SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
CIVIL DIVISION

THE NATIONAL CONSUMERS LEAGUE, **Plaintiff,** **v.** **GERBER PRODUCTS CO.,** **Defendant.**	**Case No. 2014 CA 008202 B** **Judge Maurice A. Ross**

ORDER

This matter comes before the Court on defendant Gerber Products Company's ("Gerber") Motion to Dismiss. Upon consideration of the pleadings, arguments advanced at a hearing on the matter, and for the reasons set forth below, the Court denies Defendant's Motion.

I. BACKGROUND

The Nation Consumer's League ("NCL") filed a Complaint in the Superior Court of the District of Columbia on December 24, 2014, and alleged that Gerber through misrepresentations, omissions, and false innuendo, violated seven subsections of the District of Columbia Consumer Protection Procedures Act ("DCCPPA") codified under D.C. Code § 28-3901 *et seq*. Gerber sells Good Start Gentle® ("Good Start"), an infant formula that is made with partially hydrolyzed whey proteins, and advertises the product as being easier for infants to digest than formula made with intact cow's milk proteins. Compl. ¶ 22. In its marketing and advertising, Gerber asserts that because of the partially hydrolyzed whey proteins in Good Start, feeding the formula to infants will prevent or reduce the infants' risk of developing allergies. *Id*. ¶ 23. Gerber's marketing includes a

gold label sticker on the front of the Good Start formula that reads: "1st & ONLY Routine Formula TO REDUCE THE RISK OF DEVELOPING ALLERGIES. See label inside." *Id*. ¶ 25. In addition, a badge on the product label reads: "1st & Only Meets FDA Qualified Health Claim." *Id*. Other print advertisements also contain the badge reading, "1st Formula With FDA Qualified Health Claim." *Id.* ¶ 26.

On October 31 2014, the Food and Drug Administration ("FDA") sent Gerber a warning letter informing Gerber that Good Start was misbranded in violation of the Federal Food, Drug, and Cosmetic Act. Def.'s Reply, Ex. A, FDA Warning Letter 1. The letter specifically stated that Gerber's Good Start product and website "bear health claims that were not authorized by FDA," and "that the labeling is misleading." *Id*. Furthermore, the FDA indicated that Gerber was required, but failed to include a statement accompanying the health claim that would ensure the safety of consumers, namely:

> Partially hydrolyzed formulas *should not be fed to infants who are allergic to milk or to infants with existing milk allergy symptoms*. If you suspect your baby is already allergic to milk or if your baby is on a special formula for the treatment of allergy, your baby's care and feeding choices should be under a doctor's supervision

Id. (emphasis added and bold in original). Additionally, the FDA warning letter states that it "previously considered [a Gerber] petition requesting authorization to make a qualified health claim characterizing the relationship between the consumption of 100% partially hydrolyzed whey protein infant formula and reduced risk of food allergy in infants." *Id*. at 2. However, the letter indicated that upon review of the petition and available scientific evidence, the FDA "concluded that there was no credible evidence to support a qualified health claim relating the consumption of 100 percent whey protein

partially hydrolyzed to a reduced risk of food allergy in infants." *Id.* NCL agents subsequently purchased two canisters of Good Start in the District of Columbia, on December 16, 2014, from CVS at 1101 Connecticut Avenue, N.W., and on December 17, 2014, from Safeway at 5545 Connecticut Avenue, N.W., and filed this suit pursuant to the "private attorney general" provision of the DCCPPA.

The "private attorney general" provision of the DCCPPA provides that "[a] person, whether acting for the interests of itself, its members, or the general public may bring an action under this chapter in the Superior Court of the District of Columbia seeking relief from the use by any person of a trade practice in violation of the law of the District of Columbia . . ." D.C. Code § 28-3905(k)(1). NCL's complaint specifically alleges that: (1) Gerber violated D.C. Code §§ 28-3904 (a), (d) (e), (f), (f-1), (h) and (u) by "falsely representing to consumers through marketing and advertising campaigns, that Good Start infant formula will prevent or reduce the risk of babies developing allergies when it has not been proven to do so." Compl. ¶ 4; (2) Gerber touted such false product attributes "to induce parents into purchasing [Good Start] for their children." *Id.* ¶ 5; (3) Gerber violated the aforementioned provisions of the DCCPPA by making health claims despite having "twice petitioned the [Food and Drug Administration ("FDA")] for approval in making the claims and twice being denied for lack of scientific support." *Id.* ¶ 24; (4) the "gold seal logos depicted on the [Good Start] label and in its print advertisements create the false impression that the FDA has approved the statement that use of the formula reduces the risk of developing allergies" *Id.* ¶ 41; (5) the logos "create a false impression that the FDA approved the references to multiple 'allergies' . . . when in fact the FDA only permitted significantly limited language for one allergy (atopic

dermatitis)." *Id*. ¶ 42; (6) "[Gerber's] representations mislead and/or have the ability to mislead parents to believe that [Good Start] has the tangible result of reducing the risk of allergy development." *Id*. ¶ 44; (7) "Gerber has little to no scientific or clinical proof to support its claim about [Good Start] as beneficially impacting the incident rates of food allergies or atopic dermatitis." *Id*.; (8) Gerber "knows, or should know, that its statements misrepresent the attributes of [Good Start] and that the formula does not have the purported affect on infants' allergy development." *Id*. ¶ 45; and (9) Gerber's deceptive advertising had a material effect on purchasers of Good Start. *Id*. ¶ 46. NCL offers the FDA warning letter and an enforcement action brought by the Federal Trade Commission, *Federal Trade Commission v. Gerber Products Co., et al.,* Case No. 2:14-cv-06771-SRC-CLW (D.N.J.) (the "FTC Action"), as further proof that its DCCPPA claims have merit. Pl.'s Opp. 24.

II. STANDARD OF REVIEW

When reviewing a Rule 12(b)(6) motion to dismiss, the Court must "accept the allegations of the complaint as true, and construe all facts and inferences in favor of the plaintiff." *Solers, Inc. v. Doe*, 977 A.2d 941, 947 (D.C. 2009) (quoting *In re Estate of Curseen*, 890 A.2d 191, 193 (D.C. 2006)). To survive a motion to dismiss, a complaint must "state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). Standing alone, the complaint should set out sufficient facts to enable the Court to infer the defendant's plausible liability. *Potomac Dev. Corp. v. District of Columbia*, 28 A.3d 531, 544 (D.C. 2011) (upholding the standard adopted in *Ashcroft v. Iqbal*, 556 U.S. 662, 677-79 (2009)). A formulaic recitation of the elements

of a cause of action followed by a legal conclusion is not sufficient. *Murray v. Motorola, Inc.*, 982 A.2d 764, 783 (D.C. 2007) (citing *Twombly*, 550 U.S. at 555 (2007)).

III. ANALYSIS

Gerber filed a motion to dismiss NCL's Complaint on March 3, 2015. The motion asserts that pursuant to D.C. Super. Ct. Civ. R. 8(a), 9(b), 12(b)(1) and 12(b)(6), the Complaint should be dismissed in its entirety because: (1) The FDA already has initiated an investigation to determine whether Good Start is misbranded, thus the doctrine of primary jurisdiction is applicable; (2) under the doctrine of prior substantiation, alleging that a product lacks scientific support does not give rise to a cause of action; (3) NCL does not have constitutional standing to bring this action; and (4) NCL's Complaint fails to plead all of the essential elements of a DCCPPA claim, including a legally sufficient claim for damages, with the required level of particularity. In opposition, NCL: (1) rejects the applicability of the doctrine of primary jurisdiction; (2) denies that NCL has raised a prior substantiation claim; (3) contends that NCL has constitutional and statutory standing; and (4) maintains that NCL's DCCPPA claim adequately meets the pleading standard.

a. The Doctrine of Primary Jurisdiction

The Court agrees with NCL and finds that the doctrine of primary jurisdiction is not applicable here. The doctrine of primary jurisdiction is invoked "whenever enforcement of the claim requires the resolution of issues which . . . have been placed within the special competence of an administrative body." *D.C. v. D.C. Pub. Serv. Comm'n*, 963 A.2d 1144, 1153 (D.C. 2009) (quoting *United States v. W. Pac. R.R. Co.*, 352 U.S. 59, 64 (1956)). The doctrine gives a court discretion to refer the issue to the

administrative agency, and stay or dismiss without prejudice the underlying action pending agency review. *See Reiter v. Cooper*, 507 U.S. 258, 268-69 (1993). Gerber contends that by issuing the warning letter, the FDA already has started a process of determining whether Good Start is misbranded, and thus urges the Court to defer to the FDA's on-going process and expertise, and dismiss the case. However, the District of Columbia Court of Appeals has found that the primary jurisdiction doctrine "does not negate that the court has jurisdiction; rather, it informs the court's determination whether to exercise its jurisdiction with respect to a specific matter." *D.C. Pub. Serv.*, 963 A.2d at 1153. Consequently, dismissal here is not necessarily warranted.

The Court has had the opportunity to analyze the issue of primary jurisdiction in DCCPPA actions similar to NCL's current action. *See National Consumers League v. Bimbo Bakeries USA,* No. 2013 CA 6548 B, 2015 D.C. Super. LEXIS 5 (D.C. Super. Ct. April 2, 2015) [hereinafter *Bimbo*]; *NCL v. Doctor's Associates*, No. 2013 CA 006549 B, 2014 D.C. Super. LEXIS 15 (D.C. Super. Ct. September 12, 2014) [hereinafter *Doctor's Associates*]. Acknowledging the expertise of the FDA in assessing proper food labeling, the Court rationalized that having revised labeling conforming to FDA standards is one possible remedy for a plaintiff that has alleged misrepresentation. *See Bimbo*, 2015 D.C. Super. LEXIS 5, at *19; *Doctor's Associates*, 2014 D.C. Super. LEXIS 15, at *12-13. However, the Court still determined that the nature of the issue does not "justify removing [such suits] from the sphere of the judiciary and placing it exclusively within the jurisdiction of the FDA." *Bimbo*, 2015 D.C. Super. LEXIS 5, at *19; *Doctor's Associates*, 2014 D.C. Super. LEXIS 15, at *12-13. This is more so the case when the plaintiff's claims are not confined to labeling practices but more generally take issue with

representations made about the disputed products. *See Bimbo*, 2015 D.C. Super. LEXIS 5, at *19; *Doctor's Associates*, 2014 D.C. Super. LEXIS 15, at *12-13. Here, NCL's claims do not solely concern misbranding, but also encompass Gerber's overall marketing practices, of which misbranding is only a part. Because the Court has not yet determined what specific remedies NCL seeks as corrective advertising or revised labeling, it is premature to dismiss NCL's claims on the basis of primary jurisdiction at this early stage. *See Bimbo*, 2015 D.C. Super. LEXIS 5, at *19.

b. The Doctrine of Prior Substantiation

Similarly, the doctrine of prior substantiation is not applicable here. Gerber urges the court to adopt the doctrine, which has been applied to unfair competition and false advertising laws in California and New Jersey. However, not all jurisdictions have applied the substantiation bar to their consumer statutes, and Gerber has proffered no provision of the law in this jurisdiction that would support applying the doctrine here. *See In re Horizon Organic Milk Plus DHA Omega-3 Mktg. & Sales Practice Litig.,* 955 F. Supp. 2d 1311, 1343 (S.D. Fla. 2013) ("Consumer claims for a lack of substantiation are not cognizable under some states' consumer fraud statutes"). Under California law, a private plaintiff may not bring a suit under its Unfair Competition Law, Cal. Bus. & Prof. Code §§ 17200 *et seq*, or False Advertising Law, Cal. Bus. & Prof. Code §§ 17500 *et seq*, based on a claim made in advertising that is merely unsubstantiated; actual falsehood in the advertising is required. *See, e.g.*, *Eckler v. Wal-Mart Stores, Inc*., No. 12-CV-727-LAB-MDD, 2012 U.S. Dist. LEXIS 157132, at *4 (S.D. Cal. Nov. 1, 2012) (citing *Nat'l Council Against Health Fraud, Inc. v. King Bio Pharm., Inc*., 107 Cal. App. 4th 1336, 1345 (Cal. Ct. App. 2003)).

Gerber argues that dismissal is warranted here because NCL's allegations are not that Gerber's claims are actually false. Gerber maintains that NCL's allegations are based solely on the FTC Action which alleges that Gerber lacked substantiation for the health claims on the Good Start label and in its advertising. Gerber argues that the FTC retains exclusive jurisdiction over ensuring that advertising claims are substantiated. Gerber further contends the FDA's warning letter only determined that it was "uncertain" whether the available scientific evidence supported Gerber's proposed qualified health claim, but has never contended that Gerber's claims are false or even that they lack scientific support.

The Court disagrees with Gerber's depiction of the facts and finds that beyond relying solely on the FTC Action and the FDA warning letter, NCL's complaint alleges that Gerber violated the DCCPPA through misrepresentations, omissions and innuendo that Good Start formula prevents allergies when it purportedly does not do so. Therefore, the Court is not persuaded that NCL has raised a prior substantiation claim here. Nevertheless, NCL proffers a California case, *Zakaria v. Gerber Products Co*., to bolster its argument that this Court should reject the application of the doctrine of prior substantiation. *See generally Zakaria v. Gerber Products Co*., No. LA CV-15-00200 JAK (Ex), 2015 U.S. Dist. LEXIS 80428, *25-27 (C.D. Cal. June 18, 2015) (analyzing a complaint with similar legal issues and claims against Gerber in connection with its alleged false advertising of Good Start, and denying a nearly identical motion to dismiss by Gerber). In the instant case, NCL alleges that Gerber misrepresented the degree of FDA support for its claims on its website and in its advertising. The plaintiff in *Zakaria* articulated the same allegations regarding falsity that NCL raises here, and the court in

that case, applying California law, was satisfied that the plaintiff adequately pled affirmative false statements. *See id.* at 26-27. Likewise here, the Court finds that the facts as pled in NCL's complaint would be sufficient to allege that Gerber's health claims and representations of FDA support were actually false and not just unsubstantiated.

c. Standing in a DCCPPA Action

A plaintiff proceeding under a DCCPPA claim must allege injury-in-fact to have standing. *See Williams v. Purdue Pharma Co.,* 297 F. Supp. 2d 171, 178 (D.D.C. 2003). Gerber contends that NCL has failed to demonstrate the requisite injury-in-fact to establish that it has standing to bring the DCCPPA claims. However, NCL maintains that it meets the standing requirement under D.C. Code §§ 28-3905(k)(1)(A), (C) and (D). Pl.'s Opp. 9. For purposes of ruling on a motion to dismiss for want of constitutional standing . . . the trial . . . [court] must accept as true all material allegations of the complaint, and must construe the complaint in favor of the complaining party." *Grayson v. AT&T Corp.*, 15 A.3d 219, 246 (D.C. 2011) (quoting *Warth v. Seldin,* 422 U.S. 490, 501 (1975)). District of Columbia courts follow the federal *Lujan* test to determine a plaintiff's standing. *Grayson*, 15 A.3d at 250 (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-561 (1992)). The *Lujan* test articulates three elements for establishing standing. Specifically, a Plaintiff must: "(1) suffer an 'injury-in-fact,' [that is] an invasion of a legally protected interest which is (a) concrete and particularized, and (b) 'actual or imminent, not 'conjectural' or 'hypothetical'; (2) demonstrate a causal connection between the injury and the conduct complained about . . . the injury has to be 'fairly . . . trace[able] to the challenged action of the defendant, and not . . . the result [of] the independent action of some third party not before the court; and (3) show that it is

'likely,' as opposed to merely 'speculative,' that the injury will be 'redressed by a favorable decision.' *See Grayson*, 15 A.3d at 250 (D.C. 2011) (citing *Lujan*, 504 U.S. at 560-561).

The plaintiff in *Grayson* alleged "injury in fact, based on the defendants' violation of his statutory right (derived from D.C. Code § 28-3904) [unlawful trade practices]." *Grayson*, 15 A.3d at 249. The District of Columbia Court of Appeals found the plaintiff had standing and held that his injury was "derived solely from a violation or an invasion of his statutory rights." *Id.* at 248-249. Furthermore, the Court of Appeals found that D.C. Code §§ 28-3904 and 28-3905(k)(1) create a statutory right to "be free from improper trade practices" and "may constitute an injury-in-fact sufficient to establish standing." *Id*. This right, according to the Court of Appeals, is legitimate even if a plaintiff would not have otherwise suffered a "judicially cognizable injury in the absence of [the] statute." *See id.* Expounding on the *Grayson* finding, in *Floyd v. Bank of Am. Corp*., 70 A.3d 246 (D.C. 2013), the Court of Appeals explained:

> [A] lawsuit under the [DCCPPA] does not relieve a plaintiff of the requirement to show a concrete injury-in-fact to h[er]self," [*Grayson*,] 15 A.3d at 244, [however] she may make a showing of concrete injury in fact by alleging that she is a consumer of the defendant's service(s) and that the defendant has misrepresented material facts about the service or has failed to inform the plaintiff of material information about the service. *See id*. at 248-49. The particulars of *Grayson* illustrate the broad reach of our holding . . . [w]e concluded that "[the plaintiff] alleges personal injury to himself, or injury in fact, based on the defendants' violation of his statutory right (derived from D.C. Code § 28-3904) to the disclosure of information . . . ." *Id*. at 249. Thus, our conclusion that Grayson had standing did not depend on a claim that he was entitled to recover . . . [r]ather, it sufficed that he asserted "an invasion of his statutory legal right[] created by the [DCCPPA]," *id*. at 248-49, to truthful and non-misleading information . . . .

Floyd, 70 A.3d 246, 251-252.

d. NCL's Standing

The Court of Appeals is clear that one cannot demonstrate the requisite injury-in-fact when he rests his claim entirely "on the legal rights or interests of third parties." *Grayson*, 15 A.3d at 246-47. Here, NCL maintains that it meets the standing requirement under D.C. Code §§ 28-3905(k)(1)(A), (C) and (D). The Court agrees that NCL can show an injury-in-fact under the three subsections.

i. NCL's Standing under § 28-3905(k)(1)(A)

D.C. Code § 28-3905(k)(1)(A) provides that "A consumer may bring an action seeking relief from the use of a trade practice in violation of a law of the District." D.C. Code § 28-3901(a)(2) defines consumer as "a person who, other than for purposes of resale, does or would purchase . . . or receive consumer goods or services." The definition of person under § 28-3901 includes 'association' or 'any other organization.' D.C. Code § 28-3901(a)(1); s*ee also Adam A. Weschler & Son, Inc. v. Klank*, 561 A.2d 1003, 1005 (D.C. 1989).

Here, the Court finds that NCL has pled sufficient facts to establish its standing as a consumer under § 28-3905(k)(1)(A). The *Grayson* decision directed the Court to construe the complaint "in favor of the complaining party" and reasoned that "it is within the trial court's power to allow or to require the plaintiff to supply, by amendment to the complaint or by affidavits, further particularized allegations of fact deemed supportive of plaintiff's standing" when the court rules on the motion to dismiss for want of constitutional standing. *Grayson*, 15 A.3d at 246 (quoting *Warth*, 422 U.S. at 501). NCL alleges that its agents purchased two canisters of Good Start. As an organization or person which purchased Gerber's Good Start formula for purposes other than resale,

NCL is a consumer that meets the statutory standing requirement under § 28-3905(k)(1)(A). [1]

ii. NCL's Standing under §§ 28-3905(k)(1)(C)-(D)

NCL can also show an injury-in-fact as a non-profit organization or as a public interest organization under §§ 28-3905(k)(1)(C) and (D).[2] Under § 28-3905(k)(1)(C), a "non-profit organization may, on behalf of itself or any of its members, or on any such behalf and on behalf of the general public, bring an action seeking relief from the use of a trade practice in violation of a law of the District, including a violation involving consumer goods or services that the organization purchased or received in order to test or evaluate qualities pertaining to use for personal, household, or family purposes." In addition, § 28-3905(k)(1)(D) allows a 'public interest organization' to "bring an action seeking relief from the use by any person of a trade practice in violation of a law of the District" on behalf of the "interests of a consumer or a class of consumers." The provision also requires that the public interest organization have a "sufficient nexus to the interests involved of the consumer." D.C. Code § 28-3905(k)(1)(D)(ii).

The arguments advanced by the parties here are similar to those raised in *Bimbo*. *See* 2015 D.C. Super. LEXIS 5, at *4-8. With regard to § 28-3905(k)(1)(C), in *Bimbo*, NCL sought relief from the defendant's alleged violation of the DCCPPA. In rebuttal, the defendant argued that NCL failed to meet the standing requirement because NCL did

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[1] Moreover, the District of Columbia Council suggests that "a private attorney general on behalf of the general public" is a "consumer" by mentioning the right to bring an action "as a private attorney general on behalf of the general public" among a right of action for consumers under § 28-3905(k)(1)(A). *See Bimbo*, 2015 D.C. Super. LEXIS 5, at * 10. Thus it is not necessary for NCL to have alleged separately that it is bringing claims for its own interest as a consumer to meet the standing requirement under § 28-3905(k)(1)(A).

[2] "[N]onprofit organization" means a person who: (A) [i]s not an individual; and (B) [i]s neither organized nor operating, in whole or in significant part, for profit. D.C. Code § 28-3901(a)(14).

not allege that it purchased the products in dispute in order to test or evaluate them for personal, household, or family purposes. The Court disagreed with the defendant's interpretation of the requirement under § 28-3905(k)(1)(C). As the Court articulated in *Bimbo,* here the Court similarly understands that "[b]y using the phrase 'including,' the language of § 28-3905(k)(1)(C) makes it clear that the violation does not have to involve goods that the organization purchased 'to test or evaluate qualities' for 'personal, household, or family purposes.'" *Id*. at 13. As the Court emphasized in *Bimbo*, "the report of the D.C. Council . . . suggests that § 28-3905(k)(1)(C) does not simply cover testers." *Id*. Instead, "the [DCCPPA] allows for non-profit organizational standing to the fullest extent recognized by the D.C. Court of Appeals in its past . . . decisions addressing the limits of constitutional standing under Article III." *Id*. (citing Yvette M. Alexander, Report on Bill 19-0581, the "Consumer Protection Amendment Act of [sic] 2012," at 6 (Nov. 28, 2012) ("Alexander Report")). Thus, as the Court found in *Bimbo*, here, NCL has standing as a non-profit organization under the DCCPPA.

Regarding § 28-3905(k)(1)(D), NCL meets the definition of a public interest organization as a non-profit organization that focuses on consumer protection through efforts such as promoting accurate labeling of consumer goods. *See* Compl. 3; D.C. Code § 28-3901(a)(15). As to the sufficient nexus requirement under D.C. Code § 28-3905(k)(1)(D)(ii), NCL claims that its mission, goal, and work provide this nexus. Recognizing that it was the intent of the District of Columbia Council that subsection (D) reach the "full extent of standing as may be recognized by the District of Columbia courts," Alexander Report, at 6, the Court finds that NCL's mission, goal, and work of

protecting consumers through various efforts including promoting accurate labeling of consumer goods show sufficient nexus.

e. Pleading Standard

i. Rule 9(b)

Gerber contends that NCL's Complaint alleges conduct sounding in fraud but does not comply with the heightened pleading requirements of Rule 9(b). Currently, no binding decision on the issue of whether complaints brought under the DCCPPA must meet the pleading standard of Rule 9(b) or the more lenient Rule 8(a) exists. *See Bimbo,* 2015 D.C. Super. LEXIS 5, at *23. Nevertheless, this Court has consistently concluded that Rule 9(b) does not apply to DCCPPA claims. *See id.* at 23-25 (adopting the Court's reasoning in *Doctor's Associates*, 2014 D.C. Super. LEXIS 15, at *5, and *Dahlgren v. Audiovox Commc'ns Corp.*, No. 2002 CA 007884 B, 2010 D.C. Super. LEXIS 9, at *24 (D.C. Super. Ct. July 8, 2010), which determined that a plaintiff bringing a DCCPPA claim need not prove the elements of fraud and that the pleading requirements of Rule 9(b) do not apply to such claims).[3] Accordingly, the Court concludes that Rule 9(b) does not apply to NCL's present DCCPPA claim, and will not assess whether NCL satisfied the Rule 9(b) pleading standard.

[3] As the Court in *Bimbo* explained "[i]n *Doctor's Associates*, the court found that this reasoning was also consistent with the legislature's intent in enacting the DCCPPA "to overcome the pleadings problem associated with common law fraud claims by eliminating the requirement of proving certain elements such as intent to deceive and scienter." *Bimbo,* 2015 D.C. Super. LEXIS 5, at * 24 (citing *Doctor's Associates*, 2014 D.C. Super. LEXIS 15, at *14).

ii. Rule 8(a)[4]

Rule 8(a) of the Superior Court Rules of Civil Procedure provides that a pleading shall contain "a short and plain statement of the claim showing that the pleader is entitled to relief." Super. Ct. Civ. R. 8(a). While a heightened fact pleading of specifics is not required, a plaintiff must proffer enough facts to state a claim to relief that is plausible on its face. *Twombly*, 550 U.S. at 570; *Iqbal*, 556 U.S. at 663 ("[while legal conclusions can provide the complaint's framework, they must be supported by factual allegations"). NCL alleges unlawful trade practices pursuant to D.C. Code §§ 28-3904(a), (d), (e), (f), (f-1), (h) and (u). Gerber argues that NCL's claims are deficient because NCL fails to allege any specific facts that provide a basis for the claims, and instead only offers conclusory allegations. As such, Gerber argues that the Court must dismiss NCL's complaint under the Rule 8 pleading standard. The court addresses the violations NCL alleged below.

As an initial matter, Gerber contends that NCL's complaint, which in substance alleges that Gerber falsely marketed Good Start, fails to plead that all reasonable experts in the field agree that Gerber's representations are false. Gerber urges the Court to follow the recent Fourth Circuit opinion in *In re GNC Corporation*, which held that "in order to state a false advertising claim on a theory that representations have been proven to be false under the California, Illinois, Florida, Ohio, New York, New Jersey, and Pennsylvania consumer protection statutes, plaintiffs must allege that all reasonable experts in the field agree that the representations are false." *In re GNC Corporation*, No.

[4] NCL's claims in this case are nearly identical to the claims NCL brought in *Doctor's Associates* and *Bimbo*. In those cases, NCL raised claims under D.C. Code §§ 28-3904(a), (d), (e), (f), (f-1), and (u). The reasoning in both cases is persuasive. Thus, this Court will follow the Court's decision in *Bimbo* and adopt the same methodology of the pleading analysis in *Doctor's Associates.*

14-1724, 2015 U.S. App. LEXIS 10351 (4th Cir. June 19, 2015). Additionally, the Fourth Circuit concluded that "[i]f plaintiffs cannot do so because the scientific evidence is equivocal, they have failed to plead that the representations based on this disputed scientific evidence are false." *Id.*

GNC Corporation affirmed the lower court's finding that "if there are experts who support [the claims made] in advertisements [alleged to be false], the advertisements are not false and misleading." *Id.* at 9. The reasonable interpretation derived from this holding is that a "manufacturer cannot be liable for false advertising so long as at least one qualified expert opines that the representations made are truthful, even if the overwhelming weight of scientific evidence is to the contrary. *Id*. Despite this holding, the Fourth Circuit included a caveat, noting that plaintiffs "who believe that no reasonable scientist would agree with the challenged representations remain free to make the allegation." *Id.* at 20. Plaintiffs who have adhered to the due diligence required by Rule 11 of the Federal Rules of Civil Procedure thus "need not fear that the defendant's subsequent production of a surprise expert whose opinion is not reflected in the published scientific literature would expose them to Rule 11 sanctions, "because Rule 11(b) is only violated when a party has no factual basis for an allegation in a signed pleading." *See id.* at 20-21.

Here, the Court finds that the instant case is distinguishable from *GNC Corporation*. In *GNC Corporation*, the plaintiffs conceded that although most duly qualified scientific experts may have agreed that specific active ingredients in the GNC supplements at issue were ineffective, some reasonable experts disagreed and believed that the ingredients could have provided the relief promised by the defendant companies.

Id. The Fourth Circuit thus concluded that because the plaintiffs conceded that scientific evidence was equivocal, they failed to allege that the challenged representations were literally false. *Id.* at 19. Thus this Court concludes that it is when litigants concede that some reasonable and duly qualified scientific experts agree with a disputed scientific proposition, that the litigants are barred from also arguing that the proposition is "literally false." *See id.* at 20**.**

The Court reaches this holding by acknowledging the premise that underlies the Fourth Circuit's holding. That is, the experts that agree on the scientific evidence at issue must be reasonable. *See id.* at 20-21. Plaintiffs are protected from "dubious experts" by the Federal Rules of Evidence "which ensure that any and all scientific testimony is not only relevant but reliable." *Id.* at 21. Here, NCL alleges that the "prevents allergies" statement in Gerber's marketing and advertising is affirmatively false and misleading. NCL's allegation relies to a degree on the FDA warning letter which states that upon review of the scientific evidence it "concluded that there was no credible evidence to support a qualified health claim relating the consumption of 100 percent whey protein partially hydrolyzed to a reduced risk of food allergy in infants." Warning Letter 2. Accordingly, this Court finds that NCL has sufficiently pled falsity, having not conceded that scientific evidence regarding Gerber's claims on the Good Start label is equivocal.

Regarding the seven alleged violations of D.C. Code § 28-3904, the complaint first claimed a violation of D.C. Code § 28-3904 (a) which provides that it is a violation of the DCCPPA for "a 'person' connected with the 'supply' side of a consumer transaction" to "represent that goods or services have a source, sponsorship, approval, certification . . . characteristics, ingredients, uses, [or] benefits . . . that they do not

have[.]" NCL identified representations that implicate D.C. Code § 28-3904 (a), specifically pointing to Gerber's claim that Good Start can prevent or reduce the incidence of allergies in infants, which has not been proven. NCL thus alleges that the product cannot be said to have the benefits Gerber attributes to it. Also according to the complaint, Gerber misrepresented the FDA's approval of the health claim in its advertisement and logo. Gerber's manner of advertising, including the terminology it used (for example, "1st Formula With FDA Qualified Health Claim"), misrepresented Good Start under the circumstances as a product that had certain approval, certification, and characteristics, and was of a particular standard, or quality when it is not, allegedly in violation of D.C. Code, § 28-3904 (a). Even if the Court assumes that consumers understood that Good Start was not a FDA certified formula for preventing allergies, NCL has pled sufficient facts to support a legally viable claim under this provision, that Gerber misrepresented Good Start's health benefits.

Similarly, under § 28-3904 (d), it is a violation to "represent that goods . . . are of particular standard . . . if in fact they are of another[.]" The Court is persuaded that NCL has made a plausible allegation regarding Gerber's representation that falls within subsection (d). Specifically, NCL alleges that the health claim on the Good Start label was meant to be associated with reduction of atopic dermatitis only. However, NCL alleges that in its marketing and advertising, Gerber makes a representation that Good Start has the capacity to combat more allergies than it actually does. Considering the previously mentioned representations, which the Court must accept as true, and taking into account "the requirement that we construe and apply the DCCPPA 'liberally to promote its purpose,'" the Court concludes that NCL stated a legally viable claim under

D.C. Code § 28-3904 (d). *Cf. Wetzel v. Capital City Real Estate, LLC, 73* A.3d 1000, 1005 (D.C. 2013) (citing *Fort Lincoln Civic Ass'n, Inc. v. Fort Lincoln New Town Corp.*, 944 A.2d 1055, 1073 (D.C. 2008) (quoting D.C. Code § 28-3901 (c) (2001)).

D.C. Code §§ 28-3904 (e), (f), and (f-1) all identify violations concerning tendency to mislead. Under § 28-3904 (e), it is a violation to "misrepresent as to a material fact which has a tendency to mislead." In addition, under § 28-3904 (f), it is an unfair trade practice to "fail to state a material fact if such failure tends to mislead[.]" Gerber contends that NCL fails to set forth any claim under D.C. Code § 28-3904 (f) and claims that NCL fails to allege any omissions by Gerber, much less ones that would tend to mislead. However, NCL alleges that Gerber violated the aforementioned provisions by making claims despite having twice petitioned the FDA for approval in making the claims and twice being denied for lack of scientific support. Gerber makes no mention of the limiting language that the FDA required in its marketing, and does not include it on the Good Start label.

When addressing allegations concerning §§ 28-3904 (e) and (f), the Court of Appeals has determined that a person bringing suit under these sections "need not allege or prove intentional misrepresentation or failure to disclose to prevail on a claimed violation . . . [but] must allege a material fact that tends to mislead." *Fort Lincoln Civic Ass'n, Inc*., 944 A.2d 1055, 1073 (citing *The Chelsea Condo. Unit Owners Ass'n v. 1815 A St. Condo. Grp., LLC*, 468 F. Supp. 2d 136, 142 n.6 (D.D.C. 2007) ("distinguishing plaintiff's fraud claims from their DCCPPA claims"). A violation under these subsections may be found "whether or not any consumer is in fact misled, deceived or damaged thereby[.]" D.C. Code § 28-3904. It is important to note that, "a claim of an

unfair trade practice [under the DCCPPA] is properly considered in terms of how the practice would be viewed and understood by a reasonable consumer." *Pearson v. Chung*, 961 A.2d 1067, 1075 (D.C. 2008) (citing *Jeter v. Cash,* No. 2013 CA 006943 R(RP), 2014 D.C. Super. LEXIS 6 (D.C. Super. Ct. 2014)). Here, the complaint alleged that Gerber misrepresented that buying Good Start formula and feeding it to babies would reduce or otherwise beneficially impact the risk of those babies developing allergies. NCL alleges that such misrepresentations have the tendency to mislead the public into thinking Good Start has health benefits that it does not have. Here, it is relevant that the FDA has not approved the health claims Gerber asserts, and furthermore the FDA required Gerber to use certain language which it did not. Thus, the Court finds that the complaint states a legally viable claim under D.C. Code §§ 28-3904 (e) and (f).

Under § 28-3904 (f-1), it is a violation to "use innuendo or ambiguity as to a material fact, which has a tendency to mislead." Gerber maintains that in fact, Good Start does reduce allergies in infants. However, accurate statements may still be found misleading if a "reasonable consumer" finds them to be so. *See Bimbo*, 2015 D.C. Super. LEXIS 5, at *30. NCL contends that the health claim on the Good Start label is confusing to consumers because Gerber's marketing practices, through its use of packaging, the logo and other advertising, mislead consumers about the health benefit and the nature of the FDA's approval. Furthermore, the claims made on the Good Start packaging as well as those made in advertisements for the product in magazines and on television do not contain the limiting language mandated by the FDA. The Court is persuaded that a reasonable consumer could find the claims ambiguous and infer from Gerber's representations that Good Start has health benefits that it does not have (having

the ability to reduce the instance of multiple allergies, instead of only atopic dermatitis, or none at all) and that the FDA has approved the statement that use of the formula reduces the risk of developing allergies. These are issues of fact which a jury should resolve at trial. *See Bimbo*, 2015 D.C. Super. LEXIS 5, at *30-31; *Doctor's Associates*, 2014 D.C. Super. LEXIS 15, at *23. Viewing the facts in the light most favorable to NCL, the Court finds that a fact-finder could conclude that Gerber's marketing practices, with truthful representation, could have a tendency to mislead a reasonable consumer.

NCL's complaint also alleges that Gerber violated D.C. Code § 28-3904 (h) by "advertis[ing] goods or services . . . without the intent to sell them as advertised or offered." According to the complaint, Gerber actively advertised and marketed Good Start, misrepresenting its benefits to induce parents to buy the formula. NCL contends that Gerber offered a product without the intent to sale it as advertized. Specifically, Gerber allegedly never intended to provide a formula that reduces the risk of all allergies, because NCL contends, there is no formula that can reduce the risk of all allergies, or even atopic dermatitis. In short, NCL has alleged that Good Start is merely regular formula and that Gerber's claims regarding the effect of Good Start are false. As such, NCL has pled sufficient facts to survive a motion to dismiss § 28-3904 (h).

Regarding the final claim, Gerber argues that NCL fails to state a claim under § 28-3904 (u), which makes it a violation of the DCCPPA to "represent that the subject of a transaction has been supplied in accordance with a previous representation when it has not." D.C. Code § 28-3904 (u) "calls for a backward look: did a party make a present misrepresentation that he or she has done something pursuant to a previous representation?" *Banks v. District of Columbia Dept of Consumer and Regulatory*

Affairs, 634 A.2d 433, 439 (1993). NCL alleges that Gerber violated § 28-3904 (u) when it represented Good Start's formula label with the gold seal logo in its advertisements giving a false impression that the FDA approved the references to multiple "allergies," when in fact, the FDA only permitted significantly limited language for one allergy (atopic dermatitis). Furthermore, NCL contends that although Good Start may provide nutrition and contribute to infants' growth and development, it does not prevent or reduce the incidence of allergies. Thus, the product sold does not conform to the basis of the transaction into which consumers who purchase Good Start enter. NCL has therefore sufficiently alleged that Gerber's current representations about Good Start are different from those made at some point in the past. Accordingly, NCL's claim under § 28-3904 (u) survives.

Although Gerber characterizes NCL's DCCPPA claims as mere derivative claims of the FTC Action, the unlawful trade practices alleged here entitle an aggrieved person to sue for relief "whether or not the plaintiff was damaged." *See Murray*, 982 A.2d at 783. The Court finds that this case is distinguishable from others in which the Court of Appeals has affirmed dismissal of DCCPPA claims where the complaint did not identify any affirmative or implied representations by defendants. *See Grayson*, 15 A.3d at 251. In *Grayson*, the Court of Appeals found it problematic that the plaintiff made no averment as to defendants' representation of their goods that fit within §§ 28-3904 (a), (e), (f), (h), (r) or (r)(5). *See id*. at 252. The Court of Appeals observed that "other than conclusory allegations pertaining to vulnerable members of the District's population . . . the elderly and the disabled . . . [plaintiff's] complaint [was] devoid of allegations demonstrating even by innuendo that defendants . . . issued calling cards in the District

that enable[d] them to take advantage of these segments of the population." *Id.* Conversely, here, the Court is satisfied that NCL has pled with sufficient particularity facts tending to show false or misleading statements or omissions attributable to Gerber. If proven, such representations may be deemed violations of the DCCPPA. Thus, NCL's claims under the DCCPPA survive Gerber's Motion to Dismiss.

Accordingly, it is this 5th day of August 2015 hereby:

ORDERED that Defendant's Motion to Dismiss is **DENIED**.

SO ORDERED.

Maurice A. Ross

JUDGE MAURICE A. ROSS

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