SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
CIVIL DIVISION

ENVIRONMENTAL WORKING GROUP	:	
	:	**Case No. 2024 CAB 5935**
Plaintiff,	:	
v.	:	**Judge Julie H. Becker**
	:	
TYSON FOODS, INC.	:	
Defendant.	:	

ORDER DENYING MOTION TO DISMISS

Pending before the Court is the Defendant's motion to dismiss, filed November 12, 2024. The Plaintiff filed an opposition on December 13, 2024. The Defendant filed a reply on January 10, 2025. For the reasons set forth below, the Defendant's motion to dismiss is denied.

BACKGROUND

Plaintiff Environmental Working Group ("EWG") filed a Complaint against Defendant Tyson Foods, Inc. ("Tyson"), on September 18, 2024, alleging two counts of unfair and deceptive trade practices under the D.C. Consumer Protection Procedures Act ("CPPA"), D.C. Code § 28-3901, *et seq*. First, EWG asserts Tyson made false or misleading statements to consumers in advertising its commitment to achieving net-zero greenhouse gas emissions by 2050. EWG states this promise "is not backed up by action," and is neither realistic nor achievable given Tyson's current practices. Compl. ¶ 86. Second, EWG claims that Tyson made false or misleading statements by advertising a "climate-smart beef" program that "misleads District of Columbia consumers into believing that [its] beef products are a smart choice for the climate." *Id*. ¶ 112.

Tyson filed the instant motion on November 12, 2024. It argues the case should be dismissed because the Court has no personal jurisdiction over the company and because EWG has failed to state a claim on which relief can be granted. Tyson also states that EWG's claims are barred by the First Amendment.

DISCUSSION

A. Specific Personal Jurisdiction

A motion to dismiss for lack of personal jurisdiction under Rule 12(b)(2) "tests not whether the plaintiff will prevail on the merits, but instead whether or not the court may properly exercise jurisdiction over the movants." *Kundrat v. D.C*, 106 F. Supp. 2d 1, 4 (D.D.C. 2000). The Plaintiff bears the burden of proving that a court has personal jurisdiction over a particular Defendant. *See Harris v. Omelon*, 985 A.2d 1103, 1105 (D.C. 2009).

Tyson argues that it is not subject to specific personal jurisdiction in the District of Columbia. The Court disagrees. For a District of Columbia court to exercise specific personal jurisdiction over a particular nonresident Defendant, the Plaintiff must satisfy a two-part test: (1) personal jurisdiction must be authorized by the District of Columbia's long-arm statute; and (2) "the exercise of personal jurisdiction must comport with the requirements of due process." *See, e.g., Companhia Brasileira Carbureto De Calcio v. Applied Indus. Materials Corp.*, 35 A.3d 1127, 1130 (D.C. 2012); D.C. Code § 13-423(a).

Because the District's "long-arm statute is coextensive with the reach of personal jurisdiction permitted under the Due Process Clause[,]" the Court's jurisdictional analysis focuses only on the latter requirement. *Harris*, 985 A.2d at 1105 n.1 . When a forum seeks specific personal jurisdiction over an out-of-state Defendant, the requirements of the Due Process Clause are satisfied if the defendant "purposefully directed" its activities to the forum and the lawsuit stems from alleged injuries that "arise out of or relate to" those activities. *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 472 (1985); *see also Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 779–80 (1984). A court's assertion of specific personal jurisdiction must also "comport with 'fair

play and substantial justice.'" *Burger King Corp.*, 471 U.S. at 476 (quoting *International Shoe Co. v. Washington*, 326 U.S. 310, 320 (1945)).

In other words, for specific jurisdiction to attach, there must be "minimum contacts" between the Defendant and the forum state wherein the Defendant has performed "some act by which it purposefully avails itself of the privilege of conducting activities within the forum state." *Ford Motor Co. v. Mont. Eighth Judicial Dist. Court*, 592 U.S. 351, 359 (2021) (quotation and internal quotation marks omitted). Those contacts must be voluntary and deliberate – not random, fortuitous, tenuous, or accidental – such that the Defendant "'should reasonably anticipate being haled into court here.'" *See Daley v. Alpha Kappa Alpha Sorority, Inc.*, 26 A.3d 723, 727-28 (quoting *Gonzalez v. Internacional de Elevadores, S.A.*, 891 A.2d 227, 234 (D.C. 2006)). The Plaintiff's claims must then "arise out of or relate to" the Defendant's contacts with the forum. *Ford*, 592 U.S. at 359 (citing *Bristol-Myers Squibb Co. v. Superior Court*, 528 US 255, 272 (2017)). "Or put just a bit differently, 'there must be an affiliation between the forum and the underlying controversy, principally, [an] activity or an occurrence that takes place in the forum State and is therefore subject to the State's regulation.'" *Id*.

The allegations in the complaint reflect Tyson's substantial contacts with the District. Tyson "regularly conducts business within the District" by "market[ing] and sell[ing] its products" in the city. Compl. ¶ 25. Tyson "maintains websites through which [it] directly market[s its] products to District of Columbia consumers," and individuals "can also purchase Tyson brands directly from retail outlets in the District, including Safeway, Harris Teeter, Giant, Target, Family Dollar, Streets Market, and Walgreens." *Id*. ¶ 26. EWG states that "Tyson has directed its 'net-zero' and 'climate-smart beef' representations to District of Columbia consumers through its websites, sustainability reports, and direct marketing," *id*. ¶ 27, and "in particular those

[consumers] who care deeply about environmental issues," *id*. ¶ 14. Tyson has also published online articles about its climate-smart beef in various media outlets, including the Washington Post. *See id*. ¶ 105 n. 1. EWG further notes that Tyson is registered as a foreign entity doing business in the District. *See* Pl. Opp. Mot. Dismiss at 3 (Dec. 13, 2024); *cf. District of Columbia v. Facebook, Inc.*, 2019 D.C. Super. LEXIS 72, at *28 (D.C. Super. Ct. 2019) (finding specific personal jurisdiction based on a company registering as a foreign business entity in D.C., generating revenue from D.C. consumers, and operating an office in D.C.).

Tyson's counterarguments underplay the extent of its activities within the District. This is not a "website-only" case in which a Defendant's only contact with a forum is having a generally accessible website that is also accessible within the forum state. *See* Def.'s Mot. Dismiss Mem. at 4-6 (Nov. 12, 2024). As discussed, Tyson's website is not its only contact with D.C. Tyson sells and distributes its products in brick-and-mortar stores throughout the city and maintains websites through which it markets its products directly to District consumers, demonstrating that Tyson has "purposefully avail[ed] itself of the privilege of conducting activities" in the District. *Ford,* 592 U.S. at 359 (citation and internal quotation marks omitted). These contacts also distinguish the "stream of commerce" cases that Tyson cites, in which a Defendant's contacts with a forum result from the independent actions of a distributor rather than the Defendant's own efforts. *See* Def.'s Mot. Dismiss Mem. at 7 (citing *Asahi Metal Indus. Co. v. Superior Ct. of California, Solano Cnty.*, 480 U.S. 101, 112 (1987); *Pinkett v. Dr. Leonard's Healthcare Corp.*, 2018 WL 5464793, at *4-5 (D.D.C. 2018))

The critical question for specific jurisdiction, therefore, becomes whether EWG's claims "arise out of or relate to" Tyson's contacts with D.C. *Ford*, 592 U.S. at 359 (citation and internal quotation marks omitted). On this point, the Supreme Court has "never framed the specific

jurisdiction inquiry as . . . requiring . . . proof that the [P]laintiff's claim came about because of the [D]efendant's in-state conduct." *Id*. at 362 (citing *Bristol-Myers*, 528 U.S. at 262). Rather, the Plaintiff's claims need only bear "some relationship[]" or "connection" to the Defendant's activities in the forum. *Id*. at 361-62. And while the phrase "relate to" does "incorporate[] real limits" to specific jurisdiction, *id*. at 362, it "is not a particularly high threshold" for a Plaintiff to meet, *I Mark Mktg. Servs., LLC v. Geoplast S.p.A.*, 753 F. Supp. 2d 141, 157 (D.D.C. 2010). Specific jurisdiction requires only "some discernible relationship" between the Plaintiff's claims and the Defendant's contacts. *Shoppers Food Warehouse v. Moreno*, 746 A.2d 320, 336 (D.C. 2000) (citation and internal quotation marks omitted).

Here, EWG's two CPPA claims allege that Tyson has misled D.C. consumers with false advertisements concerning its commitment to achieving net-zero greenhouse gas emissions and Climate-Smart Beef Program. According to the complaint, Tyson has established contacts with the District by marketing directly to consumers, selling its products to consumers through affiliated websites, placing online advertisements in the Washington Post, distributing its products to major retailers throughout the city, and publishing press reports and other online content accessible to D.C. consumers. Because EWG's claims and Tyson's activities in the District both involve marketing and the solicitation of potential customers, the Court views EWG's claims as bearing "some discernible relationship" with Tyson's contacts with D.C. *Id*.[1]

[1] Tyson compares the instant case to *Hasson v. FullStory, Inc*., in which the Third Circuit made the "close call" that a Plaintiff's wiretapping claims against Papa Johns were not sufficiently related to its in-state pizza-related activities. 114 F.4th 181, 193 (3d Cir. 2024). However, the wiretapping in *Hasson* occurred through a website that Papa Johns did not specifically advertise within the forum, even though it generally marketed and sold pizza in the state. *See id*. at 194. Here, EWG states that Tyson targeted its allegedly deceptive net-zero and climate-smart beef representations at D.C. consumers through direct marketing and by placing those advertisements online in the Washington Post. EWG also alleges that those marketing campaigns affect how D.C. consumers view its activities in the city. As a result, there is a much stronger "affiliation between

As Tyson notes, EWG has "not allege[d] that *any* products carrying the allegedly misleading statements are sold in the District." Def.'s Mot. Dismiss Mem. at 9; *see also* Def.'s Reply at 4. However, specific personal jurisdiction does not "requir[e] . . . proof that the [P]laintiff's claim came about because of the [D]efendant's in-state conduct." *Ford,* 592 U.S. at 362. And the Court disagrees with Tyson's assertion that its Climate-Smart Beef Program and net-zero advertising campaign are not relevant to its District-based marketing and sales activities. *See* Def.'s Mot. Dismiss Mem. at 9 n. 6. Tyson's statements concerning its climate-smart beef and greenhouse gas emissions relate to *all* of its products – including the beef that Tyson sells and markets in D.C. – because EWG alleges that those representations give D.C. residents a false or misleading impression of the goods that Tyson sells, distributes, and markets in the District. *See Animal Outlook v. Cooke Aquaculture, Inc.*, 2021 D.C. Super. LEXIS 12, at *31 (D.C. Super. Ct. 2021) (asserting personal jurisdiction because a claim "based on misrepresentation under the CPPA . . . ar[o]se[] from [the] Defendants transacting business in the District of Columbia" (citation and internal quotation marks omitted)).

For these reasons, the Court finds it fair to exercise specific jurisdiction over Tyson. *See Shoppers Food Warehouse*, 746 A.2d at 336 (explaining that assertions of personal jurisdiction must "not offend 'traditional notions of fair play and substantial justice'" (quotation omitted)). Given Tyson's extensive sales and marketing within the District, as well as the relation between those contacts and EWG's CPPA claims, Tyson could "reasonably anticipate being haled into court in the District of Columbia." *Id*.

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the forum and the underlying controversy" in this case than in *Hasson*. *Ford,* 592 U.S. at 359. (internal quotation marks omitted). *Hasson* is also not binding upon this Court.

B. Failure to State a Claim

Having established that it has specific jurisdiction over Tyson, the Court turns to the merits of EWG's Complaint. A complaint is subject to dismissal under Rule 12(b)(6) if it does not satisfy the requirement, set forth in Rule 8(a)(2), that it contains "a short and plain statement of the claim showing that the pleader is entitled to relief." *See Potomac Dev. Corp. v. District of Columbia*, 28 A.3d 531, 543 (D.C. 2011) (citation and internal quotation marks omitted)). In determining whether a complaint sufficiently sets forth a claim, the Court must construe the complaint in the light most favorable to the Plaintiff and must take the facts alleged in the complaint as true. *Casco Marina Dev., L.L.C., v. District of Columbia Redevelopment Land Agency*, 834 A.2d 77, 81 (D.C. 2003). However, "the tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions. Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009); *see also Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007) ("a plaintiff's obligation to provide the 'grounds' of his 'entitlement to relief' requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do."). Rather, "[t]o survive a motion to dismiss [under Rule 12 (b)(6)], a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Potomac Dev. Corp.*, 28 A.3d 531, 544 (D.C. 2011) (quoting *Ashcroft*, 556 U.S. at 678); *see also Bell Atl. Corp.*, 550 U.S. at 555 ("Factual allegations must be enough to raise a right to relief above the speculative level.").

"[T]he CPPA does not require much by way of pleading to state a claim." *McMullen v. Synchrony Bank*, 164 F. Supp. 3d 77, 94 (D.D.C. 2016). "To state a misrepresentation claim under the CPPA," a Plaintiff must "plausibly allege that the merchant 'misrepresented' or 'failed to state' a material fact related to its good or services." *Earth Island Inst. v. Coca-Cola Co.*, 321 A.3d 654,

664 (D.C. 2024) (citation and internal quotation marks omitted). The misrepresentation may be "affirmative or implied," so long as "a reasonable consumer would deem [it] misleading." *McMullen,* 164 F. Supp. 3d at 95 (quoting *Saucier v. Countrywide Home Loans,* 64 A.3d 428, 442-43 (D.C. 2013) (internal quotation marks omitted)).

Earth Island applies squarely here. In that case, a Plaintiff brought a CPPA misrepresentation suit against Coca-Cola for portraying itself as "working toward environmental sustainability" in statements on its website and Twitter (now "X") account. *Earth Island,* 321 A.3d at 659. Some statements expressed a general commitment to sustainability, while others set more specific environmental goals for the company. For example, Coca-Cola stated that it wanted to "make 100% of [its] packaging recyclable globally by 2025 [and u]se at least 50% recycled material in [its] packaging by 2030." *Id.* at 660. The Plaintiff claimed that these statements were actionable misrepresentations, arguing that as long as Coca-Cola continued to use single-use plastics, "it is not in any meaningful way working to be more sustainable, so . . . its statements are inconsistent with its practices." *Id*. at 661.

The Court of Appeals agreed and found that the Plaintiff had stated a plausible claim for relief under the CPPA. It explained that, according to the Plaintiff, "Coca-Cola's actions in mass producing single-use plastics, with no intention of stopping or significantly curtailing that production . . . makes it so fundamentally unsustainable that when it touts its efforts to marginally offset the very harms it inflicts on the environment, that serves only to distract consumers from its environmental evils." *Id*. at 664. Promoting its sustainability efforts, without mentioning the vast harms its practices inflict on the environment, "deceives consumers into believing that Coca-Cola is an environmental steward, where it is in fact an environmental scourge." *Id*. at 665. The Court found that Coca-Cola's statements plausibly misled "consumers about the extent to which

recycling . . . offset[s] the environmental impacts of its mass-scale plastic production," and misrepresented that "it [was] serious about hitting the concrete benchmarks it ha[d] announced for itself, when in fact its practices show[ed] no intention of doing so." *Id.*

With *Earth Island* in mind, the Court now turns to each of EWG's misrepresentation claims.

i. Count One: Net-Zero Emissions by 2050

First, EWG alleges that Tyson's representations that it is working to achieve net-zero greenhouse gas emissions by 2050 are false or misleading to consumers because Tyson is taking no meaningful steps to achieve that goal. For example, EWG states Tyson does not maintain accurate information concerning its emissions and "cannot credibly have a plan to cancel out emissions the magnitude of which it does not know." Compl. ¶ 77. It alleges that Tyson's emissions calculations are purposefully inaccurate and exclude metrics from land use change, a major source of its emissions. *Id.* ¶ 80. Tyson allegedly has no plan "for significantly reducing its enteric and manure management methane emissions, even though these are calculated to comprise over half of the company's total [greenhouse gas] emissions." *Id.* ¶ 90 (emphasis removed). There is also no "known way for Tyson to continue producing meat at its current and projected rates without relying on deforested land." *Id.* ¶ 92. And EWG claims that, despite Tysons' representations concerning its reduction target, it has admitted that its net-zero goal is "not, in fact, 'science-based.'" *Id.* ¶ 82.

Indeed, EWG does not just describe Tyson's net-zero target as unrealistic. It also alleges that Tyson's reduction goal is impossible. EWG states that "there are no agricultural practices today that eliminate nitrous oxide emissions from industrial-scale feed production. Thus, even full adoption of 'climate smart' practices will not result in significant reductions of [greenhouse gas]

emissions." *Id*. ¶ 88. Given the scale of Tyson's emissions, there also is no carbon offset structure that would allow it to achieve net-zero by 2050. *Id*. ¶¶ 98-100. EWG further alleges that there is no "existing or anticipated technology" that would enable Tyson to reach this goal either. *Id*. ¶¶ 48, 99.

According to EWG, Tyson's beef production has an "enormous" impact on the environment, emitting "far greater emissions than all other major food products." *Id*. ¶¶ 52-53. Tyson's animal agriculture practices "are also one of the largest contributors" of greenhouse gas emissions. *Id*. ¶ 47. Furthermore, its cattle grazing and production of animal feed "use vast amounts of land . . . that could otherwise sequester and store" carbon emissions. *Id*. ¶ 49

Like the claims in *Earth Island*, these allegations are sufficient to support a claim that Tyson's net-zero emissions campaign is false or misleading to environmentally conscious consumers. EWG alleges that the scale of greenhouse gases being emitted from Tyson's food production, animal agriculture practices, and land use are "so fundamentally unsustainable that when it touts its efforts to marginally offset the very harms it inflicts on the environment, that serves only to distract customers from its environmental evils." *Earth Island*, 321 A.3d at 664. And the reality that EWG alleges – in which it is impossible for Tyson to meet its net-zero goal – means that Tyson cannot be realistically "serious about hitting the concrete benchmark[] it ha[d] announced for itself." *Id*. at 665.

Tyson takes issue with this conclusion, arguing that it has taken several concrete actions to reduce its climate impact. *See* Def.'s Mot. Dismiss Mem. at 12-14. For example, it has attempted to gather emissions data related to its net-zero goal, launched pilot projects related to sustainable land stewardship, and invested $42 million into adopting climate-smart practices. *See id*. at 12.

Tyson also estimates that it will invest $2.9 billion into sustainability-related research and development between now and 2050. *See id*.

But that is not the point. EWG does not allege that Tyson is doing *nothing* to mitigate its environmental impact. Rather, EWG claims that there is a fundamental mismatch between the allegedly minimal steps Tyson is taking and the actions that would be necessary to achieve its net-zero goal. Thus, EWG argues that Tyson's net-zero representations are misleading because D.C. consumers do not know the size of the gap between what Tyson is doing and what it would need to do to achieve its advertised objective.

This vast discrepancy between Tyson's actions and its stated intentions parallels the facts in *Earth Island*. There, the Plaintiff never claimed that Coca-Cola was doing nothing to achieve its advertised goals of being more sustainable, making 100 percent of its packaging recyclable by 2025, and using at least 50 percent recycled material in its packaging by 2030. Instead, the Plaintiff claimed that Coca-Cola's efforts would never be sufficient to offset the environmental impacts of its plastic production, and that those efforts were marginal in comparison to the harm it inflicted on the environment. The Court of Appeals found that these were plausibly actionable misrepresentations. So too here. EWG claims Tyson "has not, to date, taken any serious steps toward putting [its net-zero] goal[] within reach, whereas a reasonable consumer would think [Tyson] was taking the steps necessary to achieve its stated goals" based on its net-zero representations. *Earth Island*, 321 A.3d at 665.

Tyson attempts to distinguish *Earth Island* on the time horizon for its aspirations, pointing out that Coca-Cola announced a target date of 2025, whereas Tyson does not propose reaching net-zero emissions until 2050. This argument is not persuasive. In determining whether Tyson's net-zero representations are misleading, the question is not how soon Tyson proposes to

accomplish its goal, but whether the company is taking realistic steps to meet whatever benchmark – 2025, 2050, or some other date – it has advertised to consumers.

Tyson also argues that its net-zero statements are not misleading because even if the technology to meet its goals does not exist today, technology may advance sufficiently in the next 25 years for Tyson to achieve its objective. But EWG states that neither current nor foreseeable technology will allow Tyson to be net-zero by 2050, and the Court must take its allegations as true at the motion-to-dismiss stage. *See* Compl. ¶¶ 48, 99. Of course, it is possible that some unforeseeable technology will come about and enable Tyson to meet its stated goal. However, EWG has plausibly alleged that a reasonable consumer, when "hearing a 'Net Zero by 2050 pledge[, would] expect such a promise to be backed up by a realistic plan . . . with current technology." *Id*. ¶102-03. Thus, it is plausible that "omitting the fact that it is simply impossible with current technology and offsets to sufficiently eliminate the enormous scope of its emissions" would render Tyson's net-zero pledge to be false, misleading, or unlawful under the CPPA. *Id*. ¶103.

ii. Count Two: Climate-Smart Beef

EWG's second misrepresentation claim targets Tyson's Climate-Smart Beef Program, "through which . . . it w[ould] deploy, scale, and incentivize 'climate-smart' practices 'from cradle-to-gate,' with the stated goal of achieving a 30 percent reduction of [greenhouse gas] emissions in its beef production by 2030." *Id*. ¶ 104. EWG suggests that Tyson uses the term "climate-smart beef" to market a specific product known as "Brazen Beef," as well as describe its entire beef production. *See id*. ¶¶ 104-05. Tyson makes these representations to consumers because it "knows the value of marketing its products as . . . climate-smart" and "recognizes that convincing customers of its sustainability is necessary to maintain . . . demand for its products. *Id*. ¶¶ 62, 66.

For reasons similar to those discussed above, the Court finds EWG has stated a plausible CPPA claim against Tyson regarding its Climate-Smart Beef Program. "Tyson nowhere defines what exactly 'climate-smart beef' is . . . [a]nd by all indications, Tyson has no current ability to offer consumers 'climate-smart' beef." *Id.* ¶ 106. It "has not released any data to show that any particular product meets a 'climate-smart beef' standard . . . or that any practices adopted by ranchers or feedlot owners . . . have reduced [greenhouse gas] emissions from Tyson's supply chain." *Id.* ¶ 107. Tyson also sources some of its climate-smart beef from an industrial feedlot that "is one of the country's largest feeding operations . . . which no reasonable consumer would view as climate-smart." *Id.* ¶ 108. These allegations are sufficient to show that Tyson's climate-smart beef representations might "give consumers the misleading impression that available Tyson beef products are 'climate-smart.'" *Id.* ¶ 110.

Tyson contests this conclusion on three grounds. First, Tyson argues that its representations about climate-smart beef do not relate to any products that are actually sold in D.C. *See* Def.'s Mot. Dismiss Mem. at 14-15. While it appears that some of Tyson's climate-smart beef statements do pertain to a specific "Brazen Beef" product that is not yet available for purchase, other materials suggest that Tyson is marketing a climate-smart approach to its beef production as a whole. Tyson has connected its Climate-Smart Beef Program to its goal to reduce its total beef-related emissions by 30 percent. *See* Compl. ¶ 105a. It has also labeled the initiative as a "first-of-its kind" effort to "build[] a more sustainable beef industry." *Id.* ¶ 105b. And EWG alleges that Tyson's climate-smart beef representations mislead consumers into believing that *all* of Tyson's beef products are a smart choice for the climate, including those sold in the District. *See id.* ¶ 112.

Earth Island forecloses Tyson's first argument as well. There, it was not necessary for Coca-Cola's alleged misrepresentations to be printed on individual bottles sold in D.C. Rather, the Court of Appeals found that publishing statements about those goods on the company's website and social media accounts was sufficient to mislead consumers about the environmental impacts of the company's goods and services as whole. *See Earth Island*, 321 A.3d at 670-72.

Second, Tyson argues that EWG is taking its climate-smart beef statements out of context. Tyson states that "'climate-smart' is a term of art used throughout the agricultural industry. . . to describe agricultural and supply chain practices aimed at reducing – although not eliminating – climate impacts." Def.'s Mot. Dismiss Mem. at 15. Even if that is true, that does not mean "climate-smart" is not also a marketing label for Tyson, which is what EWG alleges it to be. As discussed, Tyson's representations concerning its first-of-its-kind Climate Smart Beef Program suggest it is not referencing a generalized industry term, but rather, Tyson's specific approach to producing beef in an environmentally friendly fashion.

Third, Tyson asserts that EWG has not identified any statement made in relation to its Climate-Smart Beef Program that is actually misleading or false. But what EWG claims is that the term "climate-smart" itself is misleading. As noted above, EWG's Complaint contains multiple reasons why the term might mislead a reasonable consumer into thinking that Tyson's beef products are sustainable. According to the Plaintiff, Tyson has released no data to back up its "climate-smart" claims, and still uses an industrial feedlot in its beef production that is alleged to be extremely damaging to the environment. Additionally, even if Tyson were reducing its beef emissions by 10 or 30 percent as advertised, that would only constitute a drop in the bucket of environmental harm that Tyson is alleged to cause. *Cf. Earth Island*, 321 A.3d at 664 (characterizing Coca-Cola's efforts as "marginal[]" in comparison to "the very harms it inflicts on

the environment"). For these reasons, the Court finds that EWG has stated a plausible CPPA misrepresentation claim regarding Tyson's Climate-Smart Beef Program.

C. First Amendment

Lastly, Tyson argues that EWG's claims are barred by the First Amendment. However, the Court of Appeals explained in *Earth Island* that "[t]he First Amendment does not prohibit the State from insuring that the stream of commercial information flow[s] cleanly as well as freely. The speech that [EWG] targets is [Tyson's] commercial speech . . . [as] it is alleged that [Tyson] cultivates a sustainability narrative . . . to sell products. Because [EWG] plausibly alleges that [Tyson's] commercial speech would mislead reasonable consumers, [Tyson's] First Amendment claim is a non-starter." *Id*. at 672 (internal quotations, citations, and quotation marks omitted).

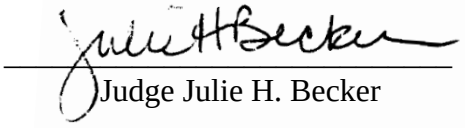
Tyson makes no attempt to distinguish the present case from *Earth Island*, arguing instead that the "ruling departs from controlling Supreme Court precedent." Def.'s Mot. Dismiss Mem. at 16. This is not correct. The Constitution "accords less protection to commercial speech than to other . . . safeguarded forms of expression." *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 64-65 (1983). Statements are commercial speech if their "core notion . . . propose[s] a commercial transaction." *Id*. at 66 (citations and internal quotation marks omitted). "Communications can 'constitute commercial speech notwithstanding the fact that they contain discussions of important public issues.'" *Bd. of Trs. v. Fox*, 492 U.S. 469, 475 (1989) (quoting *Central Hudson Gas & Electric Corp. v. Public Service Comm'n of New York*, 447 U.S. 557, 563 n.5 (1980)). Commercial speech that is "misleading . . . may be prohibited entirely." *Peel v. Atty. Registration & Disciplinary Comm'n*, 496 U.S. 91, 100 (1990).

Tyson's net-zero and climate-smart beef statements are clearly commercial speech, as EWG alleges that Tyson launched these campaigns to generate more sales from "consumers [who]

care about the climate and environmental impact of the products they purchase." Compl. ¶ 56. Thus, the First Amendment does not bar EWG's claims. But if "[EWG] is ultimately successful in this suit, the [C]ourt w[ill] take [great] care in fashioning any relief so as not to intrude on [Tyson's] First Amendment rights." *Earth Island*, 321 A.3d at 673.

CONCLUSION

For the foregoing reasons, it is this 3rd day of February, 2025, hereby **ORDERED** that the Defendant's motion to dismiss, filed November 12, 2024, is **DENIED**.



Judge Julie H. Becker

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