IN THE SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
CIVIL DIVISION

ENVIRONMENTAL WORKING GROUP, *Plaintiff*, v. TYSON FOODS, INC., *Defendant*.	Case No. 2024-CAB-005935 Judge Danya Dayson Next Event: Initial Scheduling Conference Date: January 3, 2025

MEMORANDUM IN SUPPORT OF DEFENDANT TYSON FOODS, INC.'S MOTION TO DISMISS PLAINTIFF'S COMPLAINT

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INTRODUCTION

Plaintiff asks the Court to punish Tyson Foods, Inc. ("Tyson") for (1) setting an ambition of achieving net-zero greenhouse gas ("GHG") emissions in 2050, *twenty-six years from now* ("Net Zero Ambition"), and (2) truthfully describing a program that Tyson implemented to supply certain beef products from cattle produced using practices having reduced GHG emissions, even though Plaintiff does not allege that Tyson sells, markets, or makes any statements about such beef in D.C. Jurisdictional and substantive flaws doom Plaintiff's Complaint.

First, Plaintiff does not allege facts sufficient to establish personal jurisdiction over non-resident Tyson. Plaintiff's personal jurisdiction theory relies on statements made on Tyson's passive websites outside the District and on the alleged sale in D.C. of products that the Complaint does not connect to any of the statements that Plaintiff claims are misleading. This Court (among many others) has rejected similar theories, and it should do so here. Ultimately, Plaintiff cannot show that its claims arise from or relate to any of Tyson's supposed D.C. contacts because the conduct at issue has nothing to do with D.C. or Tyson products sold here.

Second, Plaintiff's claims under the Consumer Protection Procedures Act ("CPPA") would stretch this statute beyond recognition. Plaintiff's challenge to Tyson's 2050 Net Zero Ambition relies on conclusory allegations that Tyson has not taken steps toward achieving its 26-year objective. Yet the Complaint itself cites to numerous acts, initiatives, and investments made by Tyson after its 2021 announcement in support of its 2050 Net Zero Ambition. The facts in the Complaint thus belie Plaintiff's claim that Tyson lacks intent to achieve its Net Zero Ambition by 2050. Plaintiff thus cannot meet its burden of plausibly pleading that Tyson lacks intent to achieve its Net Zero Ambition.

Moreover, Plaintiff cannot explain how a D.C. consumer could possibly be misled by

statements about an innovative program to track and reduce GHG emissions for certain beef products because the Complaint does not allege that such beef is actually marketed to D.C. consumers (rather than merely talked about on Tyson websites). Under these circumstances, no reasonable D.C. consumer could be misled by any of the challenged statements. Indeed, holding Tyson liable for them would discourage companies from embarking on bold initiatives and taking steps to address the very climate challenges about which Plaintiff purports to care.

Third, any finding of liability, and any possible relief Plaintiff seeks would impermissibly regulate Tyson's constitutionally protected speech about a matter of considerable importance. Imposing liability for pursuing a Net Zero Ambition, and for making truthful statements about its program to reduce GHG emissions generated from cattle production in Tyson's supply chain goes right to the heart of what the First Amendment protects.

For all these reasons, and those explained below, the Court should dismiss the Complaint.

BACKGROUND

Tyson is an agricultural company incorporated in Delaware and headquartered in Arkansas that sells chicken, beef, and pork food products. Compl. ¶¶ 1, 4, 23. In 2021, Tyson announced its aspiration to have net-zero greenhouse gas emissions by the year 2050. *Id.* ¶ 67. Tyson has set forth its 2050 Net Zero Ambition on its website, in sustainability reports, press releases, online articles, and online videos. *Id.* ¶¶ 7, 69. In the three years since announcing its Net Zero Ambition, Tyson has inventoried its emission sources and compiled necessary data to calculate its carbon footprint, *id.* ¶¶ 80–81, and also created pilot programs to help enrolled farmers and producers adopt climate-smart practices, *id.* ¶¶ 85, 87. In 2022, Tyson announced a $42 million investment to promote Tyson's suppliers' adoption of climate-smart practices. *Id.* ¶ 95. Tyson's $114 million annual budget for research and development ("R&D") includes R&D into "climate-reducing

technologies[.]" *Id.* ¶ 96. In 2023, Tyson also announced a Climate-Smart Beef Program to track and reduce emissions in its beef supply chain. *Id.* ¶¶ 104, 105. Tyson's website explains the program's details and objectives. *Id.* ¶ 105; *see also* Ex. 1 (Tyson 2022 Sustainability Report) at 39.[1]

While D.C. consumers can purchase Tyson products via online retailers such as Instacart, and from third-party grocers in D.C., *id.* ¶¶ 24–26, Plaintiff does not allege that any Tyson product, beef or otherwise, sold in D.C. has labeling containing statements about "net-zero" or "climate-smart." Instead, Plaintiff merely alleges that Tyson has used such phrases on its websites, sustainability reports, and two thought leadership articles in the Wall Street Journal. *Id.* ¶¶ 27, 105.

LEGAL STANDARD

On a motion to dismiss for lack of personal jurisdiction under Rule 12(b)(2), the "plaintiff bears the burden of proving that the court may establish personal jurisdiction over the defendant." *Harris v. Omelon*, 985 A.2d 1103, 1105 (D.C. 2009). The "court must accept Plaintiff's [factual] claims as true in ruling on a Rule 12(b)(2) motion," but "the court is not required to accept the plaintiff's conclusory statements or bare allegations regarding the defendant's actions in a selected forum." *Doe v. President and Fellows of Middlebury College*, No. 2023 CAB 1645, 2023 WL 9782964, at *2 (D.C. Super. Ct. Nov. 09, 2023) (citation and internal quotation marks omitted).

To survive a Rule 12(b)(6) motion, a "complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face" and "plead[ ] factual content

[1] The Complaint incorporates by reference and necessarily relies on Tyson's 2022 Sustainability Report, *see, e.g.*, Compl. ¶¶ 71, 105, so the Court may properly consider it when ruling on this motion to dismiss. *Dist. of Columbia v. Casa Ruby, Inc.*, No. 2022 CA 003343 B, 2023 WL 5286267, at *2 n.1 (D.C. Super. Ct. May 01, 2023) ("Matters that are not 'outside' the pleadings . . . include the facts alleged in the complaint, documents attached as exhibits or incorporated by reference in the complaint, or documents upon which the plaintiff's complaint necessarily relies." (internal quotation marks omitted)).

that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Potomac Dev. Corp. v. Dist. of Columbia*, 28 A.3d 531, 544 (D.C. 2011) (citation and internal quotation marks omitted). Legal conclusions and threadbare recitals supported by mere conclusory statements do not suffice. *Id.*

ARGUMENT

I. THIS COURT LACKS PERSONAL JURISDICTION OVER DEFENDANT.

Plaintiff's reliance on a "specific jurisdiction" theory requires it to demonstrate both that (1) Tyson "purposefully avail[ed] itself of the privilege of conducting activities" in D.C., and (2) Plaintiff's claims "arise out of or relate to the defendant's contacts with the forum." *Ford Motor Co. v. Montana Eighth Jud. Dist. Ct.*, 592 U.S. 351, 359 (2021) (cleaned up).[2]

Plaintiff meets neither of these burdens. By attacking Tyson's online statements related to products that the Complaint itself alleges are not sold in D.C., Plaintiff impermissibly asks this Court to extend its jurisdiction far beyond the District. Taken to its logical end, Plaintiff's theory would make this Court the regulator of general corporate speech of any company that makes products sold in D.C. and has a sustainability website. Due Process does not allow this.

A. Tyson's Website Does Not Give this Court Jurisdiction.

Plaintiff's Complaint focuses almost entirely on Tyson's website, but as a matter of law Tyson's online presence does not satisfy the requirements to establish specific jurisdiction. It is well-settled law that the "mere accessibility" of a defendant's "websites in the forum cannot by itself establish the necessary minimum contacts." *Triple Up Ltd. v. Youku Tudou Inc.*, 235 F. Supp.3d 15, 23 (D.D.C. 2017) (dismissing for lack of personal jurisdiction), *aff'd*, No. 17-7033,

[2] Because D.C.'s "long-arm statute is coextensive with the reach of personal jurisdiction permitted under the Due Process Clause[,]" the jurisdictional analysis here boils down entirely to Due Process. *Harris*, 985 A.2d at 1105 n.1 (affirming dismissal) (citation omitted).

2018 WL 4440459 (D.C. Cir. July 17, 2018). "Websites must meet a certain level of interactivity with users in" D.C. "to be deemed sufficient contacts[.]" *Staggs v. Smith & Wesson*, No. CV 21-2535 (JEB), 2022 WL 2713277, at *4 (D.D.C. July 13, 2022) (rejecting website theory and granting motion to dismiss) (cleaned up); *accord Institute for Truth in Marketing, Inc. v. Offroad*, No. 2023-CAB-000944, 2023 WL 10554164, at *2 (D.C. Super. Ct. Sept. 21, 2023) ("For a nonresident defendant to have conducted business in the jurisdiction through an online forum, the website shall enable the residents of the forum to start and complete business transactions with the defendant entirely online." (citation and internal quotation marks omitted)). Plaintiff alleges nothing to suggest that any Tyson website is "interactive" or D.C.-specific. Nor does Plaintiff allege that consumers can purchase *any* Tyson product through any Tyson website. *Cf.* Compl. ¶ 26 (alleging only that consumers can purchase unspecified "products online through retailers such as Instacart and Amazon Fresh").

Importantly, the passive websites alleged here differ from interactive "storefront" websites that this Court has deemed sufficient to conclude that a defendant has requisite minimum contacts with D.C. This Court's decision in *Offroad* is instructive. There, the Court distinguished "virtual storefront" websites from passive websites and found sufficient minimum contacts with D.C. only where the defendant used its "virtual storefront" to advertise, sell, and ship D.C.-themed products to D.C. consumers. *See Offroad*, 2023 WL 10554164, at *2. Here, in contrast, the Complaint includes none of these allegations. Indeed, Plaintiff expressly relies on statements related to Tyson products that the Complaint alleges are *not* available for sale in D.C. *See* Compl. ¶ 105(d) n.1. The law is clear that "personal jurisdiction cannot be conferred based on [a defendant's] website" when "no business with D.C. residents was being conducted on or through the website." *Gather Workspaces LLC v. Gathering Spot, LLC*, No. CV 19-2669 (RC), 2020 WL 6118439, at *7 (D.D.C.

Oct. 16, 2020) (holding there was no personal jurisdiction where a website advertised memberships for a *future* D.C. social club but "Defendants had not accepted any new members to their future D.C. location").

Moreover, where a non-resident defendant's website does not create forum contacts, even defendants that have promoted and sold products in the forum are not subject to jurisdiction for claims based on the website. For example, in *Hasson v. FullStory, Inc.*, the court found jurisdiction lacking where the plaintiff based his claims on the defendant's website but did not allege facts regarding "in-forum promotion of the" website "that allegedly harmed him." 114 F.4th 181, 194 (3d Cir. 2024). The mere fact that the defendant allegedly promoted its products generally in the forum state did not give rise to jurisdiction. *Id.* This rule makes good sense. As is widely recognized, "if websites necessarily expose their operators to suit in any jurisdiction where they are accessed," then "personal jurisdiction in internet-related cases would almost always be found in any forum, and this constitutional assurance would be shredded . . . out of practical existence." *Triple Up*, 235 F.Supp.3d at 23 (dismissing for lack of personal jurisdiction) (cleaned up). Simply put, Plaintiff's website allegations do not establish personal jurisdiction over Tyson.

B. Tyson's Sale of Products Unconnected to Plaintiff's Allegations Does Not Support Jurisdiction.

Plaintiff also cannot establish jurisdiction by alleging that D.C. consumers can purchase unspecified Tyson products from third-party online retailers and third-party grocers (not from Tyson itself). Compl. ¶¶ 25, 26. Such an expansive exercise of jurisdiction fails for two independent reasons.

First, Supreme Court precedent makes clear that placing "a product into the stream of commerce, without more, is not an act of the defendant purposefully directed toward the forum State"—even amid "a defendant's awareness that the stream of commerce . . . will sweep the

product into the forum[.]" *Asahi Metal Indus. Co. v. Superior Ct. of California, Solano Cnty.*, 480 U.S. 102, 112 (1987). Moreover, a plaintiff "must demonstrate purposeful availment by [the defendant], not its distributors." *Pinkett v. Dr. Leonard's Healthcare Corp.*, 2018 WL 5464793, at *4–5 (D.D.C. Oct. 29, 2018) (holding that the plaintiff "has not alleged sufficient facts to warrant personal jurisdiction" by alleging that the defendant "regularly conducts and solicits business in [D.C.]" and "delivered [the product] into the stream of commerce through [specified third-party retailers], and other distributors"). Here, Plaintiff alleges "no specific effort by the [defendant] to sell in" D.C., nor any "special state-related design, advertising, advice, marketing, or anything else." *J. McIntyre Mach., Ltd. v. Nicastro*, 564 U.S. 873, 889 (2011) (Breyer, J., concurring); *see also Asahi*, 480 U.S. at 112 (emphasizing that mere awareness of a product's flow through the stream of commerce to the forum state is insufficient). Indeed, the Complaint only points to Tyson's websites, online sustainability reports, and supposed online marketing. Compl. ¶¶ 25, 26, 27.[3] As noted above, these online activities are insufficient to confer personal jurisdiction as a matter of law. *See supra* § I(A). Moreover, the Complaint alleges no facts capable of rendering any of these things *D.C.-related* such that they could show intent or purpose to serve the D.C. market. *See Asahi*, 480 U.S. at 112; *Nicastro*, 564 U.S. at 889 (Breyer, J., concurring).[4] Plaintiff's Complaint must fail because it does not and cannot assert a viable "stream of commerce" theory.

[3] Plaintiff alleges that various Tyson brands each have brand-specific websites, but never alleges that these brand-specific websites include any statements that Plaintiff finds objectionable. Compl. ¶¶ 25, 26. These websites thus cannot support Plaintiff's jurisdictional theory (or its substantive claims).

[4] While Plaintiff's allegations mention "a two-part series in the Wall Street Journal" allegedly "sponsored by Deloitte," Plaintiff fails to allege any connection between this New York newspaper, beef consumers in D.C., or even any beef that is sold in the District. Compl. ¶¶ 27, 72.

Second, even if Tyson products flowing to D.C. via third-party retailers counted as relevant forum contacts (they do not), personal jurisdiction still would be absent because Plaintiff's claims do not relate to the sales of *those* products. "[E]ven regularly occurring sales of a product in a State do not justify the exercise of jurisdiction over a claim unrelated to those sales." *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915, 930 n.6 (2011); *see also Bristol-Myers Squibb Co. v. Superior Ct. of California, San Francisco Cnty.*, 582 U.S. 255, 264 (2017) (explaining "settled principles regarding specific jurisdiction").[5] The Supreme Court has emphasized that "the phrase 'relate to' incorporates real limits, as it must to adequately protect defendants foreign to a forum." *Ford Motor*, 592 U.S. at 362.

Indeed, *Ford Motor* and its progeny foreclose attempts to treat a manufacturer's various products as all identical and interchangeable for purposes of establishing personal jurisdiction. For example, in *Adams v. Aircraft Spruce & Specialty Co.*, the court held the plaintiffs failed to show their claim arose from or related to the defendant's forum contacts. 284 A.3d 600, 626 (Conn. 2022). In doing so, the court explained that its research did not "reveal any case in which a defendant manufacturer's sales or marketing of products of a different sort than the one involved in the litigation provided the necessary connection" with the forum state. *Id.* at 618 (rejecting the plaintiffs' specific jurisdiction theory resting "on such attenuated activities").

[5] District of Columbia courts, too, have explained that personal jurisdiction is "restricted to claims arising from the particular transaction of business carried out in [D.C.]." *Berwyn Fuel, Inc. v. Hogan*, 399 A.2d 79, 80 (D.C. 1979). A non-resident defendant's business in D.C. does not create jurisdiction for claims based on the defendant's conduct outside of D.C. *Id.* (reversing and holding that trial court lacked personal jurisdiction over claim arising from a shipment of goods to a purchaser in Pennsylvania because § 13-423 does not convey jurisdiction solely on the ground that the defendant had also shipped goods to purchasers in D.C.); *see also Everett v. Nissan Motor Corp. in U.S.A.*, 628 A.2d 106, 108 (D.C. 1993) (holding "the nexus between" (1) events occurring outside of D.C. giving rise to litigation and (2) "appellee's business of distributing cars in the [D.C.] metropolitan area is simply too tenuous to satisfy the requirement of the long-arm statute").

This Court should not break new ground here. Plaintiff does not allege that *any* products carrying the allegedly misleading statements are sold in the District. Indeed, Plaintiff does not allege that any such products exist at all. Plaintiff's Count I challenges statements made on Tyson's website about its Net Zero Ambition.[6] Compl. ¶¶ 113–118. Similarly, Count II challenges Tyson's online statements about the "climate-smart beef" program. In both instances, Plaintiff fails to allege that any Tyson product sold in D.C. has labeling displaying "net-zero," "climate-smart," or any other challenged statements. In fact, as to its second claim, Plaintiff's own Complaint alleges that "no beef produced pursuant to Tyson's climate-smart beef program is yet available for sale," *id.* ¶ 112, and that "Brazen Beef is not yet available for purchase anywhere in the United States[,]" *id.* ¶ 109.

At best, Plaintiff's personal jurisdiction theory improperly relies on "sales or marketing of products of a different sort than the one involved in the litigation." *Adams*, 284 A.3d at 618 (affirming dismissal). At worst, Plaintiff's theory would effectively merge specific jurisdiction into general jurisdiction and would subject a non-resident defendant to jurisdiction for any claim challenging Tyson's speech anywhere, about any subject. Plaintiff's expansive jurisdiction theory contravenes the careful limitations the Supreme Court has imposed on general jurisdiction theories and would fly in the face of the "real limits" of specific jurisdiction requirements that are necessary

[6] The lack of allegations of *relevant* marketing or sales in D.C. distinguishes the claims from those where the defendant's alleged deceptive marketing, direct sales, and delivery of the complained-of products to the plaintiff all occurred *within* D.C. *Cf. Offroad*, 2023 WL 10554164, at *3 (holding that claims challenging deceptive marketing under CPPA arose out of the defendant's D.C. contacts where "Plaintiff learned of, accessed, purchased, and had eighteen items shipped to it, *all within D.C.* by Defendant through the website" (emphasis added)).

"to adequately protect defendants foreign to a forum." *Ford Motor*, 592 U.S. at 362 (emphasizing that the "relates to" requirement for specific jurisdiction "does not mean anything goes").[7]

* * *

Because Plaintiff's claims do not "relate to the particular act or transaction forming the basis for personal jurisdiction" but instead focus on general corporate statements made in a foreign forum, Due Process does not allow the Court to exercise personal jurisdiction over Tyson. *Berwyn*, 399 A.2d at 80 (reversing for lack of personal jurisdiction). All claims should be dismissed.

II. PLAINTIFF FAILS TO PLEAD ANY VALID CLAIM.

The Complaint also fails to sufficiently plead a CPPA violation. "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). A plaintiff "cannot maintain a CPPA claim that consists of a grab-bag of statements that no reasonable consumer would ever be likely to see in combination." *Id.* at 672. Where a representation "could [not] mislead a reasonable consumer," a CPPA claim may be dismissed as a matter of law. *Alicke v. MCI Commc'ns Corp.*, 111 F.3d 909, 912 (D.C. Cir. 1997).

A. Tyson's Net-Zero Ambition and Related Statements Are Not Actionable Misstatements Under the CPPA.

Failure to achieve a stated ambition "alone could not support a misrepresentation claim." *Earth Island*, 321 A.3d at 670 (citation omitted). Indeed, D.C. courts have held that a company's

[7] For corporations, general jurisdiction exists only where the "corporation's affiliations with the State are so continuous and systematic as to render it essentially at home in the forum State." *Daimler AG v. Bauman*, 571 U.S. 117, 139 (2014) (cleaned up). Here, Plaintiff concedes Tyson is neither incorporated nor headquartered in D.C., Compl. ¶ 23, alleges no continuous and systematic affiliations with D.C., and appears not to invoke general jurisdiction, *id.* ¶ 29. In any event, Tyson is not "at home" in D.C., *see Daimler*, 571 U.S. at 139, and general jurisdiction is absent.

aspirational or "'goal' statements do not meet the plausibility standard" required to survive a motion to dismiss. *Nat'l Consumers League v. Wal-Mart Stores, Inc.*, No. 2015 CA 007731 B, 2016 WL 4080541, at *7 (D.C. Super. Ct. July 22, 2016) (Motley, J.) (holding that a corporation's aspirational statements cannot support a CPPA claim where "a fair and objective reading of the Corporate Statements clearly suggests that these are non-actionable aspirational statements").

Recently, the D.C. Court of Appeals identified a unique circumstance where an aspirational statement can give rise to a misrepresentation claim: Where the aspirant "never had any intention of taking—and never took—*any* steps that *might possibly* achieve" the aspiration. *Earth Island*, 321 A.3d at 670 (emphases added). Analogizing to an "obese husband" telling his spouse that "he is 'doing what it takes to lose a lot of weight' despite having taken no steps to lose any weight at all," the Court held that defendant Coca-Cola's alleged *inaction* despite the company's aspirational statements supported a plausible misrepresentation claim. *Id*. (holding that "when Coca-Cola says it 'act[s] in ways to create a more sustainable and better shared future,' that claim is perfectly capable of being adjudged misleading *if Coca-Cola is in fact not acting in that way*" (emphasis added)); *see id.* (explaining further that the husband lied to his spouse "midway through the year" when he "repeated his assurances that he was doing what it takes" to lose a lot of weight by year's end).

Here, Tyson's 2050 aspirations—and Plaintiff's allegations about them—differ greatly from those in *Earth Island*. Even though Plaintiff believes that Tyson is not doing *enough* to satisfy Plaintiff or to reach net-zero immediately in 2024, the Complaint's actual allegations preclude any reasonable finding that Tyson "has never even intended to do anything that could achieve" its stated aspirations. *Earth Island*, 321 A.3d at 670 (holding that the fact that the defendant "has never even intended to do anything that could achieve" its stated sustainability

goals can support a valid misrepresentation claim based on the defendant's stated sustainability goals).

Quite the opposite: The Complaint alleges affirmative acts by Tyson that foreclose any reasonable finding that it "never had any intention of taking—and never took—any steps that *might possibly* achieve" net-zero by 2050. *Id.* For example, the Complaint alleges that Tyson is gathering and calculating emissions data allegedly required for progressing to net-zero. *See, e.g.*, Compl. ¶¶ 77, 79, 81. Additionally, the Complaint alleges that Tyson has launched a Climate-Smart Beef Program to track and reduce emissions, has created "pilot projects" related to climate-smart practices and land stewardship, and is enrolling farmers in "pilot programs" with 408,000 acres enrolled as of June 2021. Compl. ¶¶ 84, 85, 87, 104–105. Plaintiff further alleges Tyson has made a $42 million investment into promoting the adoption of climate-smart practices, and devotes $114 million *annually* to R&D. *Id.* ¶¶ 95–96. Between now and 2050, Tyson allegedly will invest $2.9 billion into R&D, "inclusive of research and development into climate-reducing technologies[.]" *Id.* As recited in Plaintiff's Complaint, Tyson has taken steps to achieve its 2050 Net Zero Ambition. The complacent spouse analogy that drove the reasoning in *Earth Island* is inapposite here.

Earth Island also makes clear that the timing of the aspirational statement relative to the deadline is a key consideration. Coca-Cola's statements included goals with soon-approaching target dates 2025 and 2030, and the Court's "obese husband" illustration centered on statements made at the "midway" point of a 12-month deadline. In contrast, the alleged net-zero statements by Tyson set a 2050 target with a runway exceeding a ***quarter-century***.

Plaintiff has no answer to this, other than to argue that Tyson's efforts are not sufficient given the state of the world in 2024. But by tying its allegations about the year 2050 to the

supposed limits of *current* practices and technology, the Complaint rests on the implausible assumption that neither Tyson nor agricultural practices nor technology will change in the next 26 years. *See, e.g.*, Compl. ¶ 88 (alleging facts based on "agricultural practices today"); *id.* ¶ 103 (alleging net zero is "impossible with current technology"); *see also, e.g.*, *id.* ¶¶ 89, 91, 92, 99, 103 (assuming stasis of technology and practices).

History shows how wrong this thinking is. Recalling the year 1999 (*i.e.*, 26 years ago)—the age of dial-up internet and Y2K fears—reveals the implausibility of Plaintiff's core assumption of a static world over the *next* 26 years. To state the obvious, major technological progress and innovation can (and do) happen on a 26-year time frame—especially where a great American company is setting targets and undertaking the exploration, actions, and investments that Plaintiff's own Complaint alleges here.[8] The opportunity for technological advancement over a long-term time horizon renders wholly implausible Plaintiff's theory that, despite Tyson's alleged pilot programs and millions spent on investments into new practices and new technology, Tyson secretly lacks any intent to achieve its Net Zero Ambition by 2050.

Even accepting as true Plaintiff's allegations about the limits of "agricultural practices *today*" and "*current* technology," Compl. ¶¶ 88, 103, Tyson's alleged data collection, creation and administering of pilot projects, and alleged investments into adoption of climate-smart practices and technological R&D foreclose any reasonable inference that Tyson "never had any intention of taking—and never took—*any* steps that *might possibly* achieve" its Net Zero Ambition. *Earth Island*, 321 A.3d at 670 (emphasis added). The Complaint thus fails to adequately allege inaction

[8] To illustrate the implausibility of Plaintiff's assumption of static practices and technology over a quarter-century: The mere color and clarity of the modern smartphone *screen*—let alone the functionality of smartphone apps and how people use them—would have been mind-blowing to someone in 1999. Yet such technology is widespread and taken for granted today in 2024.

and lack of intent required to plead that Tyson's aspirational "representations could mislead reasonable consumers." *See id.* at 659. Count I fails to state a claim.

B. Plaintiff Does Not State a Claim Related to the Climate-Smart Beef Program.

Several deficiencies doom Plaintiff's Count II, which is based on alleged statements about Tyson's Climate-Smart Beef Program.[9] *First*, Plaintiff's claim is based on online statements about a supply chain management program unrelated to any product that Plaintiff alleges is being sold or marketed in D.C. The Complaint does not allege that any Tyson product sold in D.C. has any product labeling or D.C.-directed marketing related to the Climate-Smart Beef Program. *See* Compl. ¶ 105 (alleging only website content and sustainability reports as examples of Tyson's general "marketing"); *id.* ¶ 109 (alleging that Tyson "currently does not have a climate-smart beef product"). Plaintiff's theory instead fatally depends on the unsupported assumption that a reasonable D.C. consumer would think Tyson's online statements about the Climate-Smart Beef Program somehow make representations about *unrelated* (and unspecified) Tyson products[10] that lack any product labeling or marketing related to the Climate-Smart Beef Program.[11] This

[9] Plaintiff concedes that the majority of these alleged statements come from "industry outlets" and "media outlets" (not Tyson itself), or a website that no longer exists. Compl. ¶¶ 105(c), 105(d) n.1. Such statements thus are both substantively irrelevant and fundamentally unfit for the equitable remedies Plaintiff seeks.

[10] As Plaintiff alleges, numerous brands exist within Tyson's portfolio, which includes brands offering non-meat products. Compl. ¶¶ 25, 26. The Complaint alleges no facts to support Plaintiff's implied assumption that any consumer would know that any one of these distinct brands is owned by Tyson. Yet even if they did, Plaintiff lacks any valid basis to argue that statements on Tyson's corporate website about the company's aspirations and programs for GHG emissions regarding beef production are related—let alone *material*—to a reasonable D.C. consumer's decision whether to purchase a pack of tortillas. Plaintiff's claims stray far from plausibility.

[11] If Plaintiff's view were correct, then then CPPA would prohibit any product maker from making public statements about a new initiative or future product. That cannot be the law. To illustrate: Under Plaintiff's view, online statements about an automotive manufacturer's program to test and develop hydrogen-powered vehicles could somehow trick a reasonable consumer into thinking that gasoline-fueled vehicles currently on the market offer the benefits of

unreasonable assumption serves as Count II's keystone, but relies on conclusory allegations devoid of sufficient factual support. *See* Compl. ¶¶ 109–112. Count II crumbles under the weight of the reasonable consumer standard and common sense.

Second, Plaintiff strips away all context surrounding Tyson's use of the term "climate-smart" to allege that such descriptions are misleading because "mass produced beef can never be a climate-smart choice." Compl. ¶ 112. Challenged statements must be "viewed in context" and with accompanying information, and not "in isolation," *Whiting v. AARP*, 701 F. Supp. 2d 21, 29–30 & n.7 (D.D.C. 2010) (dismissing CPPA claim), or "plucked from their broader messages[,]" *Earth Island*, 321 A.3d at 672 (requiring "full context"). When viewed in context, reasonable consumers would recognize that "climate-smart" is not some catchphrase Tyson has devised to market its products. Instead, "climate-smart" is a term of art used throughout the agricultural industry, including by the United States Department of Agriculture ("USDA"), to describe agricultural and supply chain practices aimed at reducing—although not eliminating—climate impacts. Apparently unaware of the USDA's definitions or guidance on climate-smart agriculture practices, the Complaint tangles itself in self-contradiction: After conceding that Tyson considers "reduced tilling and cover cropping" to be climate-smart practices, Plaintiff alleges in the same breath that Tyson does not define what "climate-smart" means, *see* Compl. ¶ 85, and again repeats this self-contradicted allegation, *id.* ¶ 106. But the materials on which Plaintiff's claim relies show that the term "climate-smart" describes not just select practices related to Tyson or Tyson beef, but also other agricultural commodities developed through similar initiatives and programs.[12]

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hydrogen-power, despite no product labeling or marketing suggesting so. Plaintiff's non-sensical theory requires the impermissible assumption that consumers are unreasonable.

[12] *See* Ex. 1 at 39 (describing the Program as one using science-based targets and rancher experience to reduce emissions in the beef supply chain and recognizing that USDA has a "Partnerships for Climate-Smart Commodities" grant program not unique the beef industry).

Third, Plaintiff fails to adequately allege any specific statement or representation made in relation to Tyson's Climate-Smart Beef Program that is misleading. 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,* 321 A.3d at 664 (internal quotation marks omitted). Plaintiff fails to do so here. The Complaint alleges no promise by Tyson that its Climate-Smart Beef Program will eliminate *all* emissions or environmental impacts. Instead, the Complaint relies on Tyson's online materials explaining that, through the Climate-Smart Beef Program, Tyson is developing and verifying results from an accounting framework and model to investigate and implement ways to incentivize the adoption of agricultural practices that can reduce emissions in Tyson's beef supply chain. *See* Ex. 1 at 39. Plaintiff does not (and cannot) point to anything misleading about those representations. Nor does Plaintiff allege that Tyson has stated it is taking certain actions related to the Program that it, in fact, is not.

Plaintiff fails to state a claim as to Count II of the Complaint.

III. PLAINTIFF'S CLAIMS ARE BARRED BY THE FIRST AMENDMENT.

The First Amendment bars the Complaint's attempt to use the CPPA to muzzle protected speech. To the extent that *Earth Island* could be read to suggest otherwise, *see* 321 A.3d at 672–73, that ruling departs from controlling Supreme Court precedent. The "government has no power to restrict expression because of its message, its ideas, its subject matter, or its content." *Bolger v. Youngs Drug Prod. Corp.*, 463 U.S. 60, 65 (1983) (citation omitted). A law is content-based "if a regulation of speech on its face draws distinctions based on the message a speaker conveys." *Barr v. Am. Ass'n of Pol. Consultants, Inc*., 591 U.S. 610, 618 (2020) (internal quotation marks omitted). Strict scrutiny applies to content-based discrimination against fully protected speech by a corporation on matters of public importance within its industry. *See Pac. Gas and Elec. Co. v.*

Pub. Utilities Com'n of Cal., 475 U.S. 1, 19 (1986); *see also First Nat'l Bank of Bos. v. Bellotti*, 435 U.S. 765, 784 (1978). Even corporate speech promoting a product sheds "its commercial character when it is inextricably intertwined with otherwise fully protected speech." *Riley v. Nat'l Fed'n of the Blind of N.C., Inc*., 487 U.S. 781, 796 (1988).[13]

Here, Tyson's statements are "inextricably intertwined" with statements on matters of public concern—namely, sustainability issues related to the agricultural and protein industry—and are part of a broader discussion about sustainable practices in the industrial animal agricultural industry. *Riley*, 487 U.S. at 796. Tyson's speech at issue "contribute[s] to the 'discussion, debate, and the dissemination of information and ideas' that the First Amendment seeks to foster," and penalizing these statements would impermissibly chill corporate speech on the subject of its own industry. *Pac. Gas*, 475 U.S. at 8 (quoting *First Nat'l Bank of Bos. v. Bellotti*, 435 U.S. 765, 783 (1978)); *Thornhill v. Alabama*, 310 U.S. 88, 103 (1940) ("Free discussion concerning the conditions in industry . . . appears to us indispensable to the effective and intelligent use of the processes of popular government to shape the destiny of modern industrial society.").

Tyson thus enjoys "the full panoply of protections available to its direct comments on public issues." *Bolger*, 463 U.S. at 68. Under Plaintiff's interpretation of the CPPA, the statute is not narrowly tailored to serve any important governmental interest and thus fails to satisfy the strict scrutiny standard. *Pac. Gas*, 475 U.S. at 19. Plaintiff's proposed reading of the CPPA would

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[13] Where corporate speech arguably proposes a commercial transaction *and* engages in a discussion of important public issues, a court examines whether (1) it takes the form of an advertisement, (2) it includes "reference to a specific product," and (3) the speaker has an "economic motivation." *Bolger*, 463 U.S. at 66–67. A single factor cannot deem speech commercial, and a "company has the full panoply of protections available to its direct comments on public issues" when such comments are made outside "the context of commercial transactions." *Id.* at 68. Here, the statements this suit challenges fail to meet *Bolger*'s three-factor test and thus are not commercial speech. Tyson's statements are not advertisements, nor related to specific products. And even some "economic motivation for [challenged speech] would clearly be insufficient by itself to turn the materials into commercial speech." *Id.* at 67.

prevent corporations from discussing aspirational sentiments, future goals, and matters of public policy related to their industry. "In the realm of protected speech, the legislature is constitutionally disqualified from dictating the subjects about which persons may speak and the speakers who may address a public issue." *Bellotti*, 435 U.S. at 784–85.

Plaintiff's claims seeking to impose civil liability on Tyson based on the content of its speech cannot proceed without running afoul of the First Amendment because *any* finding of liability would in essence regulate Tyson's speech. *See Sorrell v. IMS Health Inc.*, 564 U.S. 552, 566 (2011) ("The First Amendment requires heightened scrutiny whenever the government creates 'a regulation of speech because of disagreement with the message it conveys.'") (quoting *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989))). Finding liability based on the identified statements thus would impermissibly *regulate* and chill Tyson's protected speech no matter what remedy may be imposed. Moreover, aside from fees and costs, Plaintiff seeks only two remedies—a declaration that Tyson's speech is impermissible and an order enjoining that speech. Compl. at 32 (Prayer for Relief). Thus, any remedy the Court could possibly grant Plaintiff would require Tyson to limit or entirely cease its protected speech. Such a restraint would impermissibly violate Tyson's First Amendment rights.

CONCLUSION

For all the foregoing reasons, Tyson Foods, Inc. respectfully requests that this Court grant this Motion and dismiss all of the Complaint's claims against Defendant Tyson Foods, Inc.

Dated: November 12, 2024

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CERTIFICATE OF SERVICE

On November 12, 2024, the undersigned hereby certifies that a true and correct copy of the above and foregoing was served via electronic mail on:

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