SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
CIVIL DIVISION

ORGANIC CONSUMERS ASSOCIATION, Plaintiff, v. NOBLE FOODS INC., d/b/a THE HAPPY EGG CO. USA, Defendant.	Case No. 2020 CA 002009 B Judge Yvonne Williams **Oral Argument Requested**

DEFENDANT'S REPLY IN SUPPORT OF MOTION TO DISMISS THE COMPLAINT

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Introduction

Happy Egg moves to dismiss this action for three discrete and independent reasons: (1) OCA cannot establish constitutional standing based on a "buy and look" theory of self-inflicted injury; (2) OCA's claim is expressly or impliedly preempted by the Egg Products Inspection Act ("EPIA"); and (3) OCA's claim is not plausible because OCA concedes that Happy Egg's eggs come from hens that are, in fact, "free range" and "pasture raised on over 8 acres."

OCA's opposition brief does not confront these arguments. First, regarding standing, OCA argues that it does not need to satisfy constitutional standing—but the D.C. Court of Appeals rejected this argument in *Little v. SunTrust Bank*, 204 A.3d 1272, 1274-75, 1274 n.3 (D.C. 2019) ("[Article III standing] requirements have been applied to claims under the CPPA."). OCA argues that this is limited to "individual plaintiffs" (Opp'n at 7), but nothing in *Little* excepts organizations from Article III standing requirements.

Second, regarding preemption, OCA argues that it does not allege that the words "pasture raised" misrepresent the "quality" of the eggs. Opp'n at 9. OCA takes this position because the EPIA contains an express preemption clause which precludes "standards of quality . . . in addition to or different from official Federal standards." 21 U.S.C. § 1052(b). But OCA's argument is defeated by its Complaint—where OCA expressly alleges that the words "pasture raised" violate the CPPA by misrepresenting the "quality" of eggs. Compl. ¶¶ 13, 57, 66.

Third, regarding plausibility, OCA all but concedes that Happy Egg's claims are "literally true" but contends that it is "at least plausible that D.C. consumers may tend to believe" (Opp'n at 12-13) something other than the truthful statements on the egg carton. But OCA focuses on the words "pasture raised" instead of the egg carton as a whole (which also contains the words "Free Range" in large type above the challenged language). It is not plausible that D.C. consumers are misled based on the egg carton as a whole.

Argument

I. OCA lacks standing

A. OCA is wrong that it need not satisfy Article III standing

OCA argues that it "is unsettled whether Article III applies specifically to this circumstance" (Opp'n at 7 n.5) and that OCA need "not suffer the kind of traditional injury-in-fact that Happy Egg contends is required" (Opp'n at 1-3, 6-8).

OCA is wrong because the D.C. Court of Appeals has recently held that constitutional standing requirements apply to D.C. courts, including under the CPPA. *See Little v. SunTrust Bank*, 204 A.3d 1272, 1274-75, 1274 n.3 (D.C. 2019) ("[Article III standing] requirements have been applied to claims under the CPPA.") (citing cases) (holding that counterclaimant did not allege any injury-in-fact and remanding with instructions to dismiss for lack of standing); *Vining v. Exec. Bd. of District of Columbia Health Benefit Exchange Auth.*, 174 A.3d 272, 277-78 (D.C. 2017) ("Although Congress established the two tribunals pursuant to Article I of the Constitution, ***we conform our exercise of judicial power to the law of Article III standing***.") (emphasis added) (internal quotations and footnotes omitted) (affirming dismissal for lack of standing).

OCA seeks to rely on the 2012 amendments to the CPPA, but this court has previously explained that the legislative history of those amendments—including the report OCA cites—"does not establish that the legislative branch intended the judicial branch to ignore in CPPA cases the baseline standing principles that D.C. courts have consistently applied in all cases brought by organizations or other types of plaintiffs." *Animal Legal Def. Fund v. Hormel Foods Corp.*, 2019 D.C. Super. LEXIS 7, at *16 (Apr. 8, 2019); *see also Children's Health Def. v. Beech-Nut Nutrition Co.*, 2020 D.C. Super. LEXIS 3, at *4 (Apr. 8, 2020) (citing *Animal Legal Defense Fund* for this finding). "The Court of Appeals' uniform holdings applying constitutional standing principles in

CPPA cases are also consistent with the legislative history of the 2012 amendments, including the committee report . . . ." *Animal Legal Def. Fund*, 2019 D.C. Super. LEXIS 7, at *15-16.

OCA's argument that *Little* and *Stone* do not apply because they concerned "individual plaintiffs" and not organizations (Opp'n at 7) is unpersuasive because the D.C. Court of Appeals held that Article III standing requirements applied to all CPPA claims—not a subset.

OCA attempts to distinguish *Beyond Pesticides v. Dr Pepper Snapple Grp., Inc.* because the court there found that the plaintiff lacked standing "even if [its argument] works in the District of Columbia's courts." 2019 WL 2744685, at *2 (D.D.C. July 1, 2019). However, OCA ignores that the court added that the plaintiff "misreads § 28-3905: it only allows an organization to sue on the public's behalf ***if it also alleges an injury to itself or to its members***." *Id.* at *2 n.1 (emphasis added). In any event, since *Atchison*, the D.C. Court of Appeals has clarified that it has "imposed on [itself]" the injury-in-fact requirement, "adher[ed] closely to Article III's constitutional requirement of standing," and *Atchison*'s reference to "flexibility" applies to mootness, not standing. *Rotunda v. Marriott Int'l, Inc.*, 123 A.3d 980, 983, 988 (D.C. 2015) (*citing Atchison v. District of Columbia*, 585 A.2d 150, 153 (D.C. 1991)).

OCA also argues that "courts have frequently found standing for organizational plaintiffs who did not suffer the kind of traditional injury-in-fact that Happy Egg contends is required." Opp'n at 6. But none of the cases OCA cites excuse the plaintiff from demonstrating an injury-in-fact. *See Organic Consumers Ass'n v. General Mills, Inc.*, 2017 D.C. Super. LEXIS 4, at *5 (July 6, 2017) ("Although they bring their claims under District of Columbia law and in our local court, Plaintiffs are not absolved of Article III's constitutional standing requirement, imposed upon District of Columbia's Article I trial courts by our Court of Appeals.").

B. OCA does not argue that it satisfies Article III organizational standing

OCA focuses exclusively on the standing provisions of the CPPA and does not explain how OCA satisfies constitutional organizational standing. *See Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1549 (2016) ("Article III standing requires a concrete injury even in the context of a statutory violation."). There must be a "direct conflict between the defendant's conduct and the organization's *mission*," and an organization cannot "manufactur[e] the injury necessary to maintain a suit from its expenditure of resources on that very suit." *Equal Rights Ctr. v. Props. Int'l*, 110 A.3d 599, 604 n.3 (D.C. 2015). To have constitutional standing, even under the CPPA, an organization must show a "concrete and demonstrable injury to the organization's activities—with the consequent drain on the organization's resources." *Id.* at 604; *Children's Health Def.*, 2020 D.C. Super. LEXIS 3, at *9 (applying this test to a CPPA claim).

Here, OCA fails to satisfy these requirements. As explained in Happy Egg's opening brief, other than buying eggs for this suit and filing suit (which do not satisfy the injury-in-fact requirement), OCA has not presented any drain on the organization's resources or effect on OCA's activities. Additionally, according to OCA's 2017 tax return (filed as an exhibit to the defendants' motion for summary judgment in *Organic Consumers Ass'n v. Ben & Jerry's Homemade, Inc.*, Case No. 2018 CA 004850 B (D.C. Super Ct. Apr. 10, 2020)), OCA does not have any members. *See* **Exhibit 1** at 6 (attached).

Further, OCA cannot establish a direct conflict with OCA's mission. OCA alleges that it was "formed in 1998 in the wake of backlash by consumers against the U.S. Department of Agriculture's proposed national regulations for organic food," that it works with other organizations "to challenge industrial agriculture and corporate globalization, and to inspire consumers to 'Buy Local, Organic, and Fair Made,'" and that it "uses funds it raises to protect the

environment by promoting regenerative, organic, and/or sustainable agriculture." Compl. ¶¶ 25-26. OCA's website similarly states its mission as "[t]o protect and advocate for consumers' right to safe, healthful food and other consumer products, a just food and farming system and an environment rich in biodiversity and free of pollutants." *About OCA*, https://www.organicconsumers.org/about-oca. Additionally, according to OCA's 2017 tax return, OCA's mission is "to increase consumers' awareness/knowledge of organic and agricultural production" and "to promote the development/expansion of the organic/sustainable agricultural model." Exhibit 1 at 2; *see also id.* (explaining OCA's "main goals," which similarly focus on organic food and agriculture). There is no allegation at issue in this case concerning organic claims or the use of pollutants. Thus, OCA fails to present the "direct conflict" required for standing.

C. OCA cannot establish standing under D.C. Code § 28-3905(k)(1)(D) because it does not identify any consumer or member and OCA does not have a sufficient nexus to the interests at issue

This Court should dismiss the Complaint because OCA cannot establish Article III standing. However, even if the Court were to find that OCA satisfies Article III, this Court should still dismiss the Complaint because OCA cannot demonstrate standing under the CPPA.

OCA's contention that it has standing under D.C. Code § 28-3905(k)(1)(D) (Opp'n at 3-4) fails for similar reasons as OCA fails to establish constitutional standing. First, OCA states that it "brings this action on behalf of its members and the general public." Opp'n at 2. But, as explained above, OCA's tax return states that OCA does not have members (*see* Exhibit 1 at 6), and OCA does not allege any injury to any member in the Complaint. Additionally, OCA has not identified any D.C. consumer on whose behalf it brings suit. *See* D.C. Code § 28-3905(a) (stating that "[a] case is begun by filing with the Department [of Consumer and Regulatory Affairs] a complaint plainly describing a trade practice and stating the complainant's (*and, if different, the consumer's*)

name and address") (emphasis added).

Second, OCA lacks the sufficient nexus to the interests involved. As explained above, OCA's mission and programs are directed at promoting organic, healthy, and sustainable food and agriculture—issues not involved in this litigation. *Cf. Organic Consumers Ass'n v. Hain Celestial Grp., Inc.*, 285 F. Supp. 3d 100, 103 (D.D.C. 2018) (finding that OCA had suffered an injury-in-fact and possessed a "sufficient nexus" where its programs were "perceptibly impaired" by defendant's actions labeling its infant and toddler formula as "organic"). OCA cites *Organic Consumers Ass'n v. Bigelow Tea Co.,* 2018 D.C. Super. LEXIS 11, at *5 (Oct. 31, 2018) to argue that OCA has a sufficient nexus, but *Bigelow Tea* is distinguishable because there OCA challenged claims of "all natural," "natural," "environmentally friendly," and "sustainable"—issues that fall within OCA's mission. 2018 D.C. Super. LEXIS 11, at *2; *see also General Mills*, 2017 D.C. Super. LEXIS 4 (OCA had standing to challenge claims that products contained "100% Natural Whole Grain Oats").

D. OCA cannot establish standing under D.C. Code § 28-3905(k)(1)(C) under OCA's "buy and look" theory of injury

OCA's argument that it has standing under D.C. Code § 28-3905(k)(1)(C) (Opp'n at 4-6) relies on an inapposite case and non-qualifying "testing." OCA relies on the trial court order denying the motion to dismiss in *Organic Consumers Association v. Handsome Brook Farm, LLC*. OCA argues that its allegations were "found sufficient to establish (k)(1)(C) standing" but that is simply not true. The court did not address standing in *Handsome Brook*. *See* Order Denying Motion to Dismiss, *Organic Consumers Ass'n v. Handsome Brook Farm, LLC*, Case No. 2016 CA 006223 B, at 4-5 (D.C. Super. Ct. Jan. 10, 2017) (attached as **Exhibit 2**). Standing is not addressed.

OCA also argues that physical testing is not required because Section 28-3905(k)(1)(C) is not limited to "tester" standing, but OCA ignores that, to sue under that provision, the nonprofit

must sue "on behalf of itself or any of its members." D.C. Code § 28-3905(k)(1)(C); *Beyond Pesticides*, 2019 WL 2744685, at *2 n.1. Here, as explained above, OCA does not allege any injury to its activities or any members (which its tax return states do not exist). The lack of actual testing further demonstrates that OCA has not undertaken any action that could amount to an injury.

Along these same lines, OCA attempts to distinguish *Fahey v. Dr. Pepper Snapple Grp., Inc.*, Case No. 2019 CA 6762 B (D.C. Super. Ct. Jan. 29, 2020) on the grounds that it was brought under Section 28-3905(k)(1)(B), which requires testing. But OCA is no different because its "buy and look" theory is its only alleged injury. *See Praxis Project v. Coca-Cola Co*., 2019 D.C. Super. LEXIS 17, at *22-23 (Oct. 1, 2019) (concluding that "purchasing a product to obtain information printed on the label," which was "clearly visible to the public and thus readily available without purchase[]—without any actual scientific or physical testing of the product"—did not qualify as "testing" under the CPPA). OCA seeks to distinguish *Praxis* because its label was not misleading, but *Praxis* noted that the label was "clearly visible to the public and thus readily available without purchase." *Id.* at *22. OCA responds that "several of the claims at issue are ***inside*** the Product packaging." Opp'n at 6. But OCA's argument fails for two reasons. First, a consumer need not buy Happy Egg's product to view the inside. Consumers regularly open egg cartons to check whether the eggs inside are broken. Second, the challenged phrase "pasture raised" appears on the outside. *See* Compl. ¶ 9, Figures 1 & 2.

II. The Egg Products Inspection Act preempts OCA's claim

A. OCA cannot avoid dismissal by contradicting the Complaint

As explained in Happy Egg's opening brief, express preemption occurs when "Congress's intent to preempt state law is 'explicitly stated in the statute's language.'" *Mills v. Giant of Maryland, LLC*, 441 F. Supp. 2d 104, 106 (D.D.C. 2006) (claims seeking to require milk sellers to provide warnings on labels about lactose were expressly preempted by the Food, Drug and

Cosmetics Act). Here, Congress did exactly that in the EPIA: "[f]or eggs which have moved or are moving in interstate or foreign commerce, (1) ***no State or local jurisdiction may require the use of standards of quality, condition, weight, quantity, or grade which are in addition to or different from the official Federal standards*** . . . ." 21 U.S.C. § 1052(b) (emphasis added). Where a claim falls within the scope of this provision, the claim is preempted and the analysis ends. That is the situation here.

OCA argues that it is not challenging the "quality" of Happy Egg's products—despite OCA's allegations in the Complaint that Happy Egg's statements about "pasture raised" misrepresent the quality of the eggs. OCA contends that "[a]lthough OCA twice uses the word 'quality' its [*sic*] complaint (Compl. ¶¶ 62, 66), this is only in the context of quoting or restating D.C. Code § 28-3904(d)." Opp'n at 9. Not true. In full, D.C. Code § 28-3904(d) provides that it is a violation to "represent that goods or services are of particular standard, quality, grade, style, or model, if in fact they are of another." Yet, in Paragraph 66 of the Complaint, OCA omits the language that it does not believe applies (specifically, "style" and "model") and alleges only that Happy Egg "misrepresents the ***standard***, ***quality***, and ***grade*** of the Eggs"—the language from the statute that OCA contends applies. (Emphasis added.) Similarly, in Paragraph 13 of the Complaint, OCA specifically states that it seeks "a declaration that Happy Egg has engaged in conduct that misrepresents the ***qualities*** of the Eggs." (Emphasis added.) OCA cannot contradict its allegations that "pasture raised" is a statement about quality. The result would be the same even if OCA had pled around this issue (instead of affirmatively alleging it) because the U.S. Department of Agriculture ("USDA") defines "quality" as "the inherent properties of any product which determine its relative degree of excellence." 9 C.F.R. § 590.5; 7 C.F.R. § 57.1.

OCA tries to confuse the issue by switching to a different provision of the EPIA that addresses "egg products." This is disingenuous because the preemption language Happy Egg relies on is limited to "eggs" not "egg products." The fact that the EPIA also preempts labeling for "egg products" does not, in any way, affect preemption of labels for "eggs" under 21 U.S.C. § 1052(b).

OCA's reliance on *Compassion Over Killing v. U.S. Food & Drug Admin*., 849 F.3d 849 (9th Cir. 2017), is also misplaced because that case did not address preemption. *See Compassion Over Killing*, 849 F.3d 849 (addressing the denial of rulemaking petitions submitted to various federal agencies). *Compassion* addressed whether the Food Safety and Inspection Service ("FSIS") had the authority to regulate egg labels. That is not the issue here. The egg label preemption language of Section 1052 is not limited to whether FSIS enacts certain standards—it is a blanket prohibition on any "State or local jurisdiction" from requiring "standards of quality, condition, weight, quantity, or grade which are in addition to or different from ***the official Federal standards***." 21 U.S.C. 1052(b) (emphasis added).

Here, it is undisputed that there is no federal standard defining "pasture raised." Therefore, at minimum, OCA seeks to impose a standard "in addition to . . . the official Federal standards." *Id*. Thus, OCA's claim is expressly preempted and that is the end of the analysis.

B. OCA fails to address the alternative argument for implied preemption

OCA fails to address Happy Egg's alternative argument that OCA's claim is impliedly preempted by the EPIA. "[I]mplied conflict pre-emption [exists] where it is impossible for a private party to comply with both state and federal requirements, ***or where state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress***." *Organic Consumers Ass'n v. Hain Celestial Grp., Inc.*, 285 F. Supp. 3d 100, 103 (D.D.C. 2018) (alterations in original) (emphasis added) (quoting *Freightliner Corp. v. Myrick*, 514 U.S. 280, 287 (1995)). This precludes OCA's claim.

Congress determined that it was "essential, in the public interest," to protect consumers "by the adoption of the measures prescribed herein for assuring that eggs . . . are wholesome, otherwise not adulterated, and ***properly labeled*** and packaged." 21 U.S.C. § 1031 (emphasis added). Congress further declared that it is "the policy of the Congress to provide for . . . ***uniformity of standards for eggs***." *Id.* § 1032 (emphasis added). As explained previously, the EPIA and its regulations have established standards of quality and condition of eggs including "adulterated," "check," "clean and sound shell egg," "dirty egg" or "dirties," "incubator reject," "inedible," "leaker," "loss," and "restricted egg." *See id.* § 1033; 9 C.F.R. § 590.5; 7 C.F.R. § 57.1. The EPIA and its regulations also provide for how eggs are to be inspected, processed, marked, and labeled. *See* 7 C.F.R. § 57.22 ("This part provides for inspection services pursuant to the Egg Products Inspection Act, as amended. Eggs shall be inspected in accordance with such standards, methods, and instructions as may be issued or approved by the Administrator."); *id.* § 57.800 (setting forth requirements for shipping containers of restricted eggs, including identification of the quality of the eggs in the container or specified statements for certain qualities of eggs).

Thus, even if OCA's claims are not expressly preempted, then they are impliedly preempted because permitting OCA to use D.C.'s consumer protection law to create additional standards for eggs poses a direct obstacle to Congress's stated purpose of uniform regulation of egg carton labels and standards. *See Hain Celestial Grp.*, 285 F. Supp. 3d at 107-09 (holding that OCA's CPPA claims were impliedly preempted by the Organic Food Protection Act of 1990 because there Congress sought to adopt "national standards governing the marketing of … organically produced products" and the result of OCA's claims would be that the defendant would not be able to market the challenged products in D.C., while the status quo would remain unchanged in the rest of the nation, which would eliminate the uniform national standard)

(alteration in original); *see also Geier v. Am. Honda Motor Co.*, 166 F.3d 1236, 1242 (D.C. Cir. 1999) (holding that, where federal law and regulations did not require the use of airbags in certain cars but presented them as one of several options, allowing liability for the absence of airbags would "interfere[] with the *method* by which Congress intended to meet its goal of increasing automobile safety") (internal quotations omitted).

OCA does not offer any argument for why its claims are not impliedly preempted as "obstacle[s] to the accomplishment and execution of the full purposes and objectives of Congress." *Hain Celestial Grp.*, 285 F. Supp. 3d at 103. Nor does OCA attempt to distinguish the cases Happy Egg cites. OCA's discussion of field preemption is inapposite—that is a different doctrine. OCA also argues that Happy Egg would still be able to comply with federal requirements if OCA's claims succeed, but that is not responsive to the type of implied conflict preemption at issue. OCA does not respond to Happy Egg's argument because there is no response.

OCA suggests that if Happy Egg is correct then "every false-advertising case would be preempted." Opp'n at 11. This is an overstatement—there are myriad cases that OCA can bring that do not focus on statements about egg quality on egg cartons—a fact that is demonstrated by the cases OCA cites in its opposition. *See Nat'l Consumers League v. Doctor's Assocs.*, 2014 D.C. Super. LEXIS 15 (Sept. 12, 2014) (claims concerned bread, not eggs). The defendants in *Organic Consumers Ass'n v. Handsome Brook Farm, LLC*, 2016 CA 006223 B (D.C. Super. Ct. Jan. 10, 2017) (attached as Exhibit 2) and *Lugones v. Pete & Gerry's Organic, LLC*, 2020 U.S. Dist. LEXIS 30012 (S.D.N.Y. Feb. 21, 2020) failed to raise preemption as a defense.

III. OCA's claim is not plausible because the egg carton, viewed as a whole, does not tend to mislead consumers

OCA's claim is for false advertising. There are two categories of false advertising: (1) the plaintiff alleges that the advertising is literally false or (2) the plaintiff alleges that the advertising

is literally true, but nevertheless, tends to mislead the audience. OCA's opposition confirms that its theory is limited to the second category.

OCA argues that "it is at least ***plausible*** that D.C. consumers may tend to believe that Happy Egg's 'pasture-raised' eggs conform to industry standards for 'pasture-raised' eggs." Opp'n at 13 (emphasis in original). OCA alleges that the "industry standard" is one nongovernmental group's standard for certification ***by that group***. *Id.* OCA's theory is that consumers see the words "pasture raised" and necessarily take away an implied message that Happy Egg has 2.5 acres per 1,000 hens. *See* Compl. ¶ 50; Opp'n at 13. OCA argues that Happy Egg is misleading consumers by saying "pasture raised" where Happy Egg has a minimum of .5 acres per 1,000 hens.

OCA's theory is implausible for three reasons. ***First***, it is implausible to conclude that consumers take away a precise mathematical ratio from the words "pasture raised." It is, as OCA concedes, literally true for Happy Egg to advertise that its eggs come from hens raised on over 8 acres of pasture. *See* Opp'n at 14 (conceding that "OCA does not allege that Happy Egg misleads consumers about the ***number of acres***") (emphasis in original). OCA pleads no facts suggesting that consumers take away the ratio that OCA believes should apply.

Second, for any consumer aware of the "standard" set by the group on which OCA relies, that consumer would have to engage in impossible mental gymnastics by: (1) believing that Happy Egg is certified by the group despite the absence of claimed certification; and (2) ignoring the larger font on the carton—directly above the words "pasture raised"—that says "FREE RANGE":

Compl. ¶ 9, Figure 1. These mental gymnastics are implausible because a sophisticated consumer aware of OCA's certification "standard" for "pasture raised" would not ignore the fact that Happy Egg does not claim such certification.

Such a sophisticated consumer would also not simultaneously ignore the larger font words "FREE RANGE" which, according to OCA, imply a raising standard different from "pasture raised." *See id.* ¶ 40. It is blackletter law that courts must view an advertising claim, "in its entirety" and cannot engage in "disputatious dissection" of phrases while ignoring the body and context of the advertisement. *Procter & Gamble Co. v. Ultreo, Inc.*, 574 F. Supp. 2d 339, 345 (S.D.N.Y. 2008) (citing *Avis Rent A Car Sys., Inc. v. Hertz Corp.*, 782 F.2d 381, 385 (2d Cir. 1986)); *see also Whiting v. AARP*, 637 F.3d 355, 364 (D.C. Cir. 2011) ("Even if [the promotional statements] could be read that way taken alone—and were not, as the district court found, accurate and non-misleading statements or mere puffery—the context refutes her proposed interpretation.") (citation omitted) (affirming dismissal of CPPA claim); *Pernod Ricard USA, LLC v. Bacardi U.S.A., Inc.*, 653 F.3d 241, 250 (3d Cir. 2011) (affirming dismissal of claim that "Havana Club, Puerto Rican Rum" misled consumers as to the origin of the product because advertisement as a whole could not be misleading as a matter of law).

According to OCA, "free range" means that hens "generally" receive "only a square foot of space" or "sometimes two square feet" plus outdoor access which "might lead to a field or might lead to only a caged porch." Compl. ¶ 40. "Pasture raised" according to OCA, on the other hand, means that hens must have "at least 108 square feet of open field per bird to roam." *Id.* Any consumer that subscribes to OCA's understanding of "pasture raised" would immediately wonder why the carton says "FREE RANGE" in larger letters and would not base their purchasing decision on the "pasture raised" standards proposed by OCA.

OCA also argues in a footnote that Happy Egg misleads consumers as to whether it is certified by the nongovernmental group as "pasture raised." Opp'n at 13 n.7. But it is not plausible to allege that a consumer would think Happy Egg's eggs are certified by the AHA when its packaging contains no claim of certification. *See* Compl. ¶ 9, Figures 1 & 2; *id.* ¶ 12. OCA vaguely refers to prior packaging but does not allege how the logo was used or state any facts that suggest a consumer will believe Happy Egg's eggs are certified by any nongovernmental groups (let alone a sophisticated consumer of the type necessarily contemplated by OCA).

Third, the standards that OCA alleges are vague. OCA alleges that "free range" "generally" means something, but "sometimes" it means something else. *Id.* ¶ 40. OCA similarly alleges that "pasture raised" hens "***sometimes*** must meet minimum requirements for time spent outdoors." *Id.* (emphasis added). This is too vague on which to base a claim. In truth, as OCA concedes, Happy Egg's eggs come from hens that are both free range and pasture raised on over 8 acres of green rolling pasture. It is not actionable for Happy Egg to truthfully disclose this information—particularly where, according to OCA, most "free range" hens do not benefit from these conditions.

Finally, OCA argues that Happy Egg's trademarked phrase "FREE-EST OF THE FREE RANGE" is not a non-actionable statement of superiority like "best food," but rather is more akin

to the statements in *Lugones v. Pete & Gerry's Organic, LLC*, 2020 U.S. Dist. LEXIS 30012 (S.D.N.Y. Feb. 21, 2020). But *Lugones* involved statements of fact (like "play on plenty of green grass") whereas the "free-est of the free range," like the word "best," is a matter of opinion. *See Hoyte v. Yum! Brands, Inc.*, 489 F. Supp. 2d 24, 30 (D.D.C. 2007).

Conclusion

WHEREFORE, Happy Egg respectfully requests that this Court dismiss the Complaint.

Respectfully submitted,

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I hereby certify that a true and correct copy of the foregoing document was electronically filed on this 23rd day of July 2020 and served on the following counsel for Plaintiff via CaseFileXpress:

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