IN THE SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
CIVIL DIVISION

EARTH ISLAND INSTITUTE, Plaintiff, v. THE COCA-COLA COMPANY, Defendant.	Civil Action No. 2021 CA 001846 B Judge Maurice A. Ross Next Event: Status Hearing Sept. 16, 2022 at 10:00 a.m.

COCA-COLA'S MOTION TO DISMISS COMPLAINT PURSUANT TO D.C. SUPER. CT. R. 12(b)(6)

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**Pro Hac Vice Motion pending*
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The Coca-Cola Company hereby moves, pursuant to Rule 12(b)(6) of the District of Columbia Superior Court Rules of Civil Procedure, to dismiss the Complaint in its entirety and with prejudice.

PRELIMINARY STATEMENT

This is a lawsuit in search of a cause of action. Plaintiff Earth Island Institute ("EII"), a self-described public interest organization focused on "environmental and human health issues," believes The Coca-Cola Company ("Coca-Cola") is not as concerned about the environment as it claims to be. According to the Complaint, Coca-Cola has "portray[ed] itself as 'sustainable,'" "cultivate[d] an environmentally friendly image," and generally held itself out "as significantly more environmentally conscious than it is." Compl. ¶¶ 28, 30, 102. In reality, EII asserts, "Coca-Cola is categorically not a sustainable company and misleads consumers in presenting itself as such." *Id.* ¶ 69.

Notably, the Complaint does not identify a single misrepresentation that Coca-Cola allegedly has made about the qualities or characteristics of any product it sells, or even about the impact of any product or its packaging on the environment. The Complaint contains no allegation that Coca-Cola ever told consumers that its products are better, more valuable, or even more environmentally friendly or sustainable than they actually are.

Instead, EII takes issue with a hodgepodge of innocuous statements by Coca-Cola about its corporate ethos and objectives. For instance, the Complaint decries Coca-Cola's assertion that "We're using our leadership to . . . build a more sustainable future for our communities and our planet." *Id.* ¶ 35. It bemoans Coca-Cola's announcement that it has set a goal to "Collect and recycle a bottle or can for each one we sell by 2030." *Id.* ¶ 43. And it alleges that Coca-Cola has undertaken certain initiatives—such as advocating for bottle deposit laws and supporting Keep

America Beautiful, an organization that promotes recycling and discourages litter—in order to "mislead consumers into believing that Coca-Cola prioritizes environmental health." *Id.* ¶ 135.

None of this is actionable under the District of Columbia Consumer Protection Procedures Act, D.C. Code §§ 28-3901-13 ("CPPA"), the statute on which EII's sole claim is based. EII has not alleged that any statement by Coca-Cola is provably false or plausibly misleading. And the CPPA cannot be used to bar a company from supporting environmental initiatives, or accurately informing consumers that it does so. The Court should dismiss the Complaint with prejudice.

BACKGROUND

A. Coca-Cola's Efforts to Reduce Plastic Pollution and Environmental Waste

Many of EII's allegations are drawn from Coca-Cola's annual Business & Sustainability Reports, which are directed primarily to shareholders and other stakeholders, and which document the status of its sustainability initiatives. *2019 Business & Sustainability Report* 3, COCA-COLA CO. (Sept. 16, 2020), https://perma.cc/QAB2-GMC5. In the reports, Coca-Cola acknowledges the environmental impact of its business activities and its "responsibility to contribute to solutions." *See, e.g., id.* at 22, 24 (detailing carbon emissions). The reports set concrete benchmarks for reducing the company's environmental impact, and reflect Coca-Cola's progress toward those goals—modest in some cases, but considerable in others. For example, in 2020, Coca-Cola met its goal of reducing the relative carbon footprint of its beverage products by 25%, set against a 2010 benchmark. *2021 Business & ESG Report* 39, COCA-COLA CO. (June 7, 2022) at 39, https://perma.cc/YL2C-HN75.[1] Coca-Cola has set a further goal of reducing "absolute emissions" by 25% by 2030, and has an ambition to be "net zero carbon" by 2050. *Id.*

[1] The Court may take judicial notice of the 2021 Business & ESG Report because it is incorporated in the Complaint by reference. Although EII cites to only the 2019 Business & Sustainability Report, it challenges Coca-Cola's practice of "publicly setting long-term goals" and alleged

Coca-Cola also recognizes that there is a "global plastic waste crisis," and has set a series of goals to alleviate it. *Id.* at 7, 32. These targets include making 100% of its packaging recyclable worldwide by 2025; using at least 50% recycled material in its packaging by 2030; collecting and recycling a bottle or can for each one it sells by 2030; and partnering with organizations and local communities to remove plastic from the environment. *Id.* at 32-37. Coca-Cola is also experimenting with new, innovative types of packaging, including a 100% plant-based bottle, label-less bottles, and reusable bottles. *Id.* at 34-35.

As these initiatives reflect, Coca-Cola acknowledges the need to improve the sustainability of its operations, and provides shareholders and the public with transparency as to its progress. Contrary to EII's unsupported allegations, Coca-Cola has not represented itself—in its Business & Sustainability Reports or elsewhere—as having already made itself "unqualifiedly sustainable."

B. EII's Grievances

By EII's telling, Coca-Cola's sustainability practices have a long way to go. EII alleges that Coca-Cola "is the world's leading plastic waste producer" and "is responsible for ***200,000 tons*** of plastic pollution per year," leading to "an unprecedented crisis for wildlife." Compl. ¶¶ 58, 60, 62 (emphasis in original). EII further accuses Coca-Cola of failing "to take responsibility for its own plastic waste." *Id.* ¶¶ 71, 109. Because these shortcomings purportedly place Coca-Cola "far from what consumers would understand to be a sustainable business," *id.* ¶ 57, EII claims

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portrayal of "itself as 'sustainable' and committed to reducing plastic pollution." Compl. ¶¶ 6, 28. Accordingly, the Business & Sustainability/Business & ESG Reports, in which Coca-Cola discusses its sustainability goals, are central to its claim. *See Drake v. McNair,* 993 A.2d 607, 616 (D.C. 2010) ("when 'a document is referred to in the complaint and is central to plaintiff's claim . . . the defendant may present an authentic copy [of that document] to the court without converting the motion to one for summary judgment.'").

that Coca-Cola deceives consumers whenever it promotes "an environmentally friendly image" in any way. *Id.* ¶ 30.

Specifically, EII alleges that Coca-Cola violates the CPPA every time it makes even the most generic declaration of concern for the environment. EII complains that an array of bromides from the company's website and Twitter account—*e.g.*, "Our planet matters"; "Business and sustainability are not separate stories for The Coca-Cola Company – but different facets of the same story"; "Partnering & investing in long-term sustainability & climate friendly solutions"—misrepresent Coca-Cola as "an environmentally conscious company." *Id.* ¶¶ 31-34. According to EII, Coca-Cola's past environmental record is so abysmal that such statements about its current beliefs and priorities are necessarily false and should be prohibited.

Even more perversely, EII seeks to freeze Coca-Cola's supposedly destructive environmental practices in place by preventing Coca-Cola from setting any public goals for improvement. For example, EII disputes Coca-Cola's aspirations to "take responsibility" for its plastic bottles by "getting every bottle back," "[c]ollect[ing] and recycl[ing] a bottle or can for each one we sell by 2030," "[m]ak[ing] 100% of our packaging recyclable globally by 2025," and "[u]s[ing] at least 50% recycled material in our packaging by 2030." *Id.* ¶¶ 37-51, 56. According to EII, these benchmarks for reducing plastic pollution violate the CPPA because they "overstat[e] the benefits of recycling." *Id.* ¶ 120. EII prefers "a transition away from single-use plastic," and considers it misleading for Coca-Cola to advocate for other approaches to reduce plastic waste. *Id.* ¶ 143. Indeed, EII asserts that, because Coca-Cola allegedly has failed to meet certain environmental goals in the past, it should not be allowed to set any for the future. *Id.* ¶¶ 98-102.

Not only does EII belittle Coca-Cola's recycling-based initiatives, it objects to ***any*** statement by Coca-Cola about its ongoing efforts to enhance the sustainability of its operations.

All such declarations, according to EII, mislead consumers as to Coca-Cola's devotion to the environment. When Coca-Cola discusses alternatives to single-use plastic—*e.g.*, by reporting that it is working "to develop a 100 percent paper bottle"—it deceives consumers into believing that it is "commit[ted] to finding more sustainable alternatives to its PET-bottle production." *Id.* ¶¶ 52, 54. When Coca-Cola supports organizations like Keep America Beautiful, it "mislead[s] the public into believing that everyday consumers are to blame for the plastics crisis, rather than . . . the corporations producing the plastics." *Id.* ¶ 117. When Coca-Cola proclaims its support for bottle deposit laws (which EII also champions), it is "portray[ing] itself as significantly more environmentally conscious than it is." *Id.* ¶ 102. And when Coca-Cola "touts ambitious bottle collection goals," it misleads consumers into believing "that the company is taking personal responsibility for the plastic waste that it produces." *Id.* ¶ 42. According to EII, because these activities, and others like them, cultivate Coca-Cola's "environmentally friendly image," they violate the CPPA—even if they have a salutary effect on the environment. *Id.* ¶ 30.

EII's Complaint is light on details as to how Coca-Cola's actions supposedly have injured District of Columbia consumers. Although it vaguely asserts that Coca-Cola's statements have enabled it to "capture the growing market of consumers in D.C. and elsewhere who are concerned about plastic pollution and seek to support environmentally friendly businesses," *id.* ¶ 17, and has "le[]d consumers to believe . . . that purchasing beverages from Coca-Cola supports initiatives aimed at reducing plastic waste," *id.* ¶ 39, EII does not name a single occasion on which a consumer bought a Coca-Cola product under false pretenses. Indeed, none of the supposedly misleading statements EII complains about appears in product labeling or traditional advertising. Nevertheless, EII demands that, to protect D.C. consumers, all of Coca-Cola's "conduct" in this arena must be declared unlawful and permanently enjoined.

ARGUMENT

This Court should dismiss the Complaint pursuant to Rule 12(b)(6) of the Superior Court Rules for failure to "state a claim to relief that is plausible on its face." *Nat'l Consumers League v. Bimbo Bakeries USA*, No. 2013 CA 006548 B, 2015 WL 1504745, at *2 (D.C. Super. Ct. Apr. 2, 2015). To survive dismissal, a complaint must provide a plausible basis to find the defendant "has engaged in unfair or deceptive trade practices under the CPPA." *Ctr. for Inquiry, Inc. v. Walmart, Inc.*, No. 2019 CA 3340 B, 2020 WL 6556839, at *5 (D.C. Super. Ct. May 28, 2020).

Here, EII does not allege that Coca-Cola has misled consumers as to its products' characteristics, or even as to its current environmental practices. Rather, EII quarrels primarily with forward-looking or aspirational statements, which courts have consistently held cannot give rise to a CPPA claim. The other statements EII disputes—such as Coca-Cola's unremarkable pronouncements that "Our planet matters"—are non-actionable puffery. Compl. ¶ 32. And to the extent EII accuses Coca-Cola of generally presenting itself as an "unqualifiedly sustainable company" through the sum total of its statements and activities, the Complaint contains no facts that show that Coca-Cola has communicated that message to reasonable consumers.

EII's bid to prevent Coca-Cola from truthfully informing the public about its sustainability goals and initiatives has no basis in the CPPA and violates the First Amendment. The Court should dismiss the Complaint, in its entirety, with prejudice.

I. Coca-Cola's Forward-Looking Statements Are Not Actionable Under the CPPA

Much of the Complaint takes Coca-Cola to task for touting "ambitious" sustainability goals that, according to EII, it is unlikely to meet. For instance, the Complaint disputes Coca-Cola's statement that it "aims to '[c]ollect and recycle a bottle or can for each one we sell by 2030." Compl. ¶ 43. It skewers Coca-Cola for publicly declaring its "goal" to "[m]ake 100% of our packaging recyclable globally by 2025," and to "[u]se at least 50% recycled material in our packaging by 2030." *Id.* ¶ 51; *see also*, *e.g.*, *id.* ¶ 55 (disputing Coca-Cola's pledge to "fundamentally rethink[ ] how we get our products to consumers, including what kind of packaging to use and whether a package is needed at all"). According to EII, Coca-Cola has not demonstrated sufficient concern for the environment in the past, so it is unlikely to meet its sustainability goals in the future.

Courts have consistently declined to entertain consumer-fraud claims premised on aspirational statements of this kind. In *National Consumers League v. Wal-Mart Stores, Inc.* ("NCL"), for example, the plaintiff claimed that a group of retailers had violated the CPPA by failing to live up to their stated goals regarding worker health and safety. No. 2015 CA 007731 B, 2016 WL 4080541, at *6-8 (D.C. Super. Ct. July 22, 2016) (Motley, J.). The court rejected that claim, on the grounds that the majority of the disputed statements were "*expectations*," as opposed to "*assurances*," as demonstrated by the "usage of the qualifying terms 'expect,' 'goal,' and 'ask.'" *Id.* at *6-7 (emphasis added). Similarly, in *Ruiz v. Darigold, Inc./Northwest. Dairy Association*, the court found that the defendant's statement that it was "[a]dopting proactive measures that protect and enhance animal well-being and sustainable farming" could not give rise to a consumer-fraud claim, because a "forward looking statement" of this sort "[could not] be reasonably interpreted as a promise." No. C14-1283RSL, 2014 WL 5599989, at *4 (W.D. Wash. Nov. 3,

2014). And in *Barber v. Nestle USA, Inc.*, the court reached the same conclusion as to statements that defendant's suppliers "will ensure [that] [t]here is no known sourcing from Illegal, Unreported and Unregulated (IUU) fisheries and vessels." 154 F. Supp. 3d 954, 963 (C.D. Cal. 2015). The court determined that, read in context, even those highly resolute statements "represent[ed] an ideal, and not necessarily a reality." *Id.*

The result can be no different here. Like the defendants in these cases, Coca-Cola has merely articulated the sustainability "ideals" it hopes to achieve at various points in time. EII does not contend that reasonable consumers interpret the disputed statements to mean that Coca-Cola has ***already*** achieved these benchmarks; rather, it expresses doubt that Coca-Cola will meet the targeted goals on the stated schedule. Whatever its professed skepticism, however, EII cannot plausibly allege that Coca-Cola's statements about its aspirations for 2025 or 2030 are false in 2022—let alone that they form the basis for consumers' current purchasing decisions. Because Coca-Cola's statements regarding its sustainability goals cannot "reasonably [be] interpreted as [] promise[s]," they cannot form the basis for a CPPA claim. *Ruiz*, 2014 WL 5599989, at *4.

II. Coca-Cola's Statements About Its Sustainability Efforts Are Non-Actionable Opinion or Puffery

EII complains that, in addition to setting goals for environmental stewardship, Coca-Cola has made a series of uncontroversial statements expressing concern for the environment, *e.g.*:

- "Our planet matters. We act in ways to create a more sustainable and better shared future. To make a difference in people's lives, communities and our planet by doing business the right way."
- "Scaling sustainability solutions and partnering with others is a focus of ours."
- "Business and sustainability are not separate stories for The Coca-Cola Company—but different facets of the same story."
- "We're using our leadership to achieve positive change in the world and build a more sustainable future for our communities and our planet."

- "[C]ommitted to creating a World Without Waste by taking responsibility for the packaging we introduce to markets and working to reduce ocean pollution."
- "We can collaborate with governments, communities, the private sector, and NGOs to help develop more effective recycling systems that meet each community's unique needs."

Compl. ¶¶ 32-35, 40, 41. According to EII, these statements are false because Coca-Cola does not currently meet consumers' expectations of what it means to be "sustainable," and "will never be a truly 'sustainable' company unless it moves away from its reliance on single-use plastic entirely, which it has no plans to do." *Id.* ¶ 15. In EII's apparent view, only companies that meet a particular set of criteria for environmental stewardship may declare their commitment to the environment without violating the CPPA.

This claim, too, is a non-starter. Only "representation[s] of material fact upon which a plaintiff successfully may place dispositive reliance" may give rise to CPPA claims. *Cannon v. Wells Fargo Bank, N.A.*, 926 F. Supp. 2d 152, 174 (D.D.C. 2013) (quoting *Howard v. Riggs Nat'l Bank*, 432 A.2d 701, 706 (D.C.1981)). "[G]eneral and subjective" claims, whose "truth or falsity . . . cannot be precisely determined," are non-actionable "puffery." *Whiting v. AARP*, 701 F. Supp. 2d 21, 30 n.7 (D.D.C. 2010) (quoting *Tietsworth v. Harley-Davidson, Inc.*, 667 N.W.2d 233, 245 (Wis. 2004)).

Ideals such as "sustainability," "a more sustainable future," and "doing business the right way" are highly subjective, and courts have consistently held that statements embracing them are not actionable. In *Organic Consumers Association v. Bigelow Tea Company*, the court dismissed a CPPA claim challenging statements almost identical to the ones at issue here—such as that the defendant was "committed to protecting the environment" and that its practices were "environmentally friendly" and "sustainable." The court concluded that all such statements were "non-actionable opinion." No. 2017 CA 008375 B, 2018 D.C. Super. LEXIS 11, at *9-13 (D.C.

Super. Oct. 31, 2018) (Rigsby, J.); *see also*, *e.g.*, *XYZ Two Way Radio Serv., Inc. v. Uber Techs., Inc.*, 214 F. Supp. 3d 179, 184 (E.D.N.Y. 2016) (dismissing consumer fraud claim based on "boastful and self-congratulatory" statements "intended to convey the impression that [the defendant] takes the safety of its passengers seriously.").

These rulings make perfect sense. Courts cannot be expected to determine whether a company is actually "[c]ommitted to creating a World Without Waste" or to "doing business the right way." And consumers do not base purchasing decisions on such vague and subjective statements. For these reasons, claims of this sort have consistently been deemed beyond the scope of the CPPA and other consumer-protection statutes. *See, e.g.*, *Whiting,* 701 F. Supp. 2d at 30 (statements that insurance policy provided "peace of mind" and was a "smart option" were "too general and subjective in nature to be considered misrepresentations" and did not violate the CPPA), *aff'd,* 637 F.3d 355 (D.C. Cir. 2011); *Pearson v. Chung*, 961 A.2d 1067, 1076 (D.C. 2008) ("Satisfaction Guaranteed" did not violate CPPA despite customer's subjective dissatisfaction)*; Hydro-Blok USA LLC v. Wedi Corp*., No. C15-671 TSZ, 2019 WL 2515318, at *7 (W.D. Wash. June 18, 2019) ("environmentally friendly" did "not have the requisite specificity to be actionable under" the Washington Consumer Protection Act), *aff'd in part, rev'd on other grounds and remanded sub nom. Wedi Corp. v. Wright,* 840 F. App'x 272 (9th Cir. 2021); *see also In re Mun. Stormwater Pond*, 2019 WL 8014508, at *3 (D. Minn. 2019) (dismissing fraudulent misrepresentation and concealment claim based on statement that defendant was "committed to environmental health and safety stewardship" because statement was "non-actionable puffery").

III. Reasonable Consumers Would Not Interpret the Disputed Statements in the Manner EII Alleges

Having failed to allege any actionable misrepresentation, EII advances an alternative theory that Coca-Cola has, through the totality of its public statements and actions, given

consumers the impression that the company is "unqualifiedly 'sustainable'" and that "there are no significant environmental consequences associated with purchasing single-use plastic." *See* Compl. ¶¶ 69, 84. As an initial matter, EII cannot make out a CPPA claim by amalgamating a collection of statements from disparate sources such as Coca-Cola's corporate website, Twitter feed and periodic sustainability reports. EII does not and cannot allege that any individual consumer was ever exposed to, let alone deceived by, that array of communications.

But even if a D.C. consumer were somehow to stumble upon the series of statements EII challenges, he or she would not take away the message that Coca-Cola is "[u]nqualifiedly '[s]ustainable,'" or that single-use plastics pose no environmental risks. Whether a statement or omission tends to mislead is evaluated in terms of how it "would be viewed and understood by a reasonable consumer." *Whiting*, 701 F. Supp. 2d at 29 (quoting *Pearson v. Chung*, 961 A.2d 1067, 1075 (D.C. 2008)). A statement's context matters, and courts will dispose of claims at the motion-to-dismiss stage where, in context, plaintiff's proposed interpretation of defendant's statements would "defy 'basic common sense.'" *Ctr. for Inquiry, Inc.*, 2020 WL 6556839, at *6 (quoting *Pearson v. Chung*, 961 A.2d 1067, 1075 (D.C. 2008)).

EII's interpretation of Coca-Cola's statements does just that. No consumer would understand Coca-Cola's endorsements of environmental responsibility, or identification of its sustainability goals, as assertions that the Company had already achieved "unqualified sustainability." On the contrary, the mere existence of Coca-Cola's goals to reduce the impact of single-use plastics reflect the company's recognition that there is ground left to cover. Indeed, many of the statements about which EII complains explicitly concede the environmental impacts of plastic packaging and the need for strategies to address them. *See, e.g.*, Compl. ¶ 44 (Coca-Cola acknowledging "[t]he interconnected global challenges of packaging waste and climate

change"); *id.* ¶¶ 52-55 (Coca-Cola announcing that it is rethinking "what kind of packaging to use and whether a package is needed at all."). Reasonable consumers would not interpret these statements ***about the environmental consequences of single-use plastics*** to mean that single-use plastics pose "no significant environmental consequences." *Id.* ¶ 84.

This is particularly true in light of the fundamental theory of EII's complaint: that Coca-Cola's statements mislead consumers who "care deeply about environmental issues," seek out "environmentally friendly" products, and "believe that plastic pollution presents significant environmental harms." *Id.* ¶¶ 2, 132. It is utterly implausible that the very consumers who are closely attuned to and concerned about these issues would conclude from Coca-Cola's statements that the company's operations are unqualifiedly sustainable, or that "there are no significant environmental consequences associated with purchasing single-use plastic." *Id.* ¶ 84.

Finally, the consumer surveys cited by EII do not salvage its claim. Those surveys merely show that some consumers prefer to do business with companies that are environmentally conscious. *See id.* ¶¶ 29, 133. Neither survey pertains to the language used by Coca-Cola, much less suggests that reasonable consumers would interpret Coca-Cola's statements in the manner EII alleges. In short, EII has not plausibly alleged that Coca-Cola has ever represented itself as "unqualifiedly sustainable," or that single-use plastics are free from environmental impact.

IV. Coca-Cola Has Not Made Any Misleading Statements About Recyclability

EII also takes a few digs at Coca-Cola for failing to inform consumers of the "well-publicized shortcomings" of recycling when discussing its environmental initiatives. *Id.* ¶ 82. EII cites news reports that "hundreds of towns and cities throughout the United States have cancelled their recycling programs," causing "vast amount[s] of recyclable plastic [to] end[] up in landfills

or enter[] the natural environment." *Id.* ¶¶ 74-95. Given these failings, EII claims, Coca-Cola's "heavy emphasis on recycling" is misleading and violates the CPPA. *Id.* ¶ 74.

That position is untenable, for at least two reasons. First, as EII acknowledges, the purported "shortcomings" of recycling are "well-publicized," and consumers exposed to Coca-Cola's perspective on recycling have likely also been informed of countervailing views. *Id.* ¶ 82. District of Columbia courts have consistently declined to interpret the CPPA to require manufacturers to provide consumers with information they already have or can easily obtain. *See Dahlgren v. Audiovox Commc'ns Corp.*, No. 2002 CA 007884 B, 2010 D.C. Super LEXIS 9, at *63-64 (D.C. Super. Ct. July 8, 2010) (dismissing CPPA claim premised on failure to disclose cell phone safety concerns, after concluding that a "reasonably well-informed consumer" would have "heard about the cell phone safety debate . . . from responsible scientists on both sides of the issue, from consumers, from the industry, and from government officials."). Coca-Cola cannot be liable for failing to provide facts that are already readily accessible to the "reasonably well-informed consumer." *Id.* at *64.

Second, the Federal Trade Commission ("FTC")—whose pronouncements are entitled to "due consideration and weight" from courts analyzing CPPA claims, *see* CPPA § 28-3901(d)—has endorsed Coca-Cola's approach. FTC's "Green Guides," which set forth the agency's guidance on environmental marketing claims, dictate that "marketers can make ***unqualified*** recyclable claims" about a given product, so long as facilities capable of recycling that product are "available to a substantial majority [i.e., 60%] of consumers or communities where the item is sold." 16 C.F.R. § 260.12(b)(1) (emphasis added). FTC has never sought to curtail the advertising or promotion of "recycl[ability]," or to require marketers to disclose the "shortcomings" of recycling in such communications. Compl. ¶ 82. And EII does not contend that Coca-Cola has

ever run afoul of the Green Guides. FTC's authoritative guidance thus provides an additional ground for dismissal of EII's Complaint.

V. Coca-Cola's Statements Are Protected by the First Amendment

EII's failure to allege that Coca-Cola has uttered a single misrepresentation, or even a statement that could mislead a reasonable consumer, requires dismissal of its Complaint. But its CPPA claim also suffers from another terminal defect. EII's claim and proposed remedy would prohibit Coca-Cola from any making future statements concerning the company's efforts to protect the environment or improve the sustainability of its operations—even where those statements acknowledge shortcomings and identify opportunities for improvement. This new and novel species of CPPA liability would violate the First Amendment and yield patently undesirable results.

EII's Complaint sweeps up ***everything*** Coca-Cola does to promote "an environmentally friendly image"—from its assertions that "Our planet matters," to its efforts to promote bottle deposit bills, to its support of the organization Keep America Beautiful—and seeks an order enjoining all of "Coca-Cola's conduct" in this area. *Id.* ¶¶ 27, 30, 32, 106, 110. Accordingly, the Complaint extends well beyond commercial speech (*i.e.*, speech that "does no more than propose a commercial transaction") and seeks to broadly inhibit Coca-Cola's rights of expression, including its political advocacy activities. *Nat'l Ass'n of Mfrs. v. SEC*, 800 F.3d 518, 523 n.12 (D.C. Cir. 2015) (quoting *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 66 (1983)).

This, too, is fatal to EII's CPPA claim. Coca-Cola's efforts to "persuade the legislature or the executive to take particular action," such as its promotion of bottle deposit laws and recycling infrastructure, are absolutely privileged under the First Amendment and cannot be restricted or enjoined. *E.R.R. Presidents Conf. v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 132 n.6, 136 (1961). Even outside the context of such advocacy, Coca-Cola's non-commercial speech on sustainability

issues enjoys robust First Amendment protection, such that restrictions on it are "presumptively invalid." S*orrell v. IMS Health Inc.*, 564 U.S. 552, 571 (2011) (quoting *R.A.V. v. City of St. Paul*, 505 U.S. 377, 382 (1992)). For these reasons, courts consistently reject attempts to muzzle companies' participation in public policy or scientific debate under the guise of prohibiting false advertising. *See ONY, Inc. v. Cornerstone Therapeutics, Inc*., 720 F.3d 490, 497 (2d Cir. 2013) (dismissing false advertising claim premised on disagreement over "contested and contestable scientific hypotheses"); *McMillan v. Togus Reg'l Off., Dep't of Veteran Affs.*, 294 F. Supp. 2d 305, 316-17 (E.D.N.Y. 2003) (dismissing claims based on alleged distortion of safety data on First Amendment grounds, noting that "[a]ny unnecessary intervention by the courts in the complex debate . . . [of] modern science can only distort and confuse."). EII's claim here—which would exclude Coca-Cola from ***any*** public discussion of a matter of pressing global concern—should be rejected for the same reason.

EII's Complaint also fails on First Amendment grounds because it seeks to snuff out speech that is truthful and not inherently misleading. *See Pearson v. Shalala*, 164 F.3d 650, 655 (D.C. App. 1999) (truthful advertising is subject to constitutional protection so long as it is not "inherently misleading"). Take, for instance, EII's attack on Coca-Cola's October 2020 announcement of its "partnership with Danish startup Paboco to develop a 100 percent paper bottle," in which the company noted that "The first-generation prototype featured a paper shell with a 100 percent recycled plastic closure and liner inside of the bottle, with future iterations projected to be entirely 'bio-based.'" Compl. ¶¶ 52-53. EII does not, and cannot, dispute the veracity these assertions—*i.e.*, it makes no allegation that Coca-Cola has lied about its efforts to develop a 100% paper bottle. Instead it complains that Coca-Cola has "position[ed] this effort as

evidence of its commitment to finding more sustainable alternatives to its PET-bottle production"—a commitment EII believes Coca-Cola lacks. *Id.* ¶ 54.

This is nonsense. EII cannot use the CPPA to prevent Coca-Cola from accurately reporting on its research and development efforts, regardless of how Coca-Cola allegedly has "positioned" the information. Any such prohibition would plainly run afoul of the First Amendment. *See Thompson v. W. States Med. Ctr.*, 535 U.S. 357, 374 (2002) ("We have previously rejected the notion that the Government has an interest in preventing the dissemination of truthful commercial information in order to prevent members of the public from making bad decisions with the information."); *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 773 (1976) (holding that First Amendment did not allow state to "completely suppress the dissemination of concededly truthful information about entirely lawful activity, fearful of that information's effect upon its disseminators and its recipients").

Finally, even laying aside its myriad other defects, EII's CPPA claim rests on a theory of "deception" that no court has previously recognized, and would create perverse and undesirable results. EII's ultimate grievance is that Coca-Cola has purportedly been a poor steward of the environment. Yet its Complaint attacks the activities Coca-Cola has undertaken to ***improve*** its environmental stewardship, lest they give consumers the false impression that Coca-Cola is truly committed to a sustainable future.

This concept of deception would, if recognized, lead to a host of unwelcome outcomes. First, it would imbue nonprofits such as EII with authority to impose their own personal standards of corporate and social responsibility on companies that sell products within the District. Second, it would lock companies accused of irresponsible practices into those same behaviors, by enjoining them from undertaking supposedly "misleading" campaigns of improvement. Third, and most

troublingly, it would chill companies from declaring their commitment to positive causes, setting corporate responsibility goals, or improving their corporate citizenship—lest any of those activities later be deemed "misleading" in a CPPA suit. This Court should decline to take the CPPA in this destructive direction.

CONCLUSION

For the foregoing reasons, the Court should grant Coca-Cola's motion and dismiss the Complaint, in its entirety, with prejudice.

Dated: June 13, 2022

Respectfully submitted,

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**Pro Hac Vice Motion pending*
***Pro Hac Vice Motion forthcoming*

CERTIFICATE OF SERVICE

I hereby certify that on June 13, 2022, a true copy of the foregoing Motion to Dismiss Pursuant to Superior Court Rule 12(b)(6) was filed through CasefileXpress, which electronically serves all counsel of record.

/s/Anthony T. Pierce
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IN THE SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
CIVIL DIVISION

EARTH ISLAND INSTITUTE, Plaintiff, v. THE COCA-COLA COMPANY, Defendant.	Civil Action No. 2021 CA 001846 B Judge Maurice A. Ross Next Event: Status Hearing Sept. 16, 2022 at 10:00 a.m.

ORDER

Upon consideration of Coca-Cola's Motion to Dismiss Pursuant to Superior Court Rule 12(b)(6) and finding it to be supported by good cause, it is hereby:

ORDERED that the Motion is **GRANTED**.

SO ORDERED.

Dated:_____

_____
THE HONORABLE **MAURICE A. ROSS**

Copies to: *All Counsel of Record*