clearly include Polymer80's products as firearms is untenable. As the District argues in its Reply, the amendments did not change the FCRA's language that defined firearms as weapons that are readily converted. *See* Pl.'s Reply 8.

deceived, or damaged by a merchant's actions." *Frankeny v. Dist. Hosp. Partners, LP*, 225 A.3d 999, 1004 (D.C. 2020)(internal quotation marks and citations omitted). For claims of unfair or deceptive trade practices, a person violates the CPPA if they (1) represent that goods have approval or certification that they do not have, (2) represent that they have approval that they do not have; or (3) represent that a transaction confers or involves rights, remedies, or obligations which it does not have or involve, or which are prohibited by law. *See* D.C. Code § 28-3904 (a),(b),(e-1). Additionally, an alleged unfair trade practice is considered "in terms of how the practice would be viewed and understood by a reasonable consumer." *Saucier v. Countrywide Home Loans*, 64 A.3d 428, 442 (D.C. 2013) (internal quotation marks and citations omitted).

The Statement

There is no dispute that the following statement appeared on Polymer80's website:

> Is it legal? YES! The Polymer80 G150 unit is well within the defined parameters of a "receiver blank" defined by the ATF and therefore has not yet reached a stage of manufacture that meets the [*11] definition of firearm frame or receiver found in the Gun Control Act of 1968 (GCA).

See Def.'s Opp'n. 22.

The Court finds that the statement is a false representation because it (1) represented that the Polymer80 G150 firearm had approval in the District of Columbia when it did not, (2) represented that Polymer80 had approval or certification to sell the firearm to District consumers when it did not, and (3) represented that District consumers would have gained the right to possess the firearm if they purchased the firearm on Polymer80's website. In the statement, when asked "Is it legal?" Polymer80 answers the question with "YES!" and cites to the ATF Determination which is *not* binding on the District. Thus, Polymer80's statement is a false representation under the CPPA.

FAQ #1

There is no dispute that the following FAQ #1 appeared on Polymer80's website:

> May I lawfully make a firearm for my own personal use, provided it is not being made for resale? "(From the ATF Website): Firearms may be lawfully made by persons who do not hold a manufacturer's license under the GCA provided they are not for sale or distribution and the maker is not prohibited from receiving or possessing firearms.

See Def.'s Opp'n. 23, *see also [*12]* Pl.'s Mot. for Summ. J. Ex. 4.

With respect to FAQ #1, the Court reaches the same conclusion as above. Namely, that the statement is a false representation that firearms sold by Polymer80 were approved by the District when they were not, Polymer80 had approval to sell firearms to District consumers, when it did not, and that if a consumer made a purchase on Polymer80's website they would have the right to possess the firearm in the District, which they did not. Indeed, Polymer80 presents the question "May I lawfully make a firearm for my own personal use, provided it is not being made for resale?" and responds by informing consumers that, under the GCA, firearms may be lawfully made by a person so long as they are nor for sale or distribution. This information is simply not true for District consumers.

FAQ # 2

There is no dispute that the following FAQ #2 appeared on Polymer80's website:

> Is it legal to assemble to assemble a firearm from commercially available parts kits that can be purchased via internet []? For your information, per provisions of the Gun Control Act (GCA of 1968). 18 U.S.C. Chapter 44, an unlicensed individual may make a firearm for his personal use, but not for sale or distribution. For further information on rulings [*13] and classifications go to the ATF Firearms website.

See Def.'s Opp'n. 23.

With respect to FAQ #2, the Court reaches the same conclusion as above. Namely, that the statement is simply false as it relates to District consumers, as it represents that firearms sold by Polymer80 were approved by the District when they were not, Polymer80 had approval to sell firearms to District consumers when it did not, and that unlicensed District consumers could make and possess Polymer80's firearms for their own personal use, which they could not.

Based upon the foregoing, and viewing all reasonable inferences in the light most favorable to the nonmoving party, the Court concludes that Polymer80 violated the CPPA with respect to D.C. Code § 28-3904 (a),(b),(e-1), and that the District is entitled to summary judgment as to these claims as a matter of law.

2. Materiality

The Court finds that Summary Judgment is not proper as to the District's claims arising under D.C. Code § 28-3904(e),(f). A person violates the CPPA if they misrepresent a material fact which has a tendency to mislead; or fail to state a material fact if such failure tends to mislead. *See* D.C. Code § 28-3904(e),(f). "For purposes of § 28-3904(e) or (f), a misrepresentation or omission is 'material' if a reasonable person 'would attach [*14] importance to its existence or nonexistence in determining his or her choice of action in the transaction' or 'the maker of the representation knows or has reason to know' that the recipient likely 'regard[s] the matter as important in determining his or her choice of action.'" *Frankeny*, 225 A.3d at 1005 (citing *Saucier*, 64 A.3d at 442 (quoting Restatement (Second) Torts § 538(2) (Am. Law Inst. 1977)). However, the actual determination of whether statements are both material and misleading "is a question of fact for the jury and not a question of law for the court." *Saucier*, 64 A.3d at 445; *see also Frankeny*, 225 A.3d at 1005 ("Ordinarily materiality is a question for the factfinder.")(citations omitted)); *Mann v. Bahi*, 251 F. Supp. 3d 112, 126 (D.D.C. 2017) ("[F]or claims under subsections (e), (f), and (f-1) [of the CPAA], whether Tri-Cities' misrepresentations or omissions (if any) pertained to material facts and had a tendency to mislead are also questions for a jury.").

Additionally, the Court notes that it agrees with Polymer80 that the burden of proof for misrepresentation claims under D.C. Code § 28-3904(e) and (f) is clear and convincing evidence. *See Frankeny*, 225 A.3d at 1005. In *Frankeny*, the appellant/patient alleged that the appellee/medical provider violated D.C. Code § 28-3904 (e) and (f) when the medical provider failed to inform the patient that her procedure would be performed by a first year medical resident, rather than the seasoned board certified [*15] surgeon she selected. *See id.* at 1002. The patient alleged that the failure constituted a material misrepresentation. *See id.* In analyzing the CPPA claim, the Court of Appeals held that the burden of proof for CPAA claims alleging material misrepresentations is clear and convincing evidence. In following *Frankeny*, this Court holds that the Plaintiff must prove its claims under D.C. Code § 28-3904 (e) and (f) by clear and convincing evidence.

Here, the parties dispute whether the language advertised on Polymer80's website through the Statement and two FAQs (collectively "Statements") were material facts which had a tendency to mislead District consumers into believing that purchasing Polymer80's products (which the Court has found to be firearms) was legal in the District, and whether Polymer80's omissions had the same tendency to mislead customers. In viewing the evidence in a light most favorable to the Defendant, the evidence is sufficient to place into dispute whether Polymer80 misrepresented or omitted material facts that tended to mislead a reasonable consumer into believing that purchasing firearms from Polymer80's website was legal. *See, e.g., Frankeny*, 225 A.3d at 1009. While the Court finds that Polymer80 made misrepresentations and omissions [*16] on its website regarding their products, as noted *supra*, the actual determination of whether these misrepresentations and omissions were both material and tended to mislead is a question of fact for the jury. Indeed, a jury could find that Polymer80's Statements were material facts which had a tendency to mislead reasonable consumers into believing that it was legal to purchase firearms from Polymer80's website. Alternatively, a jury might conclude that Polymer80's Statements were not material facts which mislead reasonable consumers into believing that their purchase, and possession, of these firearms, was legal in the District. Thus, the Court finds that there is a genuine dispute of material facts as to whether Polymer80's Statements were material facts which had a tendency to mislead reasonable consumers. As such, summary judgment as to the District's claims arising under D.C. Code § 28-3904(e),(f) is denied.

C. Count II

In the Motion, the District contends that Polymer80 violated the CPPA by selling illegal firearms to District consumers. *See* Pl.'s Mot. for Summ. J. 10. The District further contends that Polymer80 sold firearms through Polymer80's website and dealers, which violates the District's law by [*17] selling unregistered firearms to District consumers and delivering firearms to purchasers. *See id.*

In the Opposition, Polymer80 argues that Count II fails as a matter of law since the District cannot assert a claim that an alleged violation of the FCRA is a violation of the CPPA. *See* Def.'s Opp'n. 29. Polymer80 further argues that the District is not a consumer suing under D.C. Code § 28-3905 and that the Attorney General for the District of Columbia cannot avail himself of the consumer aspects of the law. *See id.* at 30. Polymer80 also argues that District lawsuits are limited to the conduct and violations of statutes expressly described in D.C. Code § 28-3904 and not any District law. *See id.* at 31.[3]

"The Consumer Protection Procedures Act is a 'comprehensive statute' with an extensive regulatory framework designed to 'remedy all improper trade practices.'" *Osbourne* , 727 A.2d at 1325 (citing *Atwater v. District of Columbia Dep't of Consumer & Regulatory Affairs*, 566 A.2d 462, 465 (D.C. 1989) (citing D.C. Code § 28-3901(b)(1))). Further, "the CPPA protects consumers from unlawful trade practices enumerated in § 28-3904, as well as practices prohibited by other statutes and common law." *Osbourne*, 727 A.2d at 1325 (citations omitted).

Under D.C. Code § 7-2504.01(b), "no person or organization shall engage in the business of selling, purchasing, or repairing any firearm, destructive device, parts therefor, or ammunitions without first [*18] obtaining a dealer's license." Moreover, no person or organization in the District shall receive, possess, control, transfer, offer for sale, sell, give, or deliver any destructive device unless that person or organization holds a valid registration certificate for the firearm. *See* D.C. Code § 7-2502.01(a). Additionally, no person or organization in the District shall possess or control any firearm, unless the person or organization holds a valid registration certificate for the firearm. *See* D.C. Code § 7-2502.01. Moreover, under D.C. Code § 7-2504.08, no licensee shall sell or offer for sale any firearm which does not have imbedded into the metal portion of such firearm a unique manufacturer's identification number or serial number, unless the licensee shall have imbedded into the metal portion of such firearm a unique dealer's identification number. The District also requires a seller to deliver a firearm to the purchaser after ten days have elapsed from the date of purchase. *See* D.C. Code § 22-4508.

Here, the Court finds that the District has satisfied its burden in establishing that there is no genuine issue of material fact that Polymer80 violated the District's gun laws, which in turn, served as a violation of the CPPA. Polymer80 violated District law by selling [*19] firearms to District consumers without the requisite licenses,[4] and failing to comply with the series of restrictions and requirements the District imposes on licensees. Additionally, Polymer80's firearms violated District law because the firearms were not registered and failed to have an identification number or serial number. Accordingly, the District is entitled to summary judgment as to Count II as a matter of law.

D. Permanent Injunction

In the Motion, the District contends that Polymer80 should be permanently enjoined from engaging in future conduct reasonably related to its committed violations. *See* Pl.'s Mot. for Summ. J. 11. In the Opposition, Polymer80 argues that the District cannot seek a permanent injunction against the advertisement and sale of lawful products because Polymer80's products are not banned under District Law, as it now stands. *See* Def.'s Opp'n. 45. Polymer80 further argues that the requested relief is unnecessary because Polymer80 ceased all sales of the products at issue in the District since July 27, 2020. *Id.* at 46. Additionally, Polymer80 argues that a permanent injunction concerning Polymer80's distributors and dealers does not meet the requirement [*20] for injunctive relief under the CPPA because the District has not proffered any proof of sales of Company products by the third parties to local residents, and failed to allege any deceptive advertising by them. *See id.*

Here, the Court finds that a permanent injunction is proper. Pursuant to D.C. Code § 28-3909(a), "if the Attorney General for the District of Columbia has reason to believe that any person is using or intends to use any method, act, or practice in violation of section . . . 28-3904, and if it is in the public interest, the Attorney General, in the name of the District of Columbia, may bring an action in the Superior Court of the District of Columbia to obtain a temporary or permanent injunction

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[3] The Court notes that Polymer80 also argues that its products are not firearms, however, the Court addressed this issue in Section A.

[4] The Court notes that the parties do not dispute that Polymer80 sold 19 of its firearms to District consumers. *See* Polymer80 Statement of Material Facts in Disp. ¶ 25; *see also* Pl.'s Statement of Material Facts Not in Disp. ¶ 25.

prohibiting the use of the method, act, or practice and requiring the violator to take affirmative action . . . ." Additionally, "a plaintiff seeking forward-looking relief, such as an injunction, must allege facts showing that the injunction is necessary to prevent injury otherwise likely to happen in the future . . . ." *Ramirez v. Salvaterra*, 232 A.3d 169, 183 (D.C. 2020)(internal quotation marks and citations omitted). Given the Court's ruling that Polymer80 violated the CPPA and the District's gun laws, and Polymer80's alarming belief that the sale of its firearms is [*21] now legal in the District, to prohibit future sales of its firearms to District consumers, the Court shall grant the Plaintiff's request for a permanent injunction.[5]

E. Damages

The District contends that the Court should order the maximum civil penalty for each violation of the CPPA, which totals $4,038,000. *See* Pl.'s Mot. for Summ. J. 13. The District further contends that the CPPA authorizes civil penalties for each violation, and that Polymer80 should be penalized each day Polymer80's website contained false, deceptive, or misleading advertisement. *See id.* at 14-15.

In Opposition, Polymer80 argues that the civil penalty calculated has no backing in law or record evidence. *See* Def.'s Opp'n. 47. Polymer80 also argues that the District's cited authority does not support entry of the civil penalties. *See id.* According to Polymer80, given the lengthy history of interactions between Polymer80 and ATF, even if Polymer80 is found liable, it is not rational to impose a maximum civil penalty here. *See id.* at 51.

At the onset, the Court notes that "a determination of a civil penalty is not an essential function of a jury trial, and ... the Seventh Amendment does not require a jury trial for that purpose in a civil [*22] action." *Tull v. United States*, 481 U.S. 412, 427, 107 S. Ct. 1831, 95 L. Ed. 2d 365 (1987). The amount of a civil penalty is an issue for the Court to decide. *See id.* "A court can require retribution for wrongful conduct based on the seriousness of the violations, the number of prior violations, and the lack of good-faith efforts to comply with the relevant requirements. It may also seek to deter future violations by basing the penalty on its economic impact." *Id.* at 422-423 (internal citations omitted).

Here, the Court finds that the District is entitled to civil penalties for Polymer80's violation of the CPPA — namely D.C. Code § 28-3904(a),(b),(e-1). Pursuant to D.C. Code § 28-3909(b)(1), the District may recover from a merchant who engaged in a first violation of § 28-3904, a civil penalty of not more than $5,000 for each violation.[6] Based upon the record, Polymer80 sold the first illegal firearm to a District consumer on March 17, 2017. *See* Pl.'s Mot. for Summ. J. 14. Polymer80 continued sales in the District until at least June 24, 2020.[7] *See id.* at 15, *see also id.* at Ex. 48. From the time Polymer80 sold its first firearm to a District consumer on March 17, 2017 to July 16, 2017 (the day before section 28-3909(b)(1) was amended), Polymer80 engaged in unfair and deceptive trade practices, by making false representations to District consumers on its website, [*23] for 488 days. From July 17, 2017 to June 24, 2020 (the day the District filed its Complaint),[8] Polymer80 continued to engage in unfair and deceptive trade practices for another 710 days. These false representations included:

- The Polymer80 G150 firearm had approval in the District of Columbia;
- Polymer80 had approval or certification to sell the G150 firearm to District consumers;
- District consumers gained the right to possess the firearms purchased on Polymer80's website;
- Firearms sold by Polymer80 were approved by the District;
- Polymer80 had approval to sell firearms to District consumers; and
- Unlicensed District consumers could make and possess Polymer80's firearms for their own personal use.

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[5] Given the Court's ruling, the District of Columbia's Opposed Motion for Preliminary Injunction, filed on June 26, 2020, is DENIED AS MOOT.

[6] The Court notes that prior to the amendment of the statute on July 17, 2018, under D.C. Code § 28-3909 (b)(1) (2014), the civil penalty was $1,000 per violation.

[7] The Court notes that on June 23, 2020, a District consumer canceled their order, and another District order was voided. On July 4, 2020, a District consumer purchased a Grip Module, and on July 9, 2020, a District consumer was refunded. *See* Pl.'s Mot. for Summ. J. Ex. 48.

[8] The Court notes Polymer80 voluntarily ceased all sales of the products at issue in the District on July 27, 2020. *See* Def.'s Opp'n. 46. However, the District is only seeking civil penalties through June 24, 2020.

See Section III(B)(1) *supra*. Each day that Polymer80 violated the CPPA by making the above refenced false representations about the use and purchase of its firearms, in contravention of the public interest that the Districts seeks to uphold pursuant to D.C. Code § 28-3909(a), a civil penalty shall be imposed. In addition to the 1,198 days that Polymer80 made false representations on its website, it is undisputed that Polymer80 sold 19 firearms to District consumers directly from its website. *See* Polymer80 Statement [*24] of Material Facts in Disp. ¶ 25; *see also* Pl.'s Statement of Material Facts Not in Disp. ¶ 25. Considering these factors as a whole, the Court imposes a civil penalty of $4,038,000 for each day that Polymer80 violated the CPPA, as follows:

Go to table1

Therefore, upon consideration of the Motion, the Opposition, the Reply, and the entire record herein, the Court GRANTS IN PART and DENIES IN PART Plaintiff's Motion for Summary Judgment. Accordingly, on this **10th day of August, 2022**, it is hereby

ORDERED that Plaintiff's Motion for Summary Judgment is **GRANTED IN PART** and **DENIED IN PART**; it is further

ORDERED that Plaintiff's Motion for Summary Judgment as to Count I claims arising under D.C. Code § 28-3904 (a),(b),(e-1) is **GRANTED**; it is further

ORDERED that Plaintiff's Motion for Summary Judgment as to Count I claims arising under D.C. Code § 28-3904 (e), (f) is **DENIED**; it is further

ORDERED that Plaintiff's Motion for Summary Judgment regarding Count II is **GRANTED**; it is further

ORDERED that Plaintiff's request for a Permanent Injunction is **GRANTED**; it is further [*25]

ORDERED that Polymer80 is prohibited from making misrepresentations regarding the legality of its firearms in the District of Columbia; it is further

ORDERED that Polymer80 is prohibited from selling all handgun frames, lower receivers, or Buy, Build, Shoot kits and any comparable products to District consumers both directly and indirectly through its dealers and distributors; it is further

ORDERED that Polymer80 is required to notify all of its dealers and distributors, past, present, and future that it is illegal to sell Polymer80 handgun frames, lower receivers, and Buy, Build, Shoot kits to residents of the District of Columbia; it is further

ORDERED that Polymer80 is required to prominently notify all visitors to www.polymer80.com , on each individual product page, that Polymer80 handgun frames, lower receivers, Buy, Build, Shoot kits and any comparable products are illegal to purchase and possess in the District of Columbia; it is further

ORDERED that Polymer80 is required to prominently notify all visitors to its website's dealers and distributors page that Polymer80 handgun frames, lower receivers, Buy, Build, Shoot kits, and comparable products cannot be sold to residents of the [*26] District of Columbia and are illegal to possess in the District of Columbia; and it is further

ORDERED that within thirty (30) days of the entry of the instant Order, Polymer80 shall pay the District of Columbia the sum of $4,038,000 as a civil penalty pursuant to D.C. Code § 28-3909(b).

SO ORDERED.

/s/ Ebony M. Scott

Associate Judge Ebony M. Scott

(Signed in Chambers)

Table1 (Return to related document text)

CPPA Violations	Number of Days	Statutory Civil Penalty Amount	Civil Penalty Assessed
March 17, 2017 to July 16, 2017	488	$1,000	$488,000
July 17, 2017 to June 24, 2020	710	$5,000	$3,550,000
			TOTAL: $4,038,000

Table1 (Return to related document text)

End of Document

Attachment C

District of Columbia v. Beech-Nut Nutrition Co.

Superior Court of the District of Columbia, Civil Division

September 21, 2021, Decided; September 21, 2021, Filed

Case No.: 2021 CA 001292 B

Reporter

2021 D.C. Super. LEXIS 43 *

DISTRICT OF COLUMBIA v. BEECH-NUT NUTRITION COMPANY

Judges: [*1] Hiram E. Puig-Lugo, Judge.

Opinion by: Hiram E. Puig-Lugo

Opinion

ORDER

This matter comes before the Court upon (1) Defendant's Motion to Dismiss and for a More Definite Statement, filed on June 24, 2021; (2) Plaintiff's Opposition, filed on July 30, 2021; and (3) Defendant's Reply, filed on August 30, 2021. For the reasons discussed below, Defendant's Motion is denied.

Background

On April 21, 2021, Plaintiff filed a Complaint against Defendant, a baby food manufacturer, alleging a violation of the D.C. Consumer Protection Procedures Act (hereinafter "CPPA"). Specifically, Defendant allegedly "violated and continues to violate" the Act through misrepresentation and omission of material facts regarding the health and safety of its baby food products. Compl. ¶¶ 5, 62-66; § 28-3904(a), (d),(e),(f),(f-1). In its complaint, Plaintiff asserts that health agencies "have declared heavy metals, such as arsenic, lead, cadmium and mercury, to be dangerous to human health." Compl. ¶ 11. Specific to Defendant, Plaintiff cites to two reports that purported to find toxic heavy metals in Defendant's baby food products.[1] Compl. ¶¶ 24-25.

In response, Defendant filed [*2] a Motion to Dismiss and for a More Definite Statement. The Motion asserts that pursuant to D.C. Super. Ct. Civ. R. 8(a) and 12(b)(6), the Complaint should be entirely dismissed because: (1) The Report, which Plaintiff relies on, allegedly omits the fact that "heavy metals are present everywhere in the environment"; (2) there is no duty to "disclose the naturally-occurring metal content in the food"; and (3) no reasonable consumer "would adopt [Plaintiff's] notion of 'natural' over a common-sense interpretation of the word" and thereby has no "[t]endency to mislead[.]" Def.'s Mot. To Dismiss at 8; Def.'s Reply at 7.

DISCUSSION

To survive a Motion to Dismiss, a Complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face. *See Potomac Dev. Corp. v. District of Columbia*, 28 A.3d 531, 543-44 (D.C. 2011); *Ashcroft v. Iqbal*, 556 U.S. 662, 678-79, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555-56, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007). Dismissal of a Complaint for failure to state a claim upon which relief can be granted should only be awarded if "it appears beyond doubt that the Plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *See* Super. Ct. Civ. R. 12(b)(6); *Fingerhut v. Children's Nat'l Med. Ctr.*, 738 A.2d 799, 803 (D.C. 1999).

When considering a Motion to Dismiss, a Court must "construe the facts on the face of the Complaint in the light most favorable to the non-moving party, and accept as true the allegations [*3] in the Complaint." *Fred Ezra Co. v. Pedas*, 682 A.2d 173, 174 (D.C. 1996). A Court should not dismiss a Complaint merely because it "doubts that a Plaintiff will prevail on a claim." *See*

[1] One of the reports was published in October 2019 by Healthy Babies Bright Futures, "an alliance of nonprofit organizations, scientists, and donors" (hereinafter the "HBBF Report"). The second report was released by the U.S. House of Representatives, titled "*Baby Foods are Tainted with Dangerous Levels of Arsenic, Lead, Cadmium, and Mercury*" (hereinafter the "Congressional Report"). *Id.*

Duncan v. Children's Nat'l Med. Ctr., 702 A.2d 207, 210 (D.C. 1997). However, the Court need not accept inferences if such inferences are unsupported by the facts set out in the Complaint. *See Kowal v. MCI Comm. Corp.*, 16 F.3d 1271, 1276, 305 U.S. App. D.C. 60 (D.C. Cir. 1994). Nor must the Court accept legal conclusions cast in the form of factual allegations. *Id.*

A pleading must contain a "short and plain statement of the claim showing that the pleader is entitled to relief." *See* Super. Ct. Civ. R. 8(a); *Ashcroft v. Iqbal*, 556 U.S. 662, 677-78, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009). To survive a Motion to Dismiss under Super. Ct. Civ. R. 12(b)(6), a Plaintiff must provide "enough facts to state a claim to relief that is plausible on its face." *See Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007). A claim is plausible on its face "when the Plaintiff pleads factual content that allows the Court to draw the reasonable inference that the Defendant is liable for the misconduct alleged." *Id.*

I. Consumer Protection Procedures Act (CPPA)

The CPPA is a broad, remedial statute that provides consumers the "right to truthful information about consumer goods and services." *Frankeny v. Dist. Hosp. Partners, LP*, 225 A.3d 999, 1004 (D.C. 2020) (citing D.C. Code § 28-3901). Therefore, the Act "must be construed and applied liberally to promote its purpose." *Saucier v. Countrywide Home Loans*, 64 A.3d 428, 442 (2013) (quoting D.C. Code § 28-3901(c)). In doing so, the Act sought to remove the pleading requirements found in common law fraud claims. *Frankeny*, 5 A.3d at 1004. Under [*4] subsections (a) and (e) of the Act, a merchant cannot make "misrepresentations about a product's source, approval, or characteristics, or about any material fact that would have a tendency to mislead a consumer[,]" either expressly or impliedly. *Yimam v. Mylé Vape, Inc.*, 2020 D.C. Super. LEXIS 7, at *6-7, Further, under subsection (d), a merchant cannot represent that the "goods or services are of particular standard, quality, grade, style, or model, if in fact they are of another[.]" D.C. Code § 28-3904(d).

In interpreting the CPPA, the D.C. Court of Appeals held that plaintiffs are not required to show intentional misrepresentation or omission under subsections (a), (d), (e) and (f). *Frankeny*, 225 A.3d at 1005. Further, courts have recognized that reasonable consumers can find accurate statements misleading, although likely uncommon. *Nat'l Consumers League v. Gerber Prods. Co.*, 2015 D.C. Super. LEXIS 10, at *28. Lastly, under subsection (f) and (f-1) of the Act, the plaintiff must show that "the omission was material and had a tendency to mislead." *Saucier*, 64 A.3d at 442. However, the plaintiff is not required "to plead and to prove a duty to disclose information." *Id.* at 44. *See Saucier*, 64 A.3d at 443 (where the Court refused to adopt the view that plaintiff must show whether a duty to disclose exists or at least show the scope of that duty).

In determining whether an omission is "material," the D.C. Court of Appeals adopted a reasonable person standard. Specifically, whether a reasonable [*5] person " 'would attach importance to its existence or nonexistence in determining his [or her] choice of action in the transaction' in question or " 'the maker of the representation knows or has reason to know' that "the recipient likely 'regard[s] the matter as important in determining his or her choice of action.'" *Frankeny*, 225 A.3d at 1005 (quoting *Saucier*, 64 A.3d at 442). Thus, when considering claims brought under section 28-3904, courts should consider the allegedly misleading practices "in terms of how [the practices] would be viewed and understood by a reasonable consumer." *Pearson v. Chung*, 961 A.2d 1067, 1075 (D.C. 2008). Therefore, "[o]rdinarily the question of materiality should not be treated as a matter of law." *Green v. H&R Block, Inc.*, 355 Md. 488, 524, 735 A.2d 1039 (Md. 1999).[2] Rather, "[o]nly when the facts do not allow for a reasonable inference of materiality or immateriality should the issue be decided as a Wetter law." *Id.*

a. Misrepresentations Pursuant to D.C. Code § 28-3904(a), (d) and (e)

Plaintiff asserts that Defendant misinterpreted the health and safety of its baby food products by promoting them as "natural, nutritious, and safe[,]" Compl. ¶ 42, and by "heavily" advertising its "very high standards for product safety testing." *Id.* ¶ 21. Plaintiff asserts that Defendant does not test for mercury, only tests ingredients and not final products, and "sells products" [*6] even when "they exceed internal standards[.] Compl. ¶ 63. *See* Compl. ¶¶ 18-19. (Defendant's advertisements include: its

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[2] The D.C. Court of Appeals in *Saucier v. Countrywide Home Loans* adopted Maryland's interpretation of a provision within their consumer protection law "which is similar to D.C. Code § 28-3904(f)." *Saucier*, 64 A.3d at 443. Further, Maryland law "is instructive in our jurisdiction." *Id.* At 442.

trademarked slogan "real food for babies."; uses words, such as "natural," "naturals," "100% natural," "organics[.]").

In response, Defendant provides the following arguments. First, that Defendant's advertisements are true. Def.'s Mot. To Dismiss at 15. Second, that "[n]o seller or manufacturer of any fruit or vegetable product" in grocery stores is required to disclose "naturally-occurring metal content in the food," nor required to test for mercury; and no reasonable consumer would adopt Plaintiff's interpretation of "natural" over the "common sense interpretation of the word." Def.'s Mot. To Dismiss at 8. In support, Defendant relies on statements made by the FDA following the Congressional Report that explain how toxic metals are naturally occurring in baby food and how they aim to reduce the level of exposure to toxic heavy metals in the future. Def.'s Mot. To Dismiss at 8, Ex. A-F. Third, and finally, Defendant claims that no factual dispute exists as to whether Defendant tests its baby food products for toxic heavy metals because this has been admitted in Plaintiff's [*7] pleadings. Def.'s Reply at 7, n. 5.

Here, even though Defendant alleges truthful advertising, a reasonable consumer can still find accurate statements misleading. *See Nat'l Consumers League v. Bimbo Bakeries USA*, 2015 D.C. Super. LEXIS 5, at *30 ("there is still a possibility that a reasonable consumer would still find an accurate statement misleading."). As to Defendant's second argument, Defendant relies on a cited case, *In re General Mills*, where the Court dismissed Plaintiff's 12(b)(6) motion after finding that "no reasonable consumer" would interpret "Made with 100% Natural Whole Grain Oats" as not containing any amount of glyphosate. *In re Gen. Mills Glyphosate Litig.*, 2017 U.S. Dist. LEXIS 108469, 2017 WL 2983877, at *14 (D. Minn. July 12, 2017). Defendant cited to similar cases outside of our jurisdiction that involve plaintiffs asserting a complete absence of a substance. *See Hawyuan Yu v. Dr. Pepper Snapple Grp.*, No. 18-cv-06664-BLF, 2019 U.S. Dist. LEXIS 102023 (N.D. Cal. June 18, 2019) (finding that a reasonable person would not interpret the word "Natural" or "All Natural Ingredients" as the "utter absence of residual pesticides[.]"); *Parks v. Ainsworth Pet Nutrition, LLC*, 18 Civ. 6936, 2020 U.S. Dist. LEXIS 29586, at *4 (S.D.N.Y. 2020) (finding that a reasonable person would not interpret the word "natural" as a product not having "any glyphosate[.]"); *Axon v. Citrus World*, 354 F. Supp. 3d 170, 183 (E.D.N.Y. 2018) (Court dismissed plaintiff's claim, finding that a reasonable person would not interpret the word "natural" as having "no traces of glyphosate.").

However, this case is distinguishable. Defendant claims that no reasonable [*8] consumer would believe that the products are "free of toxic heavy metals," making Plaintiff's claims implausible, Def.'s Reply at 7, yet Defendant has misinterpreted Plaintiff's position.

In its opposition, Plaintiff claims that a reasonable consumer could believe that the products are "free of toxic heavy metals *or* to have at least undergone finished-product testing . . . " Opp. at 5-6 (emphasis added). Although Defendant has shown, through the FDA's statements, that products cannot be completely free from heavy metals, Plaintiff has referred several times in its pleadings to "high levels" and "dangerous levels" of heavy metals. Compl. at 8-9. Defendant continuously refers to "naturally-occurring" heavy metals, while Plaintiff refers to the "manufacturing process" and "additives[.]" Compl. ¶¶ 47-48. In fact, Plaintiff appears to acknowledge that heavy metals are present in Defendant's products by pleading that Defendant violated the CPPA in part because it *exceeded* its internal limit of heavy metals. *See* Compl. ¶ 32 ("Beech Nut set an internal limit of 5,000 ppb for lead . . . which far surpasses any health guidance in existence[.]). Plaintiff also referred to standards set by the [*9] EU, FDA, and EPA on the amount of acceptable toxic metals in products and compared them to Defendant's. *Id.* Therefore, Plaintiff's claims are about the amount of toxic heavy metal, rather than its nonexistence in baby food products.

Additionally, a factual dispute remains despite Defendant's reliance on the FDA statements. The FDA statements do not appear to contradict the Congressional Report's findings. Instead, the exhibits detail the FDA's plans to minimize the amount of "naturally occurring" toxic heavy metals found in baby food products. However, as previously mentioned, Plaintiff asserts "high levels" of toxic heavy metals, different from "naturally occurring," which the FDA (as shown in Defendant's exhibit) has regulated against. *See* Def.'s Mot. To Dismiss, Ex. A. ("the FDA ordered a U.S. company . . . to stop distributing adulterated juice products containing *potentially harmful* levels of the toxic element . . . ") (emphasis added). Here, Plaintiff has plead that "additives . . . that have high levels of toxic heavy metals" are in Defendant's products. Compl. ¶ 48. Defendant, in asserting that Plaintiff deems its products toxic because they "contain heavy metals," has

mischaracterized [*10] Plaintiff's position. Def.'s Mot. To Dismiss at 1.

Third, contrary to Defendant's assertion, there is a factual dispute as to the testing for heavy metals. In its pleadings, Plaintiff alleges that *raw* ingredients are tested, but not finished products. *See* Compl. ¶ 46 (The Congressional Report "concluded that Beech-Nut has a policy of testing *only* the raw ingredients . . . "). Therefore, a factual dispute remains as to Defendant testing its products for heavy metals. Accordingly, the Court find that Plaintiff has sufficiently plead a claim under D.C. Code § 28-3904(a), (d), and (e).

b. Omissions of Fact Pursuant to D.C. Code § 28-3904(f) and (f-1)

Here, Plaintiff asserts that Defendant failed to disclose: (1) the "high levels of toxic heavy metals"; (2) the "actual levels" in its finished products; (3) "the harmful effects of these toxic heavy metals"; (4) that it does not test its finished products for toxic heavy metals; and (5) does not test for mercury. Compl. ¶ 65. Lastly, Plaintiff asserts that Defendant "has the most lax standards" for testing and also sells products that allegedly exceed internal standards. *Id.* In response, Defendant asserts that the alleged omissions do not mislead a reasonable consumer because the products are not [*11] "unfit for normal use," and there is no duty to test for mercury or to "routinely test" final products. Def.'s Mot. To Dismiss at 9, 11. Defendant relies on *Tomasella v. Nestle USA, Inc.*, where the court found that the Defendant's omission about child labor practices in the cocoa supply chains did not render the chocolate "unfit for normal use." *Tomasella v. Nestlé USA, Inc.*, 962 F.3d 60, 74 (1st Cir. 2020).[3]

Assuming that the Massachusetts Consumer Protection Act closely resembles the District's CPPA claim, *Tomasella* is unpersuasive in this case. Here, there is a closer tie between ingredients used in the baby food products and Defendant's promotion of the products than there is between labor practices and the food that is consumed. Most importantly, the plaintiff need only show that a reasonable person would likely be misled by the material omission, and "[o]nly when the facts do not allow for a reasonable inference of materiality or immaterialty[,] should the issue be decided as a matter of law." *Green*, 355 Md. at 524.

Here, Plaintiff has sufficiently plead that a reasonable person may be mislead by Defendant's alleged omissions. For instance, Plaintiff alleged that the FDA's "voluntary guidance levels" for "inorganic arsenic in infant rice cereal" is at "100 parts per billion" and Defendant used ingredients [*12] exceeding "300 ppb total arsenic[.]" Compl. ¶¶ 28-29. Therefore, an issue of fact exists as to whether a reasonable person would be misled by Defendant advertising its products as "nothing artificial added" and "safe, nutritious food[,]" Compl. ¶¶ 17, 19, while omitting that high levels of toxic heavy metals exceed its own internal levels, and the standards set forth by regulatory bodies. *See* Compl. ¶ 32. Lastly, Defendant's argument that it owes no duty to disclose is unwarranted because, as the D.C. Court of Appeals held, plaintiffs are not required "to plead and to prove a duty to disclose information." *Saucier*, 64 A.3d at 443. Instead, a duty arises when the material omission has a tendency to mislead. Given that Plaintiff has met the standard—that a reasonable person would interpret Defendant's statements or omissions as misleading, Plaintiff's claims under D.C. Code § 28-3904(f) and (f-1) survive Defendant's Motion to Dismiss.

II. Motion for a More Definite Statement

D.C. Super. Ct. Civ. R. 8(a) requires the plaintiff to make a "short and plain statement" showing that "the pleader is entitled to relief." D.C. Super. Ct. Civ. R. 8(a)(1). The plaintiff "need only plead sufficient facts" to place the defendant "on notice of the claims[.]" *Organic Consumers Assoc. v. Handsome Brook Farm*, LLC, 2017 D.C. Super. LEXIS 27, at *4. A pleading that "is so vague that it does not admit [*13] of a response" can generally be remedied through a motion for a more definite statement under D.C. Super. Ct. Civ. R. 12(e). *Id.* at *4 (quoting *Emerine v. Yancey*, 680 A.2d 1380, 1384 (D.C. 1996)).

Here, Defendant states that Plaintiff's claims are "vague and ambiguous" as to which baby foods allegedly violate the CPPA, Def.'s Mot. To Dismiss at 13, and request that Plaintiff: "(1) identify the specific product(s) which are the basis of its alleged violation; (2) identify each specific advertisement or statement which is purportedly misleading; and (3) explain briefly why each advertisement or statement is materially misleading to a

[3] Defendant asserts that the *Tomasella* case is "directly on-point here," despite being a Massachusetts case, because its consumer protection law "has the same substantive requirements as the CPPA." Def.'s Reply at 8.

reasonable consumer." Def.'s Mot. To Dismiss at 12. Defendant cites to *Pelman v. McDonald's Corp.*, where the court dismissed plaintiff's amended complaint alleging deceptive practices under New York's consumer law for failing to specify the alleged deceptive advertisements made by McDonalds. *Pelman v. McDonald's Corp.*, 396 F. 3d 508 (2d Cir. 2005). The courts in this District have applied the reasoning in *Pelman* which adopts the "bare-bones notice-pleading requirements" under Rule 8(a) rather than the pleading standard under Rule 9(b). *Nat'l Consumers League v. Bimbo Bakeries USA*, 2015 D.C. Super. LEXIS 5, at *24 (quoting *Pelman v. McDonald's Corp.*, 396 F. 3d 508).

Here, Plaintiff has identified specific statements made by Defendant, including the words used to describe the products, Compl. ¶ 19, the type of foods referenced, such as "Beech-Nut Naturals Purees," [*14] "Beech-Nut Organics," and Beech-Nut Purees," and "Organics Oatmeal Cereal Canister," along with their pictures. Compl. ¶ 19.[4] Again, Plaintiff includes Defendant's statement that they "test[] up to 255 pesticides and heavy metals . . . " with a link to Defendant's website. *Id.* ¶¶ 21, 52. Therefore, Plaintiff has provided Defendant with notice of its statements and have identified food products with the alleged heavy toxic metals. Additional products "is the sort of information that is appropriately the subject of discovery, rather than what is required" under the Rule 8(b) pleading requirements. *See Pelman v. McDonald's Corp.*, 396 F.3d 508 at 512 ("This simplified notice pleading standard [of Rule 8(a)] relies on liberal discovery rules and summary judgment motions to define disputed facts and issues and to dispose of unmeritorious claims.") (quoting *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 512-13, 122 S. Ct. 992, 152 L. Ed. 2d 1 (2002)). The products identified provide Defendant with sufficient notice; therefore, Defendant's Motion for a More Definite Statement is denied. Accordingly, it is this 21st day of September 2021, hereby:

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

ORDERED that Defendant's Motion for a More Definite Statement is **DENIED**.

IT IS SO ORDERED.

/s/ Hiram E. Puig-Lugo

Judge Hiram Puig-Lugo

*Signed [*15] in Chambers*

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[4] Defendant states that Plaintiff "has no allegations" regarding its rice cereal product because it was never sold in the District of Columbia, Def.'s Reply at 1, but Plaintiff's Complaint refers to oatmeal cereal. Compl. ¶ 44.