

**SUPERIOR COURT OF THE DISTRICT OF COLUMBIA**  
**Civil Division**

<b>NATIONAL CONSUMERS LEAGUE,</b>	:
	:
<b>Plaintiff,</b>	:
	:
<b>v.</b>	: <b>Civil Action No. 2015 CA 007731 B</b>
	: <b>Judge Thomas J. Motley</b>
<b>WAL-MART STORES, INC., J.C. PENNEY</b>	:
<b>CORPORATION, INC., and THE</b>	:
<b>CHILDREN’S PLACE, INC.,</b>	:
	:
<b>Defendants.</b>	:
	:

**ORDER DENYING DEFENDANT’S JOINT MOTION TO DISMISS**

**I. Introduction**

This matter arises out of allegations by plaintiff National Consumers League (“NCL”), on behalf of itself and the general public of the District of Columbia, that defendant retailers Wal-Mart Stores, Inc. (“Wal-Mart”), The Children’s Place, Inc. (“TCP”), and J.C. Penney Corporation, Inc. (“J.C. Penney”) violated sections of the District of Columbia Consumer Protection Procedures Act, *D.C. Code § 28-3901 et seq.* (“CPPA”).<sup>1</sup> Each retailer, on its respective websites, includes corporate social responsibility statements (“Corporate Statements”) that provides information to the general public on its efforts to ensure that (1) its suppliers comply with all applicable laws and regulations; (2) its suppliers provide for their workers a safe and healthy working environment that is free of child labor; and (3) it will make efforts to audit suppliers’ compliance with its standards. NCL contends that the defendants failed to enforce their own Corporate Statements in dealing with suppliers, thereby violating their promises to the

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<sup>1</sup> NCL filed the Complaint on October 8, 2015, and filed the Amended Complaint on December 9, 2015. Defendants filed a joint Motion to Dismiss on January 4, 2016, and NCL submitted its opposition to the motion on February 4, 2016. Lastly, defendants replied on February 17, 2016.

general public. NCL further contends that in failing to follow their Corporate Statements, retailers violated various provisions of the CPPA.

In response, defendants argue that NCL has not stated a viable claim under the CPPA because the statements referenced by NCL are aspirational in nature and cannot be reasonably relied upon by consumers in their purchasing decisions. Therefore, defendants contend that the Corporate Statements are not actionable.

For reasons stated herein and at the March 1, May 10, and May 16, 2016 hearings, this Court concludes that the defendants' Corporate Statements are generally aspirational in nature and do not violate the CPPA. Notwithstanding this general determination, 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. To the extent that NCL has attempted to recast aspirational statements in the Corporate Statements into promises, those portions of the Amended Complaint are without merit. However, to the extent that NCL has alleged that the statements regarding auditing activities are misleading and that such misrepresentation may affect a consumer's decision to purchase merchandise at one of Retailers' stores, the motion to dismiss is denied.

## **II. Factual Background**

### *A. The Corporate Statements*

Each retailer, on its website, discusses its interactions with suppliers and its efforts to impose on those suppliers a general code of conduct regarding the production of goods.<sup>2</sup> Each

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<sup>2</sup> In this Rule 12(b)(6) motion, this Court is able to examine the website of each defendant within the four corners of the complaint because the Corporate Statements are similar and analogous to examining contracts attached to a complaint. Super. Ct. Civ. R. 12(b)(6); *Martin v. Bicknell*, 99 A.3d 705, 712 (D.C. 2014). The parties are in agreement with this conclusion.

retailer also discusses auditing procedures that were put in place to monitor suppliers' compliance. The public has access to the Corporate Statements through the various websites.

Wal-Mart states in its "Sourcing Standards & Resources" and "Standards for Suppliers" statements that its suppliers are contractually required to sign its Standards for Suppliers prior to any production taking place. Suppliers are also required to comply with all applicable laws and regulations, and to provide workers with a safe and healthy work environment by being proactive in preventing any workplace hazards. Wal-Mart also states that it conducts facility compliance audits through a multi-color auditing system every six to twenty-four months to monitor suppliers' compliance with its standards. Defs.' Joint Mot. to Dismiss, Ex. A, D.<sup>3</sup>

TCP similarly states in its "Supplier Code of Conduct" and "Social Responsibility" statements that it expects its suppliers to follow its supplier standards, that its suppliers will comply with all applicable law and regulations, and that its suppliers will not knowingly use any child labor. TCP also states that it aims to continuously improve working conditions in its supply chain through factory monitoring. TCP goes on to describe what the monitoring process entails

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<sup>3</sup> Wal-Mart states in its "Sourcing Standards & Resources":

"Walmart suppliers are contractually required to sign our Standards for Suppliers before they're approved to produce merchandise for sale at Walmart. These Standards for Suppliers make clear our fundamental expectations for suppliers and factories regarding the treatment of workers and impact on the environment."

Wal-Mart's "Standards for Suppliers" states:

"Suppliers... must fully comply with all applicable national and/or local laws and regulations."

"All labor must be voluntary... [C]hild... labor will not be tolerated."

"Suppliers must provide workers with a safe and healthy work environment. Suppliers must take proactive measures to prevent workplace hazards."

"All of our facility social audits are conducted by independent accredited and internationally recognized auditing firms. Facilities are then re-audited every six to 24 months, depending on the findings of the previous audits. To make our auditing program more effective, we focus our efforts on unannounced audits... The social audit results are assigned a color rating by the Responsible Sourcing team, based on type and severity of issues found."

and what type of actions it may take if it finds that a supplier has not been in compliance with its standards, such as providing guidance on how to correct the issues. Defs.’ Joint Mot. to Dismiss, Ex. G, H. <sup>4</sup>

J.C. Penney states in its “Supplier Principles” statement that it expects its suppliers to support those principles, which are an integral part of its supplier selection process, and that it expects its suppliers to comply with applicable laws and regulations, and expects them to prohibit the use of child labor. The suppliers are expected to comply with J.C. Penney’s standards and to also cooperate with any and all auditing processes requested by J.C. Penney. Similar to the other retailers, J.C. Penney also states that it shall take action if suppliers fail to meet its standards. Defs.’ Joint Mot. to Dismiss, Ex. F. <sup>5</sup>

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<sup>4</sup> TCP states in its “Supplier Code of Conduct” that:

“We are committed to excellence in every aspect of our business... [w]e expect these same commitments to be shared by all suppliers... At a minimum, we require that all of The Children’s Place suppliers meet the following standards... Suppliers must comply with all applicable laws and regulations... [and] suppliers will not knowingly use child labor.”

TCP also states in its “Social Responsibility” statements that:

“Our goal is to continuously improve working conditions in The Children’s Place supply chain. Factory monitoring is a tool that helps provide insight into true factory working conditions... While we have established minimum standards for factory approval, we do not take a pass/fail approach... Our policy is to audit all approved factories for compliance with social responsibility standards at least one a year. For those factories that perform poorly, we will provide guidance on corrective action and visit more frequently. In Fiscal 2013, we achieved a 98% audit rate of all factories approved for production.”

<sup>5</sup> J.C. Penney states in its “Supplier Principles”:

“We expect our suppliers to comply with all applicable laws and regulations, and jcpenny’s standards”

“We ask our suppliers... and expect them to prohibit the use of child labor.”

“We expect our suppliers to support the fulfillment of these Principles by incorporating them in their own internal business processes...”

*B. The Amended Complaint*

NCL's Amended Complaint states that Wal-Mart, TCP, and J.C. Penney each "promised" NCL itself<sup>6</sup> and the general public that their suppliers will ensure safe and healthy working conditions for their workers and will not utilize child labor. Am. Compl. ¶¶ 41-66, 72-78. NCL alleges that Retailers failed to ensure compliance with their Corporate Statements and, as a result, they breached their promises. *Id.* at ¶ 86.

In an effort to provide factual support for its position that each retailer violated its promises in its Corporate Statement, NCL relies on the 2013 Rana Plaza building collapse, which took the lives of over 1,000 individuals and injured more, most of whom worked for the garment factories inside the building. According to the Amended Complaint, the managers of the building ordered the workers to work even though the building had visible cracks and was declared unsafe the day prior to the collapse. NCL alleges that each retailer purchases goods and products from Rana Plaza's factories, and that such actions constitute a failure to comply with its own Corporate Statement, violating the CPPA. *Id.* at ¶¶ 67-85. NCL further alleges that Retailers breached their promises by failing to properly inspect the building; by failing to ensure compliance with the local construction standards; and by failing to ensure the safety of the factory workers within the Rana Plaza building. *Id.* at ¶ 88. NCL relies on the Rana Plaza incident as evidence supporting an inference that Wal-Mart, TCP, and J.C. Penney knew or should have known that its Corporate Statements were false and misleading.

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"These Principles are an integral part of our supplier selection process... We require our suppliers to cooperate with all audit, assessment and investigation processes requested by jcpenny. If a supplier fails to meet our requirements, we will take decisive corrective action, up to and including cancellation of contracts and termination of our relationship."

<sup>6</sup> Prior to the lawsuit, NCL, through its agents, purchased online "a boys shorts" from Wal-Mart, "a boys graphic tee" from TCP, and "a boys crewneck tee" from J.C. Penney. Am. Compl. ¶ 19.

In the Amended Complaint, NCL also makes specific claims against the auditing procedures of each retailer. NCL claims that Wal-Mart has a built-in auditing process to verify that its suppliers are complying with Wal-Mart's Standards. Am. Compl. ¶¶ 41-53. NCL claims that TCP also has an internal and third-party auditing system in place. *Id.* at ¶¶ 54-58. NCL also alleges that J.C. Penney's Corporate Statement promised that it will audit and ensure compliance from its suppliers. *Id.* at ¶¶ 59-66. As a result of the Rana Plaza collapse, NCL claims that each retailer failed to ensure compliance with its auditing obligations listed within its Corporate Statements. *Id.* at ¶¶ 86-88. NCL relies on the collapse to support the inference that Retailers did not properly audit their suppliers because if they had performed the auditing procedures, defendants would have known about the unsafe working conditions and the presence of child labor.

### **III. Legal Standard of Review for Motion to Dismiss**

To survive a motion to dismiss pursuant to Super Ct. Civ. R. 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. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007)); *see also Potomac Dev. Corp. v. District of Columbia*, 28 A.3d 531, 544 (D.C. 2011) (holding that District of Columbia courts follow the standard set forth by *Iqbal* and *Twombly*). "In reviewing the grant of a Rule 12(b)(6) motion, this court applies the same standard as the trial judge, viz: we accept the allegations of the complaint as true, and construe all facts and inferences in favor of the plaintiff." *Atkins v. Industrial Telecomm. Ass'n, Inc.*, 660 A.2d 885, 887 (D.C. 1995); *see also In re Estate of Curseen*, 890 A.2d 191, 193 (D.C. 2006); *Solers, Inc. v. Doe*, 977 A.2d 941, 947 (D.C. 2009). To survive a motion to dismiss, after casting aside any legal conclusions made in the complaint, the remaining factual allegations must

plausibly suggest liability and raise a right to relief above the speculative level. *Twombly*, 550 U.S. at 555.

#### **IV. Parties' Contentions**

Defendants filed a Joint Motion to Dismiss claiming that the Corporate Statements referenced by NCL were aspirational statements and non-actionable because no reasonable consumer would take those statements as definitive promises of what the corporations will do. Defs.' Joint Mot. to Dismiss, at p.13. Defendants rely on the Corporate Statement's language and wording to demonstrate that the statements did not represent any specific characteristics of merchandise sold in their stores.

Defendants disagree with NCL's allegations that the Corporate Statements made "promises" of corporate social responsibility to its consumers. Am. Compl. ¶ 1. Defendants explain that the specific language utilized in the Corporate Statements did not make any promises or assurances to its consumers. Defs.' Joint Mot. to Dismiss, at p.12. Wal-Mart states that it did not make any promises to consumers that it would ensure compliance from its suppliers. *Id.* at ¶¶ 14-15. TCP makes the same argument, contending that its statements were not guarantees of any kind, but merely intended to provide guidance and support in its efforts to improve working conditions for its suppliers' workers. *Id.* at ¶¶ 17-19. J.C. Penney emphasizes that its Corporate Statement merely sets forth a set of principles for its suppliers to follow, that conveys the company's efforts to promote a culture of legal compliance. *Id.* at ¶¶ 15-17. All three retailers identified individual statements to demonstrate that the Corporate Statements as a whole are aspirational in nature, and not promises to consumers, emphasizing the utilization of qualifying terms such as "we expect" or "our goal."

In response, NCL first argues that it has made the necessary factual allegations in the Amended Complaint to support actionable claims under the CPPA because it pleaded extensive factual details regarding the retailers’ alleged intentional misrepresentations to influence consumers. Pl.’s Opp’n to Defs.’ Joint Mot. to Dismiss, at 11-12. NCL argues that the “puffery” defense is inapplicable because the Amended Complaint set forth numerous measurable and verifiable statements, suggesting that dismissal at this stage in the litigation is not appropriate. *Id.* at 12. Second, NCL reiterates its argument that modern consumers find corporate social responsibility statements to be very impactful in making purchasing decisions. *Id.* at 5-7. NCL relies on general surveys as its support that a reasonable consumer values corporate social responsibility. Am. Compl. ¶¶ 29-40. NCL argues that a reasonable consumer would rely on the Corporate Statements in making his or her purchasing decisions, and if the statement contains false or misleading information, Retailers are liable under the CPPA. *Id.* at 5.

#### **V. The Consumer Protection Procedures Act**

The CPPA was enacted to protect consumers in the District of Columbia from unfair trade practices and to deter the use of such practices in order to promote fair business activities. D.C. Code § 28-3901(b)(1)-(2). The statute provides a set of procedures and remedies for a wide range of corporate practices and activities that can injure consumers. *See Atwater v. District of Columbia Dep’t of Consumer & Regulatory Affairs*, 566 A.2d 462, 465 (D.C. 1989).

NCL alleges that defendants made misrepresentations as to the characteristics and status of their goods in its Corporate Statements, in violation of the CPPA. Am. Compl. ¶ 99. NCL relies mainly on two provisions of the CPPA. First, NCL contends that Retailers violated D.C. Code § 28-3904(a), which provides that it shall be a violation under the CPPA to “represent that goods or services have a source, sponsorship, approval, certification, accessories, characteristics,

ingredients, uses, benefits, or quantities that they do not have.” D.C. Code § 28-3904(a). Second, NCL alleged that Retailers violated D.C. Code § 28-3904(e), which provides that “[i]t shall be a violation ... whether or not any consumer is in fact misled, deceived or damaged thereby, for any person to ... misrepresent as to a material fact which has a tendency to mislead.” D.C. Code § 28-3904(e). Under D.C. Code § 28-3904(e), the plaintiff must establish that a defendant made a misrepresentation. *Saucier v. Countrywide Home Loans*, 64 A.3d 428, 442 (D.C. 2013). When facing a statement that is “literally true” and nevertheless has a tendency to mislead or confuse the consumer, the statement is actionable. *See Remeikis v. Boss & Phelps, Inc.*, 419 A.2d 986, 989 (D.C. 1980); *see also Jacobson v. Hofgard*, 2016 WL 837923, at \*4 (D.D.C. Mar. 1, 2016).

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. *See Pearson v. Chung*, 961 A.2d 1067, 1075 (D.C. 2008) (“a claim of an unfair trade practice is properly considered in terms of how the practice would be viewed and understood by a reasonable consumer”); *see also 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.”). 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. *See Grayson v. AT&T Corp.*, 15 A.3d 219, 252 n.105 (D.C. 2013) (quoting § 538(2) of the Restatement (Second) of the Law of Torts);<sup>7</sup> *see also Leonard v. Abbott Laboratories, Inc.*, 2012 U.S. Dist. LEXIS 30608, at \*64 (E.D.N.Y. 2014).

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<sup>7</sup> § 538(2) of the Restatement (Second) of the Law of Torts:

The matter is material [if]:

In contrast, general statements, such as efforts to achieve certain quality standards, are statements of “puffery” and are non-actionable. *See Pearson*, 961 A.2d at 1076 (sign stating “satisfaction guaranteed” is an example of ‘puffery’ on which no reasonable person would rely, citing *Uebelacker v. Paula Allen Holdings, Inc.*, 464 F. Supp. 2d 791, 805-06 (W.D. Wisc. 2006)); *see also Leonard*, 2012 U.S. Dist. LEXIS 30608 at \*62 (E.D.N.Y. 2014) (court found corporate statement “dedicated to the highest standards of manufacturing and marketing” to be non-actionable puffery because the statement fails to identify specific requirements or standards), *City of Pontiac Policemen’s and Firemen’s Ret. Sys. v. UBS AG*, 752 F.3d 173, 183 (2d Cir. 2014) (“[G]eneral statements about reputation, integrity, and compliance with ethical norms are inactionable ‘puffery,’ meaning that they are ‘too general to cause a reasonable investor to rely upon them.’”); *Bernstein v. Extencicare Health Services, Inc.*, 607 F. Supp. 2d 1027, 1032 (D. Minn. 2009) (court found statements that nursing home will comply with applicable laws and that it has established rigorous standards are non-actionable statements of puffery because the statements are so general and unspecific).

## **VI. Analysis**

### *A. D.C. Code § 28-3904(a)*

In the instant case, NCL alleges that Retailers violated the CPPA by misleading consumers that their products were made with socially responsible suppliers, but the Rana Plaza incident demonstrated otherwise. Am. Compl. ¶¶ 86-90. After close examination of the retailers’ Corporate Statements, this Court finds that the majority of statements referenced by NCL are

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(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; or

(b) the maker of the representation knows or has reason to know that its recipient regards or is likely to regard the matter as important in determining his [or her] choice of action, although a reasonable man [or woman] would not so regard it.

aspirational statements. The statements were not false on their face and were general in nature outlining the expectations of each retailer and efforts by each retailer to place pressure on its suppliers to be more socially responsible. The following statement from Wal-Mart demonstrates the aspirational nature of the Corporate Statements:

Walmart suppliers are contractually required to sign our Standards for Suppliers before they're approved to produce merchandise for sale at Walmart. These Standards for Suppliers make clear our *fundamental expectations* for suppliers and factories regarding the treatment of workers and impact on the environment.

Defs. Joint Mot. to Dismiss' Ex. A, at \*2 (Emphasis added). Examining the plain language of this statement, it is clear that the Standards for Suppliers is not an assurance of any kind that Wal-Mart's suppliers will comply with absolute certainty. Instead, the language states that it is only Retailers' "expectations" of the suppliers.<sup>8</sup>

The usage of the qualifying terms "expect", "goal", and "ask" is demonstrative of the aspirational nature of the statements and further demonstrates that the statements are not promises to consumers, as NCL alleges in its Amended Complaint. In these Corporate Statements, the defendants did not use qualifying terms binding Retailers such as "ensure", "promise" or "forbid." However, when discussing these statements in the Amended Complaint, NCL goes too far by recasting the retailers' aspirational statements into "promises" made to the consumer. *See, e.g.*, Am. Compl. ¶¶ 41, 44, 47, 58, 63.<sup>9</sup> It is clear that the language of the

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<sup>8</sup> The same analysis applies with TCP's "Social Responsibility" statements: "We are committed to excellence in every aspect of our business ... [w]e expect these same commitments to be shared by all suppliers ... Our goal is to continuously improve working conditions in The Children's Place supply chain." Defs. Joint Mot. to Dismiss' Ex. G, at \*1.

The analysis also applies to J.C. Penney's "Supplier Principles": "We expect our suppliers to comply with all applicable laws and regulations, and jcpenny's standards..." and "[w]e ask our suppliers... and expect them to prohibit the use of child labor." See Defs. Joint Mot. to Dismiss' Ex. F, at \*1, \*3.

<sup>9</sup> For example, NCL itself states that Wal-Mart's "Standard for Suppliers" are the company's fundamental expectations of its suppliers, which is clearly not a promise. Am. Compl. ¶ 42. NCL states that TCP

defendants does not convey a promise. The use of qualifying terms such as “we expect our suppliers...” or “our goal is to...” does not create a promise to the consumer that the retailer is ensuring absolute compliance on the suppliers’ part or that the retailer itself was providing any specific promises. Such language suggests that some suppliers’ goods may be purchased in violation of the standards. Wal-Mart acknowledges in its Corporate Statements: “[u]nauthorized subcontracting continues to be an issue across the global supply chain.” Defs. Joint Mot. to Dismiss, Ex. A. In the Corporate Statements of the defendants, the term “promise” never appeared at any point. *See* Defs. Joint Mot. to Dismiss’ Ex. A, D, F, G, H. The Corporate Statements only state that each retailer had taken steps to reduce the likelihood of child labor and unlawful working conditions for workers.

Under § 28-3904(a), NCL has failed to state a cause of action, because Corporate Statements of the defendants do not rise to the level that the statute requires for an actionable claim. The Corporate Statements do not make any representations about the “certification” or “characteristics” of the shirts and shorts NCL employees purchased at Retailers’ stores.<sup>10</sup> NCL argues that a fair reading of the Corporate Statements suggests that Retailers have promised or ensured that their products will be sold child labor free or by workers who work in a safe and healthy environment that follows all applicable laws and regulations. This Court disagrees because such a reading is contrary to a fair objective reading by a reasonable consumer. There were no representations at any point stating that the shirts and shorts NCL’s agents purchased

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“believes protecting workers’ rights goes beyond compliance with a safe and healthy workplace,” Am. Compl. ¶ 59, but that statement represents the goals and aspirations of Retailer, not a promise to the consumer. NCL also refers to J.C. Penney’s Corporate Statement, under the heading “Socially Responsible Supply Chain,” which stated “we expect our suppliers to,” another example of an aspirational, non-actionable statement under the CPPA because the qualifier “expect” demonstrates that it is not a promise. *Id.* at ¶ 57.

<sup>10</sup> NCL focuses specifically on “certification” and “characteristics” under § 28-3904(a). Am. Compl. ¶ 99.

were sold without child labor. As a matter of fact, the reason why Retailers have an auditing process is to check whether suppliers are abiding by their Corporate Statements and to take corrective action when they do not. As stated previously, such language presumes the possibility that some suppliers may be in violation of the standards.

*B. D.C. Code § 28-3904(e)*

The analysis under § 28-3904(e) is more problematic because the statute does not require false statements about a particular product, but a false impression is sufficient. Defendants allege that NCL failed to identify material facts that defendants made about the t-shirts and shorts NCL purchased. Defs. Joint Mot. to Dismiss, at 10. Without the identification of these specific facts, defendants argue that NCL “cannot demonstrate any tendency of the defendants to mislead consumers,” and the Amended Complaint fails to state a cause of action under § 28-3904(e) as a result. *Id.* However, under § 28-3904(e), claims are not limited to advertisements or statements about specific goods. *See, e.g., Murray v. Motorola, Inc.*, 982 A.2d 764, 783 (D.C. 2009) (stating that defendants can be held liable for providing consumers with false and misleading information through their public press conference); *Leonard*, 2012 U.S. Dist. LEXIS 30608, at \*64-65 (court found plaintiff’s allegations of product packaging being misleading to consumers was enough to defeat a motion to dismiss).

Even though generally an accurate statement would not mislead a reasonable consumer, the possibility remains that a reasonable consumer may find an accurate statement to be misleading. *National Consumers League v. Bimbo Bakeries USA*, 2015 D.C. Super. LEXIS 5, at \*30 (fact-finder can find materiality that product name of classic honey wheat bread is misleading to consumers when the product is actually offered without or with very little amount of whole grains). So long as a statement available to the public is capable of influencing the

consumers' decision-making process in purchasing goods, it can be actionable. *Grayson*, 15 A.3d at 252. Assuming NCL's allegations that reasonable consumers care about the truthfulness of Corporate Statements, then the statements of defendants are capable of influencing how consumers make purchasing decisions. Although a retailer's Corporate Statement may not be literally false, statements shown to be guarantees or promises are not requirements of a successful claim under D.C. Code § 28-3904(e). Under this subsection, the inquiry focuses on representations, inferences from or impressions made by the Corporate Statements. If a statement is literally true and is capable of misleading consumers in their purchasing decisions, then plaintiff has an actionable claim against defendants. *See Pearson*, 961 A.2d at 1075; *Beer*, 993 A.2d at 768.

#### 1. Aspirational Statements

As discussed above, the majority of the statements referenced by NCL were aspirational statements. The majority of the Corporate Statements are literally true, and when read responsibly by the reasonable and objective reader, the statements do not make assurances or promises, notwithstanding the inaccurate legal conclusions to the contrary made in the Amended Complaint.<sup>11</sup> General and unspecific statements are not actionable due to the fact that no reasonable consumer would rely upon them. *Pearson*, 961 A.2d at 1076. Therefore, the "expectations" and "goal" statements do not meet the plausibility standard under *Iqbal* and *Twombly*. *Iqbal*, 556 U.S. at 678; *Twombly*, 550 U.S. at 570; *Potomac Dev. Corp.*, 28 A.3d at 544. Nevertheless, NCL argues that some consumers read the Corporate Statements and form an impression that Retailers promised the consumers that their goods are manufactured free of child labor. This erroneous impression is based on a misreading of the Corporate Statements because a

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<sup>11</sup> In considering a Rule 12(b)(6) motion, legal conclusions are not accepted as true. *Twombly*, 550 U.S. at 555.

fair and objective reading of the Corporate Statements clearly suggests that these are non-actionable aspirational statements.

## 2. Auditing Statements

Although the majority of the Corporate Statements are aspirational in nature, the allegations made by NCL concerning the auditing statements within the Corporate Statements may constitute a basis for a plausible cause of action. Retailers' auditing statements are more specific and contain verifiable facts that may be material to a consumer's purchasing decisions. If a retailer does not have an auditing process in place, the Corporate Statement leaves a false impression that the retailer has an auditing process to monitor suppliers' compliance with the retailer's standards.

Wal-Mart and TCP both go beyond general aspirational statements by listing detailed information regarding their auditing process. Wal-Mart describes its color-rating based compliance auditing process, stating that "20,322 assessments were conducted across 15,027 active factories" in 2013. Defs. Joint Mot. to Dismiss' Ex. A. Wal-Mart also stated that if it finds suppliers are non-compliant with its Corporate Statements, the suppliers must take corrective action to improve its performance. *Id.* Similarly, TCP specifies details for its social auditing process, and states that it achieved a 98% audit rate of all its factories approved for production. Defs. Joint Mot. to Dismiss' Ex. G. TCP also states that if a supplier fails to meet its standards, it will provide guidance on corrective action and will visit the supplier more frequently. *Id.* The in-depth descriptions and detailed statistics of the auditing process can influence the reasonable consumer's purchasing decisions. If in reality no audits were done, then representations about the auditing process would be misleading to consumers purchasing merchandise.

J.C. Penney also strongly implies that it has an auditing process to monitor compliance with its requirement that suppliers comply with its Corporate Statements.<sup>12</sup> Even though the statement does not provide the details of their auditing process, it does leave the consumer with the impression that an auditing process exists. Similar to Wal-Mart and TCP, if in reality no audits were performed, the representations would be misleading for consumers in making purchasing decisions.

NCL has sufficiently pleaded a claim under § 28-3904(e) because the Corporate Statements regarding audits are capable of being verified.<sup>13</sup> The auditing process outlined in the Corporate Statements are alleged to be material factors in a consumer's purchasing decisions. Thus, NCL has plausibly suggested liability and raised a right to relief above the speculative level. *Twombly*, 550 U.S. at 555. This Court does not reach the merits of the allegations in the Amended Complaint. Indeed, the summary judgment stage may prove the existence of an auditing process that may provide a sufficient basis to conclude that the auditing process described in the Corporate Statements was not misleading. However, at the current stage, NCL has pleaded a plausible cause of action.

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<sup>12</sup> “We require our suppliers to cooperate with all audit, assessment and investigation processes requested by jcpenny.” Defs. Joint Mot. to Dismiss, Ex. F, at \*4.

<sup>13</sup> NCL's Amended Complaint also alleges that defendants violated two other sub-sections of § 28-3904: (h) advertise or offer goods or services without the intent to sell them as advertised or offered; and (u) represent that the subject of a transaction has been supplied in accordance with a previous representation when it has not. Am. Compl. ¶ 99. This Court will not separately address claims under sub-section (h) because NCL has not identified any advertisements by defendants for an actionable claim. This Court will also not separately address claims under sub-section (u) because it is inapplicable.

**VII. Conclusion**

For reasons stated above, this Court denies the Defendants' Joint Motion to Dismiss.

Accordingly, it is this 22<sup>nd</sup> day of July 2016, hereby:

**ORDERED** that the Joint Motion to Dismiss is **DENIED**.

**SO ORDERED.**



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THOMAS J. MOTLEY  
Associate Judge

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