No. 22-CV-0895

In the

District of Columbia Court of Appeals

EARTH ISLAND INSTITUTE,

Appellant,

v.

THE COCA-COLA COMPANY,

Appellee.

On Appeal from the Superior Court of the District of Columbia, Civil Division in Case No. 2021 CA 001846 B (Honorable Maurice A. Ross, Judge)

BRIEF FOR APPELLANT

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RULE 26.1 CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule of Appellate Procedure 26.1, Plaintiff-Appellant Earth Island Institute states that it has no parent corporation, and there is no publicly held corporation that owns 10% or more of its stock.

RULE 28(a)(2) DISCLOSURE STATEMENT

Pursuant to Rule of Appellate Procedure 28(a)(2), Plaintiff-Appellant Earth Island Institute states the following Parties and counsel were involved in this matter in the trial court and appellate proceeding:

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I. JURISDICTIONAL STATEMENT

Plaintiff-Appellant Earth Island Institute ("Earth Island") brought claims under the District of Columbia Consumer Protection Procedures Act ("CPPA"), D.C. Code §§ 28-3901 – 28-3913, against Defendant-Appellee The Coca-Cola Company ("Coca-Cola") for misleading representations to consumers in the District of Columbia that Coca-Cola products and services are sustainable and that recycling is a solution for its plastic pollution. Earth Island sought declaratory and injunctive relief for Coca-Cola's allegedly unlawful conduct and reasonable attorneys' fees. (Complaint ("Compl.") *Prayer for Relief*, A44[1]). The lower court had jurisdiction over Earth Island's claims brought under the CPPA. D.C. Code §§ 28-3905(k)(1)(B), (k)(1)(D), (k)(2). On November 10, 2022, the lower court granted Coca-Cola's motion to dismiss ("MTD Order"). On November 18, 2022, Earth Island filed its notice of appeal from that order and judgement. Therefore, this Court has jurisdiction under D.C. Code § 11–721 and D.C. Rule App. P. 3 & 4.

II. STATEMENT OF THE ISSUES

1. Whether the lower court erred in holding that a corporation's misleading statements to consumers cannot violate the CPPA unless they present "promises or measurable datapoints" that make the statements definitively true or false.

[1] Page numbers beginning with "A" refer to the Joint Appendix.

2. Whether the lower court erred in holding that beverage bottles are not "goods" under the CPPA.
3. Whether the lower court erred in holding that the CPPA does not cover advertising misrepresentations unless the representations are repeated on the product packaging.
4. Whether the lower court erred in holding that the totality of a corporation's representations cannot be considered in determining whether the CPPA has been violated.

III. STATEMENT OF THE CASE

Proceeding under the CPPA, Earth Island alleged that Coca-Cola makes a wide array of representations to consumers regarding the alleged sustainability of its product packaging, that such statements are material to consumers, and that such statements are misleading and deceptive given the immense scale of Coca-Cola's environmentally harmful plastic pollution. Coca-Cola uses a variety of terms and representations to suggest to consumers that it "act[s] in ways to create a more sustainable and better shared future" and that it "make[s] a difference . . . [for] the planet by doing business the right way." (Compl. ¶ 32, A15.) Coca-Cola relatedly claims that its generation of millions of tons of plastic is compatible with "scaling sustainability" (*id*. ¶ 33, A16), because it will "[m]ake 100% of [its] packaging recyclable globally by 2025." (*Id*. ¶ 51, A24.) In reality, Earth Island alleges that

Coca-Cola continues to be one of the world's largest plastic polluters and that Coca-Cola's claims about recycling and reaching a "circular economy" are misleading, given that only a small fraction of Coca-Cola's products are actually recycled. For example, Earth Island's Complaint alleged that based on a 2018 estimate from the Environmental Protection Agency, only 8.7% of all recyclable plastics in the U.S. were recycled—a fact that, according to the allegations in Earth Island's Complaint, is well known in the plastics industry, where large producers such as Coca-Cola continue to deceptively push ineffective "recycling" as a viable tool to assuage their environmental pollution.

Nonetheless, the lower court dismissed Earth Island's Complaint, concluding that Earth Island failed to state a claim under the CPPA, a decision that is inconsistent with established Superior Court precedent and the legislative intent underlying the CPPA. The lower court held that, as a matter of law, the challenged statements could not mislead consumers because the statements were aspirational in nature, as they were not tied to "measurable data points"; that they were not about a "good or service" because they were about the bottles Coca-Cola produces; that they were unactionable because they were not on the product itself; and were unable to give rise to a viable claim because they were about the "general impression" Coca-Cola created. These findings run afoul of established law in the District and, critically, threaten the viability of the CPPA, which is meant to "be construed and

applied liberally" to ensure "an enforceable right to truthful information," "remedy all improper trade practices and deter the[ir] continued use," and "educate consumers to demand high standards." D.C. Code §§ 28-3901(b)-(c). The decision below provides merchants such as Coca-Cola with a new license to deceive consumers. It cannot stand.

IV. STATEMENT OF FACTS

A. Earth Island's Claims.

Earth Island's Complaint identifies a number of marketing statements that Coca-Cola makes through its various consumer-facing websites and social media feeds that represent to consumers that it is a sustainable company, and that recycling can solve its plastic pollution problem. In terms of its general sustainability representations, Earth Island's Complaint identified several representations made by Coca-Cola, such as that it "act[s] in ways to create a more sustainable and better shared future" that it "make[s] a difference . . . [for] the planet by doing business the right way," (Compl. ¶ 32, A15), and that "Business and sustainability are not separate stories for The Coca-Cola Company - but different facets of the same story." (*Id*. ¶ 34, A17.) Plaintiff's Complaint also identified representations made by Coca-Cola about the viability of recycling as a solution to its plastic pollution. For example, Coca-Cola represents that it is "taking responsibility" for its plastic waste

and that it will "get[] every bottle back," (*id.* ¶ 37, A18), by measures like "[m]ak[ing] 100% of [its] packaging recyclable globally by 2025," (*id*. ¶ 51. A24).

According to the allegations in Earth Island's Complaint, these representations mislead consumers because, far from being a sustainable company, Coca-Cola contributes 2.9 million metric tons of plastic waste per year, including approximately one-fifth of the entire world's polyethylene terephthalate ("PET")-bottle output. (*Id*. ¶ 9, A11.) Earth Island's Complaint alleges that plastic pollution presents serious risks to human health and wildlife (*id.* ¶¶ 61-63, A26-27), and causes harm to the environment due to plastics' carbon-intensive life cycles. For example, Earth Island's Complaint alleges that nearly 1.8 billion metric tons of CO2 were involved in all stages of plastic use in 2015. (*Id.* ¶ 67, A27.) Further, Earth Island alleged that Coca-Cola's representations that it was "taking responsibility" for its plastic pollution by instigating recycling programs was deceptive because Coca-Cola knows that recycling is an inadequate solution, with recycling rates for all plastics being as low as only 8.7%. (*Id.* ¶ 75, A28.) According to the Complaint, these low rates of recycling mean that a vast amount of recyclable plastic ends up in landfills or enters the natural environment. (*Id.* ¶¶ 77-78, A29.)

Earth Island's Complaint alleges that Coca-Cola's representations to consumers are in violation of the CPPA because, among other things, Coca-Cola's advertising misrepresents, tends to mislead, and omits facts regarding the

characteristics, standard, quality, and grade of its business practices and the products and services it sells in violation of D.C. Code § 28-3904. Earth Island's Complaint also alleged that, based on relevant consumer surveys, such representations were not only deceptive but also material to consumers, who care about the environmental impact of their purchases. (Compl. ¶ 29, A15.)

B. Prior Decisions in This Case

On July 16, 2021, Coca-Cola removed the case to federal court. (*See* A3.) Earth Island successfully moved to remand the case because Coca-Cola "failed to meet its burden in establishing the amount in controversy," needed for federal diversity jurisdiction. *Earth Island Inst. v. Coca-Cola Co.*, No. 21-1926 (PLF), 2022 U.S. Dist. LEXIS 53414, at *1 (D.D.C. Mar. 24, 2022). Specifically, the district court held that "the appropriate measure of the requested injunctive relief is not the amount that [Cola-Cola] must spend to comply with the injunction, but that amount divided by the number of members of the public on whose behalf [Earth Island] brings the action." *Id*. at 11-12. Coca-Cola made no "attempt to demonstrate compliance with [this] non-aggregation principle," and thus failed "to carry its burden, as the removing party, to demonstrate that this Court has jurisdiction." *Id*. at 12.

C. The Motion to Dismiss Decision

Judge Maurice A. Ross has held the case since it was reassigned following remand from the district court on April 14th, 2022. (*See Supra* § IV.B.) The lower court began its analysis by stating that the "standard for surviving dismissal in this matter would require a plausible basis that Defendant 'has engaged in unfair or deceptive trade practices under the CPPA.'" (MTD Order at 2, A190.) As a matter of law, dismissal of a CPPA claim is only appropriate where no "reasonable jury could conclude that the [challenged statements] would be relevant" or "misleading" "to a reasonable consumer." *Saucier v. Countrywide Home Loans*, 64 A.3d 428, 445 (D.C. 2013) (Reid, J.). Earth Island maintains that Coca-Cola's representations are not only relevant, but also would be misleading to a reasonable consumer.

The lower court first claimed that "Defendant's statements are aspirational in nature and, therefore, not a violation of the CPPA." (MTD Order at 3, A191.) The court stated that because many of Coca-Cola's statements were "general, aspirational corporate ethos," they are not "promises or measurable datapoints that would render the above statements true or false." (*Id.* at 4, A192.) The court, though, placed too much of an emphasis on the measurability of statements made by a defendant, thus ignoring the precedent that "whether a statement is likely to mislead a consumer is a question for the jury." *Earth Island Institute v. BlueTriton Brands*, No. 2021 CA 003027 B, 2022 D.C. Super. LEXIS 11 at *14-15 (D.C. Super. Ct.

June 7, 2022); *see also Mann v. Bahi,* 251 F. Supp. 3d 112, 126 (D.D.C. 2017) ("How the practice would be viewed by a reasonable consumer is generally a question for the jury"). Notably, in the case the court relies on, *Nat'l Consumers League v. Wal-Mart Stores, Inc.*, No. 2015 CA 007731 B, 2016 D.C. Super WL 4080541 (D. C. Super. Ct. July 22, 2016), the motion to dismiss was denied because, "the key inquiry of misrepresentation under the CPPA is the ***overall impression*** that the advertisements or statements can create on the public, not whether the statements made by the defendants are literally false." *Id.* at *5 (emphasis added.) Earth Island's complaint and opposition to the motion to dismiss both show that Coca-Cola's statements create an impression of a sustainable company, regardless of the veracity or aspirational nature of these statements.

The lower court also acknowledged that some of Coca-Cola's statements could not plausibly be labeled aspirational because they included specific and measurable promises. (MTD Order at 5-6, A193-94). The lower court, however, still found these measurable promises unactionable because, according to the court, "the statements also include the caveat that the goals are set significantly in the future." (*Id*. at 5, A193.) The promises at issue included Coca-Cola's representations that it will "help collect and recycle a bottle or can for every one we sell globally by ***2030***" (Compl. ¶ 45, A21.) and "Make 100% of our packaging recyclable globally by ***2025***." (*Id*. ¶ 51, A24). The latter promise, a mere two years away, is far from

"significantly in the future" especially given Earth Island's allegation that such a promise is infeasible due to the gross inadequacy of existing recycling infrastructure. (Compl. § II(b), A32-36.).

The lower court's second reason for denial was that "Defendant's statements are not tied to a 'good[] or service,'" (MTD Order at 7, A195) as required by the CPPA. According to the lower court, "the good at issue is the beverage sold by Coca-Cola" (*id.*) and the court indicated that it would be a stretch to include the bottle as part of Coca-Cola's goods and services—despite the fact that the bottle is an inherent and necessary part of what Coca-Cola offers to consumers. The lower court seemed to believe that Coca-Cola's statements about the sustainability and recyclability of its products were not actionable because they did not relate to the liquid contained within the bottle.

The lower court's third proffered reason for its denial of Earth Island's Complaint was that the claims at issue were not on the products. As the lower court stated, "of all of the statements cited by Plaintiff, not one of them is pictured on the bottle itself," with representations instead coming from "external sources." (*Id*.) In support of this reasoning, the court only cites an example of a case, *GMO Free USA v. Aldi Inc.*, No. 2021 CA 001694 B, 2022 D.C. Super WL 554486 (D.C. Super. Ct. Feb. 16, 2022), where the court denied a motion to dismiss because the defendant's representations appeared on the packaging. The lower court then took these facts

incorrectly to assume, by way of a clear logical fallacy, that if representations do not appear on the packaging, "they cannot be evaluated under CPAA," and must fail. (MTD Order at 8, A196.).

The lower court's final finding was that Earth Island's Complaint should be dismissed because "Defendant's statements cannot be cobbled together to allege one general misrepresentation." (*Id* at 3, A191.) The court rejected "the notion that a plaintiff can make a CPPA claim on the basis of a 'general impression' or a 'mosaic of representations.'" (*Id.* at 9, A197.) In so finding, the court held that "[n]othing [in] the CPPA prevents an entity from cultivating an image" (*id*. at 10, A198). The court, however, cited no precedent in support of this claim, ignoring the clear parallels between the array of sustainability claims found in *BlueTriton Brands*, where the motion to dismiss was denied, and those made by Coca-Cola.

Taking all these reasons together, the court concluded the "cited statements by Defendant are aspirational, limited, and vague such that, as a matter of law, such statements cannot be misleading." (*Id.* at 12, A200.)

V. STANDARD OF REVIEW

This Court reviews the trial court's order granting the Defendant's Motion to Dismiss *de novo*. *See Wetzel v. Capital City Real Estate, LLC,* 73 A.3d 1000, 1002 (D.C. 2013) (Ruiz, J.) ("The standard of review of an order granting a motion to dismiss is well settled. We review an order granting a motion to dismiss *de novo*.")

(quoting *Hillbroom v. PricewaterhouseCoopers LLP*, 17 A.3d 566, 573 (D.C. 2011) (Thompson, J.)). Further, on an appeal from a motion to dismiss, this Court "take[s] all factual allegations in the complaint as true." *Papageorge v. Zucker*, 169 A.3d 861, 863 (D.C. 2017) (Beckwith, J.) (citing *Solers, Inc. v. Doe*, 977 A.2d 941, 947-48 (D.C. 2009) (Fisher, J.)).

VI. SUMMARY OF ARGUMENT

Earth Island's claims against Coca-Cola are actionable under prevailing law. ***First***, the CPPA enables plaintiffs to bring suit for unfair and deceptive trade practices. The lower court's more onerous standard of requiring "measurable data points" is unsupported by the language of the statute or its regular application. ***Second***, the CPPA clearly defines "goods and services" as including "any and all parts of the economic output of society," D.C. Code § 28-3901(a)(7), and the lower court's contention that Coca-Cola's plastic bottles are excluded from this definition runs afoul of the statute's plain language. ***Third***, the lower court found that Coca-Cola's representations were unactionable because they were not on the bottle itself. To Earth Island's knowledge, no other court in this District has read such a requirement into the CPPA, and on the contrary, numerous cases have found representations across a company's other media actionable under the statute. ***Fourth***, the CPPA provides a cause of action for a company's deceptive acts and practices and "the key inquiry of misrepresentation under the CPPA is the overall impression

that the advertisements or statements can create on the public," *Nat'l Consumers League*, 2016 D.C. Super WL 4080541 at * 5. The lower court thus erred in finding that a company's creation of a deceptive "general impression" is unactionable under the CPPA.

VII. ARGUMENT

A. A CPPA action may rest upon the overall misleading impression cultivated by a corporation and does not require definitively "true" or "false" statements measured by datapoints.

Earth Island alleged that Coca-Cola makes definitive representations to consumers that it is a sustainable company taking significant actions to further grow and effectuate its sustainability. For example, Coca-Cola tells consumers that "[s]caling sustainability solutions and partnering with others is a focus of ours" (Compl. ¶ 33, A16), and because "[o]ur planet matters. We act in ways to create a more sustainable and better shared future" (*id.* ¶ 32, A15). Similarly, Coca-Cola claims that "We're using our leadership to achieve positive change in the world. . . ." (*id.* ¶ 35-36, A17-18) and "[b]usiness and sustainability are not separate stories for the Coca-Cola Company but different facets of the same story." (*Id.* ¶ 34, A17.) Earth Island alleged that such representations mislead reasonable consumers given Coca-Cola's continued immense contributions to global plastic waste. These allegations state a claim under both the words of the statute and prior decisions of the Superior Court. The lower court therefore erred in holding that Coca-Cola's

representations to consumers are unactionable because they are too aspirational and are not "promises or measurable datapoints that would render the above statements true or false." (MTD Order at 4, A192.).

1. The CPPA does not require plaintiffs to provide "measurable data points" that render the challenged statements definitively "true or false."

As an initial point, nowhere in the statute does the CPPA require that plaintiffs must demonstrate "promises or measurable datapoints that would render the above statements true or false" and such an exacting standard runs counter to both the words of the statute and clear legislative intent. The CPPA establishes a cause of action not only for literally false statements, but for unfair and deceptive trade practices, which includes "represent(ing) that goods or services have a source, sponsorship, approval, certification, accessories, characteristics, ingredients, uses, benefits, or quantities that they do not have; misrepresent[ing] as to a material fact which has a tendency to mislead; [or] us[ing] innuendo or ambiguity as to a material fact, which has a tendency to mislead." D.C. §§ 28–3904 (a)-(f). And, the CPPA explicitly states that engaging in such practices constitutes a violation of the statute "whether or not any consumer is in fact misled, deceived, or damaged thereby." D.C. Code § 28–3904.

Instead of plaintiffs needing to provide "measurable datapoints that would render the [challenged] statements true or false," it is well established that, under the

CPPA, "'a statement [that is] literally true' is nonetheless 'actionable if made to create a false impression.'" *Jefferson v. Collins*, 210 F. Supp. 3d 75, 92 (D.D.C. 2016) (internal citation omitted). Furthermore, the CPPA was explicitly designed to provide expansive recourse for deceptive advertising, and a decade ago, the D.C. Council added subsection § 28-3901(c) to state unambiguously that: "This chapter shall be construed and applied liberally to promote its purpose." Courts throughout the District have noted the importance of this expansive legislative intent in construing the statute. *See, e.g., Baylor v. Mitchell Rubenstein & Assocs., P.C.,* 857 F.3d 939, 947-48 (D.C. 2017) (Edwards, J.) ("One of the principal goals of the CPPA is to 'assure that a just mechanism exists to remedy all improper trade practices'") (internal citations omitted); *Curran v. Wells Fargo Bank, N.A.,* No. 20-cv-492 (CRC), 2021 U.S. Dist. LEXIS 252461, at *21 (D.D.C. Mar. 11, 2021) ("The CPPA is a comprehensive statute designed to provide procedures and remedies for a broad range of practices which injure consumers.") (quoting *Sundberg v. TTR Realty, LLC*, 109 A.3d 1123, 1129 (D.C. 2015) (Okun, J.)).

2. In finding that Coca-Cola's representations to consumers that it acts sustainably are merely aspirational, the lower court broke with all applicable precedent.

Coca-Cola's claims are ***not*** couched as mere aspirations. Coca-Cola is not telling consumers that perhaps, one day, it will act more sustainably or consider

sustainability at the same level it considers its business practices. Instead, Coca-Cola is claiming that, right now, it ***act[s]*** to create a more sustainable future and that, right now, business and sustainability are different facets of the same story for it as a company. The lower court's finding that such representations cannot, as a matter of law, mislead reasonable consumers is an outlier among decisions that interpret the legislative intent of the CPPA to provide expansive recourse for deceptive advertising. *See, e.g.*, *Organic Consumers Ass'n v. Smithfield Foods*, No. 2020 CA 2566 B, 2020 D.C. Super. LEXIS 28, at *15 (D.C. Super. Ct. Dec. 14, 2020) (declining to dismiss claim alleging this misleading statement: "We are committed to setting the industry standard for providing our customers with the highest quality and safest U.S. born and bred products possible"); *Organic Consumers Ass'n v. Ben & Jerry's Homemade, Inc*., No. 2018 CA 004850 B, 2019 D.C. Super. LEXIS 1, at *5-7 (D.C. Super. Ct. Jan. 7, 2019) (denying motion to dismiss claims regarding "vague commitments to environmentalism and sustainability" where the commitments, viewed with messages relating to the product "sourcing," were likely to influence consumer expectations); *BlueTriton Brands*, 2022 D.C. Super. LEXIS 11, at *3, 14-15 (denying defendant's motion to dismiss claims regarding "the sustainable and environmentally beneficial manufacturing practices" as only aspirational puffery given that "[w]hether a statement is likely to mislead a consumer is a question for the jury.").

These decisions accord with those of other districts, even though the CPPA is a more expansive statute. Courts around the country have found companies' representations regarding their alleged sustainability, which are designed to appeal to environmentally conscious consumers, are actionable under consumer protection law. *See, e.g., Rawson v. ALDI, Inc*., No. 21-cv-2811, 2022 U.S. Dist. LEXIS 88511, at *8 (N.D. Ill. May 17, 2022) (finding ALDI's sustainable label actionable under New York law because "[i]t attempts to connect its product to at least some environmental benefit. As a result, a reasonable inference can be made that ALDI's label suggests, at a minimum, that its product is made in such a way that minimizes negative impact to the environment, which can be actionable as something beyond puffery."); *White v. Kroger Co.,* No. 21-cv-08004-RS, 2022 U.S. Dist. LEXIS 54273, at *6-7 (N.D. Cal. Mar. 25, 2022) (finding "reef friendly" representations actionable under California consumer protection law.); *Lee v. Canada Goose US, Inc.*, 2021 U.S. Dist. LEXIS 121084 (S.D.N.Y. June 29, 2021) (consumer plausibly stated a claim that company's statement was misleading under the D.C.'s Consumer Protection Procedures Act because of purported commitment to ethical fur sourcing, despite obtaining fur from trappers who allegedly used inhumane leghold traps and snares).

The trial court decided to disregard all of this established precedent, and to go against the words and intent of the CPPA to "assure that a just mechanism exists to

remedy all improper trade practices," *Baylor,* 857 F.3d at 947-48, by finding that Coca-Cola's representations along these exact same lines were, as a matter of law, "aspirational and general statements. . . [that] do not successfully create a claim under the CPPA." (MTD Order at 5, A193.)[2] Such a finding improperly converts a question of fact into a question of law. *See, e.g., Mann*, 251 F. Supp. 3d at 126 ("How the [alleged unfair trade] practice would be viewed by a reasonable consumer is generally a question for the jury.") (citing *Saucier*, 64 A.3d at 445); *BlueTriton Brands*, 2022 D.C. Super. LEXIS 11 at *13 ("The 'determination of whether [a

[2] The lower court also took issue with the fact that Earth Island cites to Coca-Cola's failure to take action on its plastic pollution to support its allegation that Coca-Cola's statements about achieving a "circular economy" and being a sustainable business are misleading (MTD Order at 6, A194). The Court stated that "Plaintiff's argument highlights the flaw in its reasoning. Plaintiff is not challenging Defendant's statement or product, as it must under the CPPA, but its actions." (*Id*.) As an initial point, Earth Island is not challenging this lack of taking action. It is using this inaction to support its allegation that Coca-Cola's representations regarding recycling as a "solution" to its plastic pollution are misleading. Regardless, the Court's holding that only statements are actionable under the CPPA is not supported by the statute itself. The CPPA provides a cause of action for unfair and deceptive trade practices, which are defined as "any ***act*** which does or would create, alter, repair, furnish, make available, provide information about, or, directly or indirectly, solicit or offer for or effectuate, a sale, lease or transfer, of consumer goods or services." D.C. Code § 28-3901(6) (emphasis added); *see also, Ctr. for Inquiry, Inc. v Walmart, Inc.*, 283 A.3d 109, 118 (D.C. 2022) (Thompson, J.) ("Thus, 'acts,' not just words or statements, fall within the scope of the unfair or deceptive 'trade practice[s]' prohibited by the CPPA.").

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.'")[3]

Finally, in finding the challenged statements merely aspirational and therefore unactionable as a matter of law under the CPPA, the lower court relied heavily on *Nat'l Consumers League*, 2016 WL 4080541. (*See* MTD Order at 3-6, A191-94.) *Nat'l Consumers League* involved challenges to the corporate statements of retailers, Wal-Mart, The Children's Place and J.C. Penny, regarding their efforts to keep their supply chains free of child labor and in compliance with applicable laws and regulations—tellingly, this case did not involve any representations related to the goods themselves but instead to the supply chain that produced them. Furthermore,

[3] While there are cases where "it is sufficiently clear to be determined as a matter of law" that a statement is mere puffery, *E.M. v. Shady Grove Reprod. Sci. Ctr. P.C.,* 496 F. Supp. 3d 338, 409 (D.D.C. 2020) (citations omitted), this is not such a case. In fact, Earth Island's has offered consumer surveys which show that the sorts of statements that it has identified in this case are indeed material and potentially misleading to consumers. (*See* Compl. §III, A38-39, detailing consumer surveys regarding the materiality of sustainability representations to consumers.) Such evidence counsels against the lower court's decision to transform this question of fact into a question of law. *See e.g., Beyond Pesticides v. Sargento Foods Inc*., 2021 D.C. Super. LEXIS 11, *11 (D.C. Super. Ct. June 23, 2021) (denying defendant's motion to dismiss and finding that reasonable consumers could be misled, noting plaintiff's citations to customer surveys as evidence of such); *Sparf v. United States*, 156 U.S. 51, 78-79 (1895) ("it is the province of the court, and of the court alone, to determine all questions of law arising in the progress of a trial; and it is the province of the jury to pass upon the evidence and determine all contested questions of fact. The responsibility of deciding correctly as to the law rests solely with the court, and the responsibility of finding correctly the facts rests solely with the jury.") (internal citation omitted.)

the court did not deny the plaintiff's motion in full but instead struck ***some*** of the statements that included qualifying terms like "expect" and "goal." In contrast, as noted, Coca-Cola's representations contain no such qualification. Coca-Cola states that "we act in ways to create a more sustainable future" (Compl ¶ 32, A15) and "[w]e're using our leadership to achieve positive change in the world and build a more sustainable future for our communities and our planet." (*Id*. ¶ 35, A17.) In other words, Coca-Cola is not telling consumers that it is ***expecting*** to use its leadership to build a more sustainable future or has a ***goal*** to act for such an end, it is instead telling consumers that it is definitively acting to do so. Such statements are actionable under the expansive purview of the CPPA. *See, e.g., Rotunda v. Marriott Intl., Inc.*, 123 A.3d 980, 987 (D.C. 2015) (Farrell, J.) ("the CPPA itself makes actionable a wide array of false or misleading representations and omissions of material fact."); *Organic Consumers Ass'n v. Tyson Foods, Inc*., 2021 D.C. Super. LEXIS 7, *8-9 (D.C. Super. Ct. Mar. 31, 2021) (finding 'excellence in animal welfare' a "detailed and concrete enough [statement] to be actionable under the D.C. CPPA.")

3. Deceptive promises to consumers are actionable under the CPPA, even when tied to a future date.

While the lower court acknowledged that some of the claims identified by Earth Island could not be cast as general or aspirational given that they involved specific promises, (MTD Order at 5-6, A193-94), it still found that these specific

promises were unactionable because "the goals are set significantly in the future." (*Id*. at 5, A193.) Yet, Coca-Cola's goals are not decades away—they are years. Coca-Cola represents that it will "[m]ake 100% of our packaging recyclable globally by ***2025***. [And] [u]se at least 50% recycled material in our packaging by ***2030***." (Compl. ¶ 45, A21; ¶ 51, A24.) To achieve these goals on such an expedited timeline, Coca-Cola would need to be taking measurable steps right now—and it is not. Earth Island has offered evidence not only that Coca-Cola is unable to meet these goals, but also that it has failed to meet similar goals in the past. (*See id.* ¶¶ 98-104, A33; ¶¶ 123-130, A37-38, noting that in 2020, the Changing Markets Foundation classified Coca-Cola's previous commitment to recover 50% of its bottles and cans a "broken promise" because the company failed to reach this goal in the designated time). This reality shows that Coca-Cola has a history of making sustainability promises and failing to deliver on them, a history that is bound to repeat itself given that none of Coca-Cola's business plans or lobbying efforts would enable it to actually achieve its alleged recycling goals, especially given the inadequacy of recycling infrastructure. (*See id*. ¶¶ 104-120, A33-36; ¶ 127, A37, noting Coca-Cola's history of actively opposing bottle bills that could increase bottle collection and recycling rates and Coca-Cola's admittance that it has no plans to move away from single use plastics).

The lower court's finding that Coca-Cola's statements are unactionable merely because they are connected to a date in the future suggests to defendants that they are free to make whatever promises about sustainability as they would like, no matter how ludicrous or impracticable, as long as they attach a future date to their claim. Such a ruling would go against the letter and spirit of the CPPA, which has been designed to provide "maximum standing" for consumers and be interpreted broadly. *See Animal Legal Def. Fund v. Hormel Foods Corp.*, 258 A.3d 174, 184 (D.C. 2021) (Deahl, J.).

B. Coca-Cola's "goods and services" include its plastic bottles.

Earth Island's allegations involve representations about Coca-Cola's plastic pollution—the majority of which stems from its plastic bottles. These bottles are a necessary and inherent part of Coca-Cola's economic output and the lower court erred in finding that this part of Coca-Cola's supply chain is not constitutive of the company's "goods or services" under the CPPA. D.C. Code § 28-3901(a)(7).

The lower court seems to have interpreted the CPPA's stipulation of "goods or services" as seemingly, somehow, only applying to the liquid in Coca-Cola's products—not the bottle in which it is sold. The fact is, however, that the packaging is an integral and necessary part of the ultimate "good" that Coca-Cola is selling. In the motion to dismiss hearing, the Court seemed unable to accept this reality, stating that "even the bottle is not a product, the product is the—is the—what's in the

bottle." (MTD Transcript 9:10-11, A120.) Tellingly, even counsel for Defendant pushed back on this point: "Your Honor, we - we- we do not contend that the bottle in which the product is sold is not a product." (*Id.* 9:23-25, A120.) Despite this clarification from Coca-Cola, the Court remained unpersuaded and held that part of the reason for its dismissal of Earth Island's Complaint was that "the good at issue is the beverage sold by Coca-Cola." (MTD Order at 7, A195.)

This holding runs counter not only to the reality of what Coca-Cola is actually selling, but also the clear language of the CPPA, which defines goods and services broadly as "***any and all parts of the economic output of society, at any stage or related or necessary point in the economic process.***" D.C. Code § 28-3901(a)(7) (emphasis added); *see also Baylor,* 857 F.3d at 947-48 (D.C. 2017) ("One of the principal goals of the CPPA is to 'assure that a just mechanism exists to remedy all improper trade practices.'") (citing D.C. Code § 28-3901(b)(1)); *District of Columbia v. CashCall, Inc*., No. 2015 CA 006904 B, 2016 D.C. Super. LEXIS 8, *17 (D.C. Super. Ct. July 11 2016) ("the CPPA's definition of 'goods and services' includes 'any and all parts of the economic output of society, at any stage or related or necessary point in the economic process'"); *Jeter v. Cash*, No. 2013 CA 006943 R, 2014 D.C. Super. LEXIS 6, *17 (D.C. Super. Ct. Apr. 21, 2014) (same). To that end, it embraces both an expansive understanding of the conduct which constitutes a "'trade practice' [involving] consumer goods or services, which are 'any and all

parts of the economic output of society, at any stage or related or necessary point in the economic process'". *DeBerry v. First Govt. Mtge. & Invs. Corp.*, 743 A.2d 699, 702 (D.C. 1999) (Farrell, J.). As Coca-Cola does not dispute, the plastic bottles that hold its beverages are a key part of its products and are indisputably part of its "economic output." The lower court's finding to the contrary, and constrictive and unsupported interpretation of "goods and services," therefore cannot stand.

C. Advertising representations can violate the CPPA, even if not repeated on the product packaging.

Earth Island's Complaint identified misleading representations made by Coca-Cola across a variety of its advertising platforms, including its consumer-facing website, twitter feeds, and business and sustainability reports. The lower court found that Coca-Cola's misrepresentations across these various sources could not amount to a claim under the CPPA because they were not "on the bottle itself." (MTD Order at 7, A195.) Such a finding runs counter to established precedent and the statutory language of the CPPA.

The CPPA provides a cause of action for unfair trade practices, which is further defined as "any act which does or would create, alter, repair, furnish, make available, provide information about, or, directly or indirectly, solicit or offer for or effectuate, a sale, lease or transfer, of consumer goods or services." D.C. Code § 28-3901(6). According to the language of the statute, it is not only on-label representations that can constitute a deceptive trade practice, but rather anything—

acts or statements—that are designed to provide information about, or effectuate a sale of, the defendant's products. Here, Earth Island's Complaint has identified numerous representations that are designed to provide information about and solicit a sale of Coca-Cola's products. Earth Island's Complaint also supports the notion that representations about sustainability are material to consumers and shows that Coca-Cola makes such representations in order to appeal to these environmentally-minded consumers. (*See* Compl. § III, A38-39.)

Nowhere, to Earth Island's knowledge, has a court found that actionable misrepresentations under the CPPA are ***only*** those which appear on the product itself. To the contrary, numerous cases have found advertisements across websites and other media, and various other "acts" actionable. *See, e.g., Ctr. for Inquiry, Inc.*, 283 A.3d at 122 (denying defendants' motion to dismiss plaintiff's claims where misleading allegations were based on defendants' marketing and product placement: "These factual allegations plausibly support an inference that, through their product placement practices, Walmart and CVS mislead consumers into believing that homeopathic products are equivalent alternatives to FDA-approved over-the-counter drugs."); *Smithfield Foods, Inc.*, 2020 D.C. Super. LEXIS 28, at *2 (finding actionable statements by defendant across "its website, in YouTube videos, and on other media that its products are the 'safest' possible U.S. pork products."); *Tyson Foods, Inc*., 2021 D.C. Super. LEXIS 7 (finding that a company's statements broadly

touting—through sustainability reports, the company's website, and social media—sustainable and humane practices constituted actionable misrepresentations under the CPPA). Even one of the most prominent decisions upon which the lower court relied in its order dismissing Earth Island's Complaint, *Nat'l Consumers League*, involved statements across the defendants' websites and corporate statements—some of which the court held to be actionable under the CPPA: "this Court must deny the Motion to Dismiss because NCL stated a plausible claim of relief under the CPPA regarding statements by each retailer related to its efforts to audit its own suppliers." No. 2015 CA 007731 B, 2016 WL 4080541, at *1.

These findings in D.C. correspond with analogous precedent under various consumer protection laws around the country, which, even though they are ***less*** expansive than the CPPA, have still routinely found not on-product representations an actionable basis for plaintiff's claims. *See, e.g., Fanning v. FTC*, 821 F.3d 164 (1st Cir. 2016) (finding material misrepresentations on a website actionable); *Lemberg Law, LLC v. Egeneration Mktg., Inc.*, No. 3:18-cv-570, 2020 U.S. Dist. LEXIS 94879 (D. Conn. May 29, 2020) (denying defendant's motion to dismiss plaintiff's allegations regarding misrepresentations on a website); *23andMe, Inc. v. Ancestry.com DNA, LLC*, 356 F. Supp. 3d 889, 910 (N.D. Cal. 2018) (misrepresentations made on a website were actionable where the allegations stated that these misrepresentations misled consumers).

D. The totality of a corporation's representations are properly considered in determining whether the CPPA has been violated.

The lower court erred in finding that Earth Island's case should also be dismissed because "[n]othing in the CPPA prohibits an entity from cultivating an image" (MTD Order at 10, A198) and that a plaintiff cannot "make a CPPA claim on the basis of a 'general impression.'" In so finding, the lower court noted that "[t]he statute provides a cause of action for a misleading 'material fact,'" and that could not come from a "bungle of different statements taken from various documents at different times" (*Id*. at 9, A197). These findings constitute a departure from the language of the CPPA and its regular application, as well as a misunderstanding of the nature of the allegations in Earth Island's Complaint.

As an initial point, Coca-Cola's misleading depiction of itself as a sustainable company ***is*** the material fact at issue. The CPPA states that it shall be a violation of the Chapter to:

> (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) [u]se innuendo or ambiguity as to a material fact, which has a tendency to mislead.

D.C. Code § 28-3904(e), (f), (f-1).

"Under the CPPA, a fact is material if: (a) a reasonable man or woman would attach importance to its existence or nonexistence in determining his or her choice of action in the transaction in question. . . ." *Simon v. Hofgard*, 172 F. Supp. 3d 308,

316 (D.D.C. 2016) (citing *Saucier*, 64 A.3d at 442). The lower court apparently believed that Earth Island had to identify one material fact in a single source in order to state a claim. (MTD Order at 9, A197.) That constrictive reading runs counter to prevailing law.

Earth Island has shown that Coca-Cola's sustainability representations, which it utilizes in order to cultivate an image of itself as an environmentally friendly company to appeal to the growing constituency of consumers around the District who care about these issues, are "material facts" under the statute. Earth Island has included sources in the form of consumer surveys that reasonable consumers "attach importance" to the existence or nonexistence of Coca-Cola's sustainability in "determining [their] choice of action" in purchasing Coca-Cola's Products. (Compl. ¶¶ 132-134, A38, noting surveys demonstrating that consumers care deeply about environmental issues and are more likely to purchase products that they perceive as environmentally friendly).

And, Earth Island has shown that Coca-Cola is misrepresenting as to these facts, because its representations that it is a sustainable company, that it is able to achieve a "circular economy," and that recycling is a solution for its plastic pollution are unsupported by the reality of its practices. (*See* Compl. § II, A26-38.) The allegations in Earth Island's Complaint are therefore sufficient to evidence that Coca-Cola's misrepresentations are as to a material fact. *See Nat'l Consumers*

League, 2016 WL 4080541, at *5 ("If the statement is capable of influencing consumers' purchasing decisions, then it is actionable under consumer protection statutes because it is a material fact that has a tendency to mislead.") At the very least, it is clear that this question should go to the jury. *See, e.g., Frankeny v. Dist. Hosp. Partners, LP,* 225 A.3d 999, 1005 (D.C. 2020) (Blackburne-Rigsby, J.) ("[o]rdinarily materiality is a question for the factfinder."); *Mann*, 251 F. Supp. 3d at 126 ("whether [the] misrepresentations or omissions (if any) pertained to material facts and had a tendency to mislead are also questions for a jury.").[4]

In coming to its finding that Coca-Cola is not "prohibited from cultivating an image" of itself, even if such an image deceives consumers, and that plaintiffs must identify and target a singular "misleading fact" from a singular source, the lower court also rejected Earth Island's proposition that the misleading representations should be viewed in a holistic fashion. (MTD Order at 9, A197, "this Court rejects

[4] Notably, the lower court's other arguments on this point also abound in further improperly resolving factual questions as a matter of law. For example, the lower court stated that "[t]he complaint begs several questions: What is a sustainable company, or even an environmental advocacy group? Who defines the terms? What are consumer expectations? There is no precedent for such questions, in part because the law does not regulate expectations." (MTD Order at 10, A198). Earth Island agrees that the law does not regulate such expectations, and for that very reason, these factual questions should go to a jury. *See Saucier*, 64 A.3d at 445 ("the actual determination of whether the notice would be both material and misleading with respect to the plaintiffs who did not receive it, or who questioned whether they received it, is a question of fact for the jury and not a question of law for the court.") (internal citation omitted).

the notion that a plaintiff can make a CPPA claim on the basis of a 'general impression' or a 'mosaic of representations.'") Such a holding does not square with existing principles of consumer protection law. *See, e.g., Lemberg Law, LLC*, 2020 U.S. Dist. LEXIS 94879, at *23 ("courts should 'view each allegedly misleading statement in light of its context on the product label or advertisement as a whole;' the 'entire mosaic' is 'viewed rather than each tile separately.'") (citation omitted); *Beer v. Bennett*, 993 A.2d 765, 768 (N.H. 2010) ("[E]ven if the individual representations could be read as literally true, the advertisement could still violate the [consumer protection act] if it created an overall misleading impression.")).

VIII. CONCLUSION

Earth Island Institute has stated an actionable claim under the CPPA against Coca-Cola's misleading sustainability representations. Earth Island thus respectfully requests that the Court reverse the lower court's granting of Coca-Cola's motion to dismiss.

Dated: March 14, 2023

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was filed electronically on March 14, 2023. Notice of this filing will be sent to the following parties by operation of the Court's electronic filing system to all counsel of record:

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Pursuant to Administrative Order No. M-274-21 (filed June 17, 2021), this certificate must be filed in conjunction with all briefs submitted in all cases designated with a "CV" docketing number to include Civil I, Collections, Contracts, General Civil, Landlord and Tenant, Liens, Malpractice, Merit Personnel, Other Civil, Property, Real Property, Torts and Vehicle Cases.

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

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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.

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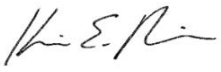

Signature

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