

**SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
CIVIL DIVISION**

GMO FREE USA d/b/a TOXIN FREE USA,	:	Case No. 2021 CA 001694 B
	:	
<i>Plaintiff,</i>	:	
	:	
v.	:	
	:	Judge Heidi M. Pasichow
	:	
ALDI INC.,	:	
	:	
<i>Defendant.</i>	:	

**ORDER (1) GRANTING THIRD PARTY MOTION FOR LEAVE TO FILE *AMICUS* BRIEF,
(2) DENYING DEFENDANT’S MOTION TO DISMISS PLAINTIFF’S COMPLAINT, AND
(3) GRANTING MOTION FOR ADMISSION *PRO HAC VICE***

This matter is before the court based upon (1) Non-Party Global Seafood Alliance’s Motion for Leave to File *Amicus* Brief, filed January 28, 2022; (2) Defendant’s Motion to Dismiss Plaintiff’s Complaint, filed on January 21, 2022; and (3) Non-Party Global Seafood Alliance’s Motion for Admission *Pro Hac Vice*, filed on February 3, 2022. All parties are represented by counsel.

I. Factual History

Plaintiff GMO Free USA d/b/a Toxin Free USA brought this action against Defendant Aldi Inc. alleging a violation of the District of Columbia Consumer Protection Procedures Act (“CPPA”). Plaintiff contends that Aldi has misled District of Columbia consumers by using deceptive words on the labels of their Atlantic salmon. Plaintiff brought this action on behalf of District of Columbia consumers in its capacity as a public interest organization, alleging that Aldi’s use of the word “sustainable” on Atlantic salmon packaging leads consumers to believe that the salmon was farmed in accordance with high environmental and animal welfare standards, Compl. at ¶ 21, but in reality, the salmon are sourced unsustainably. Compl. at ¶ 28.

II. Procedural History

On May 21, 2021, Plaintiff filed their Complaint for Deceit against Aldi. On June 25, 2021, Defendant filed a Notice of Appearance of Counsel as well as an Agreed Motion for Extension of Time to file an Answer to Plaintiff’s Complaint, and filed a Second Agreed Motion for Extension of Time to

Answer on August 9, 2021. On August 10, 2021, the Court granted *nunc pro tunc* Defendant's Agreed Motion for Extension of Time, ordering the Defendants to file an Answer on or before August 12, 2021. On August 26, 2021, the Court granted Defendant's Second Agreed Motion for Extension of Time, ordering Defendants to file their Answer on or before October 26, 2021. The court found good cause to grant this Extension because of the parties' ongoing discussions regarding mediation.

On October 1, 2021, Defendants filed a Third Agreed Motion for Extension of Time, which the Court granted *nunc pro tunc* on November 8, 2021, ordering Defendant to file their responsive pleading on or before November 23, 2021. On November 18, Defendants filed their Fourth Agreed Motion for Extension of Time, which the Court granted *nunc pro tunc* on December 9, 2021, extending Defendant's time to reply to on or before January 7, 2022. On December 31, 2021, Defendants filed their Fifth Agreed Motion for Extension of Time. The Court granted this Motion *nunc pro tunc* on January 20, 2022. On January 21, 2022, Defendants filed the instant Motion to Dismiss Plaintiff's Complaint for failure to state a claim on which relief can be granted. On January 28, 2022, Global Seafood Alliance filed the instant Motion for Leave to File *Amicus* Brief. On February 3, 2022, Global Seafood Alliance filed the instant Motion for Admission *Pro Hac Vice*.

III. Motion for Leave to File *Amicus* Brief

In its Motion, nonparty Global Seafood Alliance ("GSA") moves for leave to file an *amicus* brief based on its interest as a non-profit group dedicated to "advancing environmentally and socially responsible aquaculture." Mot. for Leave at 1. GSA believes it can provide helpful information for the Court regarding consumers' perceptions of the word "sustainability" in marketing and the Best Aquaculture Practices ("BAP") certifications on products. *Id.* at 2. Defendant's counsel has indicated consent to this Motion for Leave, and Plaintiff's counsel did not consent, yet did not file an Opposition to this Motion with the Court. *Id.* at 3. The Court finds the information in the *amicus* brief helpful to consider in the instant Motion to Dismiss and therefore grants nonparty GSA's Motion for Leave to File *Amicus* Brief.

IV. Motion to Dismiss Plaintiff's Complaint

a. Legal Standard

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

When considering a Motion to Dismiss, a Court must “construe the facts on the face of the Complaint in the light most favorable to the non-moving party, and accept as true the allegations in the Complaint.” *Fred Ezra Co. v. Pedas*, 682 A.2d 173, 174 (D.C. 1996). A Court should not dismiss a Complaint merely because it “doubts that a Plaintiff will prevail on a claim.” *See Duncan v. Children's Nat'l Med. Ctr.*, 702 A.2d 207, 210 (D.C. 1997). However, the Court need not accept inferences if such inferences are unsupported by the facts set out in the Complaint. *See Kowal v. MCI Comm. Corp.*, 16 F.3d 1271, 1276 (D.C. Cir. 1994). Nor must the Court accept legal conclusions cast in the form of factual allegations. *Id.*

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

b. Analysis

In its Motion to Dismiss, Defendant first contends that Plaintiff failed to plead the required elements of a claim under the Consumer Protection Procedures Act (“CPPA”), D.C. Code § 28-3095(k)(1)(D). Mot. at 5. Defendant argues that although Plaintiff purports to bring the claim under paragraph (D), it actually conflates paragraphs (C) and (D). *Id.* Paragraph (D) permits a nonprofit organization to bring an action on behalf of the interests of a consumer or a class of consumers, while paragraph (C) requires the plaintiff or its members to be injured, but allows the plaintiff to bring an action on behalf of the general public. *See* D.C. Code § 28-3095(k)(1)(C)-(D). Defendant argues that the Complaint should be dismissed because Plaintiff brings the suit on behalf of the “general public,” but brings the claim only under paragraph (D). However, from the Complaint it is clear that Plaintiff has met the required pleading standard under the CPPA. If Plaintiff conflates the terms “consumers” and “general public,” the Court is confident that it does so on purpose, as “a public-interest organization may act on behalf of consumers, *i.e.* the general public of the District of Columbia.” Compl. at ¶ 12. Moreover, Plaintiff states it has brought similar claims before and has sufficient “nexus to D.C. consumers to adequately represent their interests.” *Id.* The Court is confident that Plaintiff understands the requirements of pleading a cause of action under D.C. Code § 28-3095(k)(1)(D) and therefore declines to dismiss the Complaint on these grounds.

Second, Defendant argues that, as a matter of law, its label is not misleading. Mot. at 7. Defendant argues that courts should determine whether a statement is false or misleading under the CPPA from the perspective of how it may be understood by a reasonable consumer. *Id.* The potentially misleading words should be viewed in the context of the packaging. *Id.* Defendant urges viewing the word “sustainable” on the salmon label in context with the “Best Aquaculture Practice” (“BAP”) Certified” graphic adjacent to it, which provides a verification that the producers are using best practices when farming their salmon. *Id.* at 8. Defendant’s emphasis on context and viewing the word “sustainable” together with the BAP certification does not account for the fact that the reasonable consumer might not know the level of reputability of the BAP seal, or even what the BAP represents.

Defendant claims that Plaintiff's attempts to show that Defendant's label is misleading fail. *Id.* at 10. The Court disagrees. The Complaint cites several bases for the argument that consumers may perceive the word "sustainable" as misleading, including consumer research concluding that Defendant's salmon packaging and advertising is confusing to consumers. Compl. at ¶ 25–27. Plaintiff also cites to Federal Trade Commission guidance that a claim that something is "sustainable" is likely to convey to consumers that the product has "specific and far-reaching environmental benefits and may convey that the item . . . has no environmental impact." *Id.* at ¶ 24. Viewing the facts in the light most favorable to the Plaintiff, Plaintiff has met their burden in the Complaint to cite facts to support their claim that Defendant's packaging is misleading. *See Twombly*, 550 U.S. at 570.

The Court has considered the *amicus* brief filed by Global Seafood Alliance. Global Seafood Alliance urges that a reasonable consumer would understand Defendant's sustainability claim on their packaging as a reflection of "seafood sourced according to industry best practices." *Amicus Br.* at 7. Global Seafood Alliance supports this with examples of other leading retailers' packaging that boasts similar assertions of sustainability. *Id.* at 6. It asserts that the sustainability claims would be understood by a reasonable consumer as comporting with industry best practices because these companies "know best" what reasonable consumers understand about sustainable seafood. *Id.* at 6–7. However, Global Seafood Alliance does not cite any research or evidence that consumers actually *do* perceive the term "sustainability" to mean that the product complies with best practices. Global Seafood Alliance's comparisons to other major retailers do not refute the consumer research Plaintiff cited in its Complaint and the Court does not find this argument persuasive as to dismiss Plaintiff's Complaint on this ground.

Third and finally, Defendant contends that Plaintiff fails to allege all elements of a § 28-3904(h) violation. Mot. at 12. Defendant argues that claiming a violation of § 28-3904(h) requires an element of intent and the Complaint does not cite facts supporting the contention that Defendant *intended* to make certain representations on its salmon labels. Mot. at 12–13. However, Plaintiff does not purport to be bringing a claim specifically and only under section (h). Though it mentions (h) as an example of some CPPA provisions of potential relevance, Plaintiff does not specify a section of § 28-3904 under which

brings its claim. Compl. at ¶ 8. The mere fact that Plaintiff might not have pled sufficient facts regarding Defendant's intent cannot entirely dispose of this Complaint because Plaintiff does not bring the action solely under (h).

V. Motion for Admission *Pro Hac Vice*

Global Seafood Alliance has additionally filed a Motion for Admission *Pro Hac Vice* to admit Joshua D. Dunlap. Under Rule 101(a)(3) of the Superior Court Rules of Civil Procedure, an attorney who is "a member in good standing of the bar of any United States Court," but is *not* barred in the District of Columbia, may enter an appearance and participate in proceedings *pro hac vice* so long as a member in good standing of the District of Columbia Bar will be "at all times prepared to go forward with the case . . . sign all documents subsequently filed . . . and attend all subsequent proceedings in the action, *unless this latter requirement is waived by the judge presiding at the proceeding in question.*" (emphasis added). The rule also requires that the attorney file a praecipe providing his "name, address, telephone number, jurisdiction where [he] is a member of the bar, and the number of times [he] has previously sought to appear under this Rule." *Id.*

Mr. Dunlap is a member in good standing of the State of Maine, the Commonwealth of Massachusetts, and the State of New Hampshire. Mot. at 1. Mr. Kyle Noonan, member of the District of Columbia Bar, remains counsel of record in this matter. *Id.* Therefore, the Court finds Mr. Dunlap has met the requirements under Rule 101 to be admitted *pro hac vice* for the purpose of representing non-party Global Seafood Alliance.

For the foregoing reasons, it is this 16th day of February 2022,

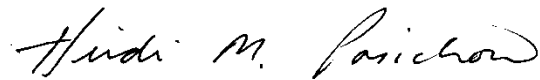
ORDERED that Global Seafood Alliance's Motion for Leave to File *Amicus* Brief is **GRANTED**; it is

FURTHER ORDERED that Defendant's Motion to Dismiss Plaintiff's Complaint is **DENIED**; it is

FURTHER ORDERED that the Parties' Initial Scheduling Conference **REMAINS SCHEDULED** for March 25, 2022 at 9:30 a.m. in Courtroom 516; it is

FURTHER ORDERED that Global Seafood Alliance's Motion for Admission *Pro Hac Vice* is **GRANTED**; and it is

FURTHER ORDERED that Joshua D. Dunlap is admitted to the Bar of this Court *pro hac vice* as Counsel in this matter for the purpose of serving as counsel for non-party Global Seafood Alliance.



Heidi M. Pasichow
Associate Judge
(Signed in Chambers)

Copies e-served to:

Kim E. Richman
Jay Shooster
Counsel for Plaintiff

Michael Klebanov
Counsel for Defendant

Kyle Noonan
Joshua D. Dunlap, *pro hac vice*
Counsel for Non-Party Global Seafood Alliance