SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
CIVIL DIVISION

RAPTORS ARE THE SOLUTION, A PROJECT OF EARTH ISLAND INSTITUTE,	:	
Plaintiff,	:	**Case No. 2023 CAB 225**
	:	**Judge Todd E. Edelman**
v.	:	
BELL LABORATORIES, INC.,	:	
Defendant.	:	

ORDER

This matter comes before the Court on Defendant, Bell Laboratories, Inc.'s ("Bell Labs") Motion to Dismiss ("Bell Labs' Motion"), filed March 22, 2023. For the reasons stated *infra*, Bell Labs' Motion is denied.

I. Background

Plaintiff Raptors Are The Solution, A Project of Earth Island Institute ("RATS") has sued Bell Labs to "end [Bell Labs'] deceptive marketing and advertising." Compl. ¶ 1. RATS brings this suit under the District of Columbia Consumer Protection Procedures Act ("CPPA" or "the Act"), D.C. Code § 28-3901, *et seq.*, alleging that "Bell Labs' marketing of rodenticide products [] as environmentally responsible and low risk is misleading because the [p]roducts, in fact, pose substantial risks and consistently endanger pets, wildlife, and the environment." Opp'n at 1. The Complaint states that Bell Labs represents its rodenticide products and business practices as "environmentally responsible, sustainable, and low risk," but "the active ingredients in those [p]roducts pose severe environmental risks," including to pets and wildlife. Compl. ¶¶ 27, 41-42. The Complaint further avers that "[i]nformation about the sustainability of and risks posed

by rodenticide products is material to consumers" and that Bell Labs' representation of itself as "environmentally responsible, sustainable, and an environmental steward" misleads consumers via "ambiguity, misrepresentation, and omission." *Id.* ¶¶ 60, 65, 68.

RATS filed its Complaint against Bell Labs on January 11, 2023. Bell Labs' Motion was filed on March 22, 2023 and argues that (i) the aspirational language that RATS challenges does not amount to "misrepresentations about the merchant's consumer products" as required to state a CPPA claim; (ii) the statements RATS identified have not and could not mislead a reasonable consumer; and (iii) the CPPA does not apply to Bell Labs' sales of rodenticides because the products are not available to consumers. Bell Labs' Mot. at 1-2. RATS filed its Opposition on April 19, 2023, to which Bell Labs filed its Reply on May 25, 2023.[1]

II. Legal Standard

Bell Labs seeks dismissal of RATS' claim pursuant to D.C. Superior Court Civil Rule 12(b)(6). Dismissal pursuant to this section is only appropriate if it is "beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Atkins v. Indus. Telecomm. Ass'n*, 660 A.2d 885, 887 (D.C. 1995) (quoting *Owens v. Tiber Island Condo. Ass'n*, 373 A.2d 890, 893 (D.C. 1977)). The Complaint must be construed in the light most favorable to the plaintiff. *Id.* "The only issue on review of a dismissal made pursuant to Rule 12(b)(6) is the legal sufficiency of the complaint; and a complaint should not be dismissed because a court does not believe that a plaintiff will prevail on [his] claim." *Grayson v. AT&T Corp.*, 15 A.3d 219, 228-29 (D.C. 2011) (en banc) (alteration in original) (internal quotations

[1] Bell Labs filed a Reply on May 12, 2023 that exceeded the length permitted by the undersigned's Supplement to the Civil Division's General Order. The Court directed Bell Labs to file a Reply of the appropriate length, which Bell Labs filed on May 25, 2023.

omitted); *see also Poola v. Howard Univ.*, 147 A.3d 267, 276 (D.C. 2016) (citing *Doe v. Bernabei & Wachtel, PLLC*, 116 A.3d 1262, 1266 (D.C. 2015)).

The Court must conduct a two-pronged inquiry to determine whether a complaint survives a motion to dismiss, examining whether the complaint includes well-pled factual allegations, and whether such allegations plausibly give rise to an entitlement for relief. *Potomac Dev. Corp. v. District of Columbia*, 28 A.3d 531, 544 (D.C. 2011) (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 678-79 (2009)). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* While a court "must accept as true all of the allegations contained in a complaint . . . [t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice" to survive a motion to dismiss. *Iqbal*, 556 U.S. at 678 (citing *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007)); *see also Bernabei & Wachtel*, 116 A.3d at 1266. A well-pled complaint must "fairly put[] the defendant on notice of the claim against him." *Keranen v. AMTRAK*, 743 A.2d 703, 713 (D.C. 2000) (quoting *Nelson v. Covington*, 519 A.2d 177, 178 (D.C. 1986)).

III. Analysis

The CPPA "establishes an enforceable right to truthful information from merchants about consumer goods and services that are or would be purchased, leased, or received in the District of Columbia." D.C. Code § 28-3901(c). The Act seeks to restrict "unfair or deceptive trade practices," *id.* § 28-3904, and defines a "trade practice" as "any act which does or would create, alter, repair, furnish, make available, provide information about, or, directly or indirectly, solicit or offer for or effectuate, a sale, lease or transfer, of consumer goods or services," *id.* § 28-

3901(a)(6). The CPPA further provides an extensive list of violations and trade practices covered by the Act, including making it unlawful for "any person" to:

> (a) represent that goods or services have a source, sponsorship, approval, certification, accessories, characteristics, ingredients, uses, benefits, or quantities that they do not have;
>
> . . .
>
> (d) represent that goods or services are of a particular standard, quality, grade, style, or model, if in fact they are of another;
>
> (e) misrepresent as to a material fact which has a tendency to mislead;
>
> . . .
>
> (f) fail to state a material fact if such failure tends to mislead;
>
> (f-1) use innuendo or ambiguity as to a material fact, which has a tendency to mislead;
>
> . . .
>
> (h) advertise or offer goods or services without the intent to sell them or without the intent to sell them as advertised or offered. . .

See D.C. Code § 28-3904(a), (d), (e), (f), (f-1), (h).

A. The Challenged Statements Cannot be Characterized as Merely "Aspirational"

Bell Labs first contends that (i) most of the statements challenged in the Complaint amount to nothing more than "aspirational statements" not actionable under the CPPA, and (ii) the remaining statements are snippets of language taken out of context and ascribed unintended meaning by Plaintiff. Bell Labs' Mot. at 5. RATS argues that this issue cannot be resolved as a matter of law at the pleadings stage, and also contends that (i) the statements contain "clear and unambiguous statements of fact, which cannot be considered merely aspirational puffery;" (ii)

District of Columbia courts have found that similar representations related to sustainability and environmental responsibility are actionable; and (iii) Bell Labs' reliance on *Earth Island Institute v. Coca-Cola*, No. 2021 CA 001846 B (D.C. Super. Ct. Nov. 10, 2022) (Ross, J.) is misplaced because the cases are factually different, and *Coca-Cola* is currently briefed on appeal. Opp'n at 3.

It is true that puffery is generally not actionable, as it is considered "exaggerations [made by a] seller as to the degree of quality of his product, the truth or falsity of which cannot be precisely determined." *See Pearson v. Soo Chung*, 961 A.2d 1067, 1076 (D.C. 2008) (quoting *Tietsworth v. Harley-Davidson, Inc*., 270 Wis. 2d 146, 171 (Wis. 2004)). However, the bulk of the challenged statements[2] here pertain to Bell Labs' products, including the components and environmental impact, in a way which speaks directly to the products' "source," "characteristics," "ingredients," "benefits," "standards," and "quality." *See* D.C. Code § 28-3904(a), (d). Many of the statements also speak to the company's business practices in a manner which, according to RATS, has "a tendency to mislead." *Id.* § 28-3904(e); *see* Opp'n at 3. The Complaint cites to data contradicting the factual accuracy of Bell Labs' statements and sustainability representations including articles stating that "[t]he number of animals who get either compromised or die from [rodenticides] is enormous"; "rodenticides have been among the top eight toxins to which pets are exposed"; rodenticide use has "contributed to the deaths of pets

[2] The challenged statements include, *inter alia,* claims that Bell Labs "fully embraces the concept[] of environmental responsibility"; Bell Labs has "implemented numerous ongoing programs to examine and improve [their] procedures, systems, material use, and facilities to create not only practices, but also an attitude of environmental and social responsibility"; "[t]hrough its environmental efforts [and] product solutions . . . Bell strives to create sustainable practices wherever possible"; Bell Labs is "Helping the Community, Helping the Earth"; Bell Labs is "gaining back a healthy ecosystem"; Bell Labs has "assisted in saving many threatened & endangered animal species"; "#earthfriendly"; "#earthdayeveryday"; Bell Labs' Terad$_3$ Ag product poses "a low risk of secondary poisoning . . . [and] a low risk of toxicity to birds"; "Bell manufactures DITRAC with food-grade ingredients and enhancers"; and the PCQ Pro product "produces a fresher, better compressed pellet" which "is designed to compete with natural food sources." Compl. ¶¶ 29-40.

and wildlife"; "Vitamin D3 rodenticide use . . . has been deemed . . . 'inhumane and painful' for a variety of wild animals"; rodenticides affect the behavioral patterns of various bird species that ingest them; and there is a growing prevalence of rodenticide exposure in several species of wild animals. *See, e.g.*, Compl. ¶¶ 44-53. The Complaint also references sources stating that consumers are aware of the harms of rodenticides, concerned about the impact of the products they buy, and willing to pay more for products they perceive as sustainable. Compl. ¶¶ 13, 64. If accepted as true, the cited data and sources establish a plausible claim that the majority of the identified statements go beyond mere "aspirational statements" and constitute misrepresentations of "material fact[s] which [have] a tendency to mislead." D.C. Code § 28-3904(e); *see also* Compl. ¶¶ 27-70.

Courts in this jurisdiction have frequently held that a company's representations that its products are "sustainable," when they are in fact not, constitute unlawful "trade practices" under the CPPA. *Earth Island Inst. v. BlueTriton Brands*, No. 2021 CA 003027 B, 2022 D.C. Super. LEXIS 11, *12-13 (D.C. Super. Ct. June 7, 2022) (McKenna, J.); *see also GMO Free USA v. ALDI Inc.*, No. 2021 CA 001694 B, 2022 D.C. Super. LEXIS 1 at *8 (D.C. Super. Ct. Feb. 16, 2022) (Pasichow, J.); *Organic Consumers Ass'n v. Tyson Foods, Inc.*, No. 2019 CA 004547 B, 2021 D.C. Super. LEXIS 7 at *8-9 (D.C. Super. Ct. Mar. 31, 2021) (Jackson, J.); *Lee v. Can. Goose U.S., Inc.*, No. 20 Civ 9809, 2021 U.S. Dist. LEXIS 121084 at *12 (S.D.N.Y. June 29, 2021) (interpreting the CPPA). While these cases involve misrepresentations made on labels and product packaging or in advertising campaigns, Bell Labs' statements appear on its website, in its newsletter, and on its social media accounts, all of which are accessible by District of Columbia consumers and the public in general. *See BlueTriton*, 2022 D.C. Super. LEXIS 11 at *12-13, 15. Given that Bell Labs holds itself out in the public as producing products with

specific environmentally responsible and environmentally safe qualities, construing the facts alleged in the light most favorable to RATS, Bell Labs' representations could be found to have the same effect on the consumer as direct advertising or statements on a product's packaging or label. *See id.* Here, RATS "has sufficiently identified representations by [Bell Labs] that may establish 'unfair or deceptive trade practices' subject to the CPPA," and dismissal at this early stage in the litigation is thus inappropriate. *Id.* at 13.

B. <u>The Question of Whether the Challenged Statements Could Plausibly Mislead Consumers is a Question of Fact</u>

Bell Labs next contends that the "cherry-picked" snippets that RATS has compiled to allege material misrepresentation have been mischaracterized and misunderstood, but that in their original contexts, the statements are not incorrect, misleading, or deceptive. Bell Labs' Mot. at 11-12. RATS responds that examination of the context of the statements at issue is inappropriate at the motion to dismiss stage, and that even if it is appropriate, the context Bell Labs provides does not cure the deception—"that Bell Labs, through its advertising scheme, positions its [p]roducts for District consumers as environmentally safe, despite the proven dangers of its rodenticide"—alleged in the Complaint. Opp'n at 6-7.

The "determination of whether [a statement] would be both material and misleading [to a reasonable consumer] . . . 'is a question of fact for the jury and not a question of law for the court.'" *See Saucier v. Countrywide Home Loans*, 64 A.3d 428, 445 (D.C. 2013) (quoting *Green v. H & R Block, Inc.*, 735 A.2d 1039, 1059 (Md. 1999)); *see also Mann v. Bahi*, 251 F. Supp. 3d 112, 126 (D.D.C. 2017) (stating that the question of how a reasonable consumer would view a statement having a "tendency to mislead" is "generally a question for the jury"); *Pearson*, 961 A.2d at 1075-76; *District of Columbia v. DoorDash, Inc.*, 2020 D.C. Super. LEXIS 115, *7

(D.C. Super. Ct. March 2, 2020) (Matini, J.) ("[W]hat a 'reasonable consumer' would consider material or misleading is generally a question for the jury, and cannot necessarily be resolved at the motion to dismiss stage of litigation."). *But see Mann*, 251 F. Supp. 3d at 126 ("[T]here are times when it is sufficiently clear to be determined as a matter of law").

The statements at issue here are comprised of representations regarding the quality and characteristics of Bell Labs' products and business practices as well as the extent of the company's environmental impact. *See generally* Compl. Bell Labs asserts that these individual statements are not misleading or deceptive when viewed in the context of its entire representation, for example the full webpage, social media post, or article, especially where the Complaint only identifies the challenged statements in isolation. Bell Labs' Mot. at 9-13; Reply at 2-3.

Accepting all facts and allegations set forth in the Complaint as true, it would be improper and beyond the scope of the 12(b)(6) inquiry for the Court to engage in a detailed analysis of whether each statement is "properly qualified" or likely to mislead a reasonable consumer. *See generally Organic Consumers Ass'n v. Smithfield Foods, Inc.*, 2020 D.C. Super. LEXIS 28 at 16 n.3 (D.C. Super. Ct. Dec. 14, 2020) (Pan, J.). Bell Labs' argument that the statements here cannot provide the basis for a CPPA claim because they are "not actionable," Bell Labs' Mot. at 5; "general, aspirational, corporate ethos," *id.* at 8 (quoting *Coca-Cola*, No. 2021 CA 001846 B at *3-4); "not promises," *id.*; "not measurable," *id.*; statements of puffery, Reply at 3; and not misrepresentations when viewed in the entire context in which they were made, Bell Labs' Mot, at 2, 8-13, thus does not justify dismissal of RATS' claims, at least at this early stage in the litigation. Simply put, "[w]hether a statement is likely to mislead a consumer is a question for the jury." *BlueTriton*, 2022 D.C. Super. LEXIS 11 at *15. The Court finds that

RATS has at the very least pled sufficient facts to establish a plausible claim that Bell Labs' statements may have a tendency to mislead a reasonable consumer pursuant to the CPPA.

C. <u>"Consumer Transactions"</u>

Finally, Bell Labs contends that its rodenticide sales are not "consumer transactions" under the CPPA because Bell Labs sells its products to authorized distributors and not to individual consumers for personal, household, or family use. Bell Labs' Mot. at 13-14. RATS responds that Bell Labs cannot immunize its deception of consumers by selling its products via distributors, and notes that consumers in the District can readily purchase Bell Labs' products online. Opp'n at 10-11.

The CPPA "was meant to embrace consumer-merchant interactions exclusively," *Indep. Commc'ns Network, Inc. v. MCI Telecomms. Corp.*, 657 F. Supp. 785, 787 (D.D.C. 1987), and it applies "only to trade practices arising out of the supplier-purchaser relationship," *id.* (citing *Howard v. Riggs Nat'l Bank*, 432 A.2d 701, 709 (D.C. App. 1981)). *See Stone v. Landis Constr. Co.*, 120 A.3d 1287, 1289 (D.C. 2015); *Julian Ford v. ChartOne, Inc.*, 908 A.2d 72, 81 (D.C. 2006) ("[A] valid claim for relief under the CPPA must originate out of a consumer transaction."); *Slaby v. Fairbridge*, 3 F. Supp. 2d 22, 28 (D.D.C. 1998) (finding plaintiff did not state a CPPA claim "because she fail[ed] to allege a consumer-merchant relationship"). Under the CPPA, a "consumer" is "a person who, other than for purposes of resale, does or would purchase, lease (as lessee), or receive consumer goods or services . . . or does or would otherwise provide the economic demand for a trade practice." D.C. Code § 28-3901(a)(2)(A). The Act defines a "merchant" as someone who "does or would sell, lease (to), or transfer, *either directly or indirectly*, consumer goods or services, or a person who in the ordinary course of business

does or would supply the goods or services which are or would be the subject matter of a trade practice." *Id.* § 28-3901(a)(3) (emphasis added).

As noted by RATS, the consumer-merchant relationship defined in the CPPA encompasses both direct and indirect transactions. Opp'n at 10-11. It is enough that Bell Labs "suppl[ies] the goods or services which are or would be the subject matter of a trade practice." D.C. Code § 28-3901(a)(3). The CPPA does not require that Bell Labs be the party selling the goods or services, here rodenticides, to District of Columbia consumers so long as is it "connected with the 'supply' side of [the] consumer transaction." *Howard*, 432 A.2d at 709; *Adler v. Vision Lab Telcoms., Inc.*, 393 F. Supp. 2d 35, 39 (D.D.C. 2005); *Save Immaculata/Dunblane, Inc. v. Immaculata Preparatory Sch., Inc.*, 514 A.2d 1152, 1159, (D.C. 1986). Here, Bell Labs sells its products to distributors who in turn may or may not sell the products to consumers. *See* Bell Labs' Mot. at 14-15; Opp'n at 10-12; Reply at 5. In either case, Bell Labs sells goods or services and is on the supply side of the transactions. The Complaint therefore sufficiently alleges "consumer transactions" within the ambit of the CPPA to preclude dismissal.

IV. Conclusion

For the foregoing reasons, it is this 1st day of June, 2023, hereby

ORDERED that Bell Labs' Motion is DENIED.

Todd E. Edelman
Associate Judge
(Signed in Chambers)

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