SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
CIVIL DIVISION

DEAN MOSTOFI,	:	
	:	
Plaintiff,	:	
	:	**Case No. 2011 CA 163 B**
v.	:	**Calendar 12**
	:	**Judge Brian F. Holeman**
MOHTARAM, INC.	:	
	:	
Defendant.	:	

OMNIBUS ORDER

This matter comes before the Court upon consideration of Defendant's Motion for Summary Judgment, filed on December 1, 2012 and Plaintiff's Motion for Partial Summary Judgment on Certain Issues, Filed on November 30, 2012. On January 9, 2013, Plaintiff filed the sealed Memorandum of Points and Authorities in Opposition to Defendants' Motion for Summary Judgment ("Opposition").

I. PROCEDURAL HISTORY

On January 7, 2011 Plaintiff filed the *pro se* Complaint, alleging that Defendant violated the District of Columbia Consumer Protection Procedures Act ("CPPA") by misrepresenting Pompeian-brand olive oil ("Pompeian") as "extra virgin" and selling Pompeian in violation of D.C. law. (Compl. 16-21.) On January 28, 2011, Defendant filed the Answer.

On April 9, 2011, Plaintiff's Counsel, Thomas Willcox, entered his appearance before the Court. On February 22, 2012, Plaintiff filed the Motion to Withdraw as Counsel ("Motion to Withdraw"). On March 21, 2012, Hassan A. Zavareei filed the Notice of Appearance of Counsel for Plaintiff. On March 23, 2012, in open court, the Court orally granted the Motion to Withdraw.

On October 23, 2012, Plaintiff filed the Second Amended Complaint ("Final Complaint"). On November 13, 2012, Defendant filed the Consent Motion for Extension of Summary Judgment Briefing Schedule, which was granted by the Court on November 20, 2012. On December 1, 2012, Defendant filed the Motion for Summary Judgment. On January 9, 2013, Plaintiff filed the Opposition.

II. JURISDICTIONAL REQUIREMENT OF STANDING

There exists the jurisdictional question whether Plaintiff has standing to maintain this matter. Standing is the "[making of] a case or controversy between [plaintiff] and the defendant within the meaning of Article III [of the Constitution]." *Grayson v. AT&T Corp.*, 15 A.3d 219, 233-234 (D.C. 2011) (citation omitted).

The District of Columbia Court of Appeals "follows Supreme Court developments in constitutional standing jurisprudence as to 'whether the plaintiff has made out a case or controversy." *Id*. at 233 (citation omitted). Further, even though "Congress created the District of Columbia court system under Article I of the Constitution, rather than Article III, this court has followed consistently the constitutional *standing* requirement embodied in Article III." *Floyd v. Bank of Am. Corp.*, 2013 WL 3466397 (D.C. 2013) (citing *Grayson*, 15 A.3d at 224).

The District of Columbia recognizes the federal *Lujan* test to determine a plaintiff's standing. *Grayson*¸ 15 A.3d at 250 (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-561 (1992)). The *Lujan* test articulates three elements of the "irreducible constitutional minimum of standing:"

> First, the plaintiff must have suffered an "injury in fact" – an invasion of a legally protected interest which is (a) concrete and particularized . . . and (b) "actual or imminent, not 'conjectural' or

> 'hypothetical.' Second, there must be a causal connection between the injury and the conduct complained of – the injury has to be "fairly . . . trace[able] to the challenged action of the defendant, and not . . . the result [of] independent action of some third party not before the court. Third, it must be "likely," as opposed to merely "speculative," that the injury will be redressed by a favorable decision."

Lujan, 504 U.S. at 560, 561 (internal citations omitted). Plaintiff, however, brings this action under statute, specifically District of Columbia Code § 28-3905(k)(1) of the CPPA.[1]

A. Standing in a CPPA Action

Grayson involved plaintiffs who brought actions under D.C. Code § 28-3905(k)(1). *See supra* note 1, at 3. The *Grayson* court stated that "elimination of our constitutional standing requirement would be so unusual that we will not lightly infer such intent on the part of the Council." *Grayson*, 15 A.3d at 244. The court concluded that "a lawsuit under the CPPA *does not* relieve a plaintiff of the *requirement to show a concrete injury-in-fact* to himself." *Id*. (emphasis added).

In *Grayson*, the Plaintiff alleged "injury in fact, based on the defendants' violation of his statutory right (derived from D.C. Code § 28-3904) [unlawful trade practices]." *Grayson*, 15 A.3d at 249 (citation omitted). The court held that even though Grayson's injury was "derived solely from a violation or an invasion of his statutory rights created," a statutory right to "be free from improper trade practices" under D.C. Code § 28-3904 and D.C. Code § 28-3905(k)(1) "*may constitute an injury-in-fact sufficient to establish*

[1] D.C. Code § 28-3905(k)(1) reads, "A person, whether acting for the interests of itself, its members, or the general public, may bring an action under this chapter in the Superior Court of the District of Columbia seeking relief from the use by any person of a trade practice in violation of a law of the District of Columbia . . . " *See also* D.C. Code § 28-3904 (listing unlawful trade practices).

standing," even though a plaintiff "suffered no judicially cognizable injury in the absence of [the] statute." *Id.* at 248-249 (citation omitted) (emphasis added).

B. Plaintiff's Standing

At this stage, "the 'mere allegations' of the pleadings become insufficient" and "constitutional standing must be shown through 'specific facts' set forth . . . to survive a motion for summary judgment." *Grayson*, 15 A.3d at 246.

Defendant alleges that Plaintiff "manufactured" standing; that Plaintiff "knowingly purchased products that he believed were defective and did so for the purpose of filing a lawsuit." (Mot. for Summary Judgment 18-19.) This presents the dilemma whether standing may be established upon a "self-inflicted injury." The courts are conflicted on this issue.

The United States Court of Appeals for the District of Columbia Circuit offers guidance on the "chimerical" dilemma of establishing a party's standing based on a self-inflicted injury, noting that it has "consistently held that self-inflicted harm *doesn't* satisfy the basic requirements for standing." *Nat'l Family Planning & Reprod. Health Ass'n v. Gonzales*, 468 F.3d 826, 831 (D.C. Cir. 2006) (citations omitted) (emphasis added). Further, "even if self-inflicted harm qualified as an injury it would *not be fairly traceable* to the defendant's alleged conduct," thus failing to satisfy the second prong of the *Lujan* test. *Id*. (citations omitted) (emphasis added); *see supra* ¶ 4 at 2. Conversely, the District of Columbia Court of Appeals has held that the local courts are "not bound by the decisions of the United States Court of Appeals rendered after [February 1, 1971," although decisions by the U.S. Court of Appeals are "entitled to great respect." *See*, *e.g.*, *Bethea v. United States*, 365 A.2d 64, 70 (D.C. 1976).

Here, Plaintiff attempts to establish standing from purchasing one bottle of Pompeian from Defendant on January 3, 2011. (Final Compl. 6.) Defendant admits that Plaintiff bought one bottle of Pompeian on January 3, 2011. (Mohtaram Statement of Material Facts 1.) Plaintiff admits that he bought "EVOO" (extra virgin olive oil) from Defendant after becoming aware of studies from the University of California – Davis, reported in June 2010 and April 2011 ("2010 Study" and "2011 Study," respectively), that concluded that certain brands of EVOO failed to satisfy international and United States Department of Agriculture ("USDA") standards for EVOO. (Final Compl. 8-11.) Plaintiff admits to having purchased EVOO to test in comparison to the findings of the U.C. Davis studies of 2010 and 2011; this demonstrates Plaintiff's awareness of alleged defects with EVOO prior to filing suit. (Final Compl. 10; *see* Mostofi Deposition Dec. 22, 2011 92. (admitting that Plaintiff bought EVOO that "ended up being the basis of the complaints here" to test whether that EVOO was "true extra virgin olive oil")).

Ultimately, neither the intent of Plaintiff nor whether he "manufactured" standing are dispositive of the question. No precedent establishes that the Court must apply a "good faith" standard to the actions of a plaintiff in order to find that the standing requirement has been met. Further, Plaintiff does not need to demonstrate that he suffered any physical, emotional, or monetary injury; an actual or immediate statutory violation is sufficient to establish an injury-in-fact. *Grayson*, 15 A.3d at 248-249 (citation omitted).[2]

[2] Upon questioning during deposition, Plaintiff admitted that he did not suffer any illness, physical harm, or emotional distress upon learning that Filippo Berio olive oil, involved in a similar pending matter before the Court, may not be "100 percent made from Italian olives." (Mostofi Deposition Apr. 18, 2012 631-632). Plaintiff made a conclusory statement that he "clearly [had been] monetarily harmed." (*Id.* at 631.) But for the holding in *Grayson* that plaintiff's allegations of violations of the CPPA may constitute a violation of plaintiff's statutory rights that "may constitute an injury-in-fact sufficient to establish

The dispositive consideration is that Plaintiff is a consumer who engaged in a consumer transaction. This transaction is protected by the CPPA. Under D.C. Code § 28-3901, a "consumer" is a person who "does or would purchase, lease (from), or *receive* consumer goods or services . . . " (emphasis added). Under D.C. Code § 28-3901(a)(7), "goods and services" are "any and all parts of the economic output of society, at any stage or related or necessary point in the economic process . . . " The D.C. Court of Appeals has recognized that these CPPA definitions are broad and extend the reach of the CPPA to most sales of goods and services.

The D.C. Court of Appeals has held that a transaction to acquire medical records was a consumer transaction and that plaintiff could claim a violation of his CPPA rights for an allegedly exorbitant fee charged for release of those medical records. *See Julian Ford v. ChartOne, Inc.*, 908 A.2d 72, 83 (D.C. 2006) (holding that the definition of consumer transaction under D.C. Code § 28-3901(a)(7) includes consumer purchases of business opportunities, and purchase of medical records for a lawsuit qualifies as purchasing a business opportunity).

In *Adam A. Weschler & Son, Inc. v. Klank*, the D.C. Court of Appeals explained that "it is not the use to which the purchaser ultimately puts the goods or services, but rather the nature of the purchaser that determines the nature of the transaction." *Adam A. Weschler & Son, Inc. v. Klank*, 561 A.2d 1003, 1005 (D.C. 1989). If "the purchaser is not engaged in the regular business of purchasing this type of good or service and reselling it, then the transaction will usually fall within the [CPPA]." *Id.*

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standing," Plaintiff's admissions may have been fatal to his case. *See Grayson*, 15 A.3d at 248-249 (citation omitted).

Here, on January 3, 2011, Plaintiff purchased one bottle of Pompeian from Defendant's grocery store. Regardless of Plaintiff's underlying motivation for buying that bottle of Pompeian or his desire to test that bottle, Plaintiff was not a purchaser engaging in the regular business of purchasing olive oil to *resell* it. The motivations of the plaintiff in *Julian Ford* are similar to Plaintiff; both bought a good for the purpose of advancing litigation. At the very least, Plaintiff qualifies as a consumer that engaged in a consumer transaction for the purchase of a business opportunity as defined in *Julian Ford*. *See supra* ¶ 2, at 6. In the alternative, Plaintiff bought a bottle of Pompeian for personal consumption or to test that bottle, which does not disqualify Plaintiff under D.C. Code § 28-3901(a)(7).

If there is a genuine dispute of material fact whether Defendant misrepresented and sold EVOO of Italian origin, the harm would not be self-inflicted upon Plaintiff's purchase of Pompeian; rather the harm of an unlawful trade practice occurred once Defendant offered to sell that bottle of Pompeian in its store. *See* D.C. Code § 28-3904(x) (stating that an unlawful trade practice is the sale of consumer goods "in a condition or manner not consistent with that warranted by operation of sections 28:2-312 through 318 of the District of Columbia Official Code, or by operation or requirement of federal law"); *Compare Nat'l Family Planning & Reprod. Health Ass'n*, 468 F.3d at 831 (stating that plaintiff suffered self-inflicted harm by refusing to inquire into readily available administrative relief).

Review of Plaintiff's claims on the merits will resolve the issue of standing: any remaining genuine dispute of material fact whether Defendant violated any provision of

the CPPA at the time that Defendant sold Pompeian to Plaintiff on January 3, 2011, resolves the issue of standing in Plaintiff's favor. *See supra* note 2, at 6.

III. STANDARD OF REVIEW FOR SUMMARY JUDGMENT ON THE MERITS

Under Superior Court Rules of Civil Procedure, Rule 56(c), the Court shall grant summary judgment "if . . . there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." To prevail on a motion for summary judgment, the moving party must demonstrate, based on the pleadings, discovery responses, and any affidavits submitted, that there is *no* genuine issue as to *any* material fact and that it is thus entitled to judgment as a matter of law. *See* Super. Ct. Civ. R. 56(c); *Grant v. May Department Stores Co.*, 786 A.2d 580, 583 (D.C. 2001). *Grant v. May Department Stores Co.*, 786 A.2d 580, 583 (D.C. 2001). A trial court considering a motion for summary judgment must view the pleadings, discovery materials, and affidavits in the light most favorable to the non-moving party and may grant the motion *only* if a reasonable finder of fact, having drawn all reasonable inferences in favor of the non-moving party, could not find for the non-moving party based on the evidence in the record. *Grant*, 786 A.2d at 583 (internal citations omitted).

The moving party has the initial burden of proving that there is no genuine issue of material fact in dispute. If the moving party carries its initial burden, then the non-moving party assumes the burden of establishing that there is a genuine issue of material fact in dispute. *Grant*, *supra,* 786 A.2d at 593 (internal citations omitted).

Count I of the Final Complaint alleges that Defendant violated D.C. Code § 28-3904 by making multiple misrepresentations and omissions of material fact regarding the "extra-virgin" quality of Pompeian. (Final Compl. 18-20.) Count II of the Final

Complaint alleges that Defendant violated D.C. Code § 28-3904 by making multiple misrepresentations of material fact regarding the Italian origin of Pompeian. (*Id*. at 20-21.) Under Count II, Plaintiff also alleges violations of federal statutes as the basis of violations of D.C. Code § 28-3904, specifically Title 19 of the United States Code § 1304 (of the Tariff Act of 1930, hereafter "Tariff Act") and Title 19 of the Code of Federal Regulations § 134.46.[3] (*Id*. at 21-22.)

Count III of the Final Complaint alleges that Defendant violated D.C. Code § 28:2-313 and D.C. Code § 28:2-314 by selling Pompeian as "extra-virgin" olive oil in a manner inconsistent with D.C law and that these infractions in turn violated D.C. Code § 28-3904.[4] (Final Compl. 23-27.) Count IV of the Final Complaint alleges that Defendant violated D.C. Code §§ 28:2-313, 28:2-314 and 28-3904 by selling Pompeian as EVOO imported from Italy even though Pompeian is allegedly not of Italian origin. (Final Compl. 27-32.)

IV. SUMMARY JUDGMENT ON COUNTS I AND III

Defendant advances three (3) arguments for summary judgment in its favor on Counts I and III of the Final Complaint: (1) Plaintiff lacks requisite expert testimony to establish that the Pompeian he bought on January 3, 2011, was not "extra virgin;" (2) Plaintiff cannot base his claims on tests of bottles from multiple lots packaged and sold at

[3] 19 U.S.C. § 1304 concerns the marking of imported articles and containers. 19 C.F.R. 134.46 concerns the marking of products if the name of country or locality other than the country of origin appears on that product. D.C. Code § 28-3904(t) states that it shall be an unlawful trade practice for any person to "use deceptive representations or designations of geographic origin in connection with goods or services."

[4] D.C. Code § 28-3904(x) states that it shall be an unlawful trade practice for any person to "sell consumer goods in a condition or manner not consistent with that warranted by operation of sections 28:2-312 through 318 of the District of Columbia Official Code, or by operation or requirement of federal law." D.C. Code § 28:2-313 and D.C. Code § 28:2-314 concern express warranties and merchantability of goods.

different times; and (3) there is no evidence that any EVOO sold by Defendant violated a reasonable consumer's expectation. (Mot. for Summary Judgment i.)

Regarding Defendant's first argument, Defendant is unable to establish that Plaintiff has absolutely no expert testimony to support a genuine dispute of material fact as to Count I and Count III of the Complaint. In the Omnibus Order issued concurrently herewith, the Court has denied Defendant's Motion to Exclude Nancy Ash's Testimony. Ash is an expert who conducted taste tests of Pompeian and other EVOOs. In that same Omnibus Order, the Court also denied Defendants' Motion to Strike the Untimely Expert Declarations of Rodney J. Mailer, Abraham Wyner, and Nancy Ash, three (3) of Plaintiff's expert witnesses. (*See* Omnibus Order November 12, 2013.) Further, conflicting expert testimony and evaluation of an expert's qualifications, demeanor, credibility, and reasoning are factual issues that must be resolved through trial on the merits, and should be left as questions of fact for the jury. *See Derzavis v. Bepko*, 766 A.2d 514, 524-525 (D.C. 2000) (stating "it was for the jury to determine whether to accept or reject the expert's education . . . credibility, and all other evidence in this case") (citation omitted).

Regarding Defendant's second argument, Defendant asserts that "no finder of fact could reasonably draw conclusions about Plaintiff's January 2011 bottle . . . from tests of bottles from different lots." (Mot. for Summary Judgment 9-11.) Defendant is essentially arguing that the results of Plaintiff's tests of multiple EVOO samples are unreliable as speculative. The trial court "must take care to avoid weighing the evidence . . . if it is possible to derive conflicting inferences from the evidence, the trial judge should allow the case to go to the jury." *Giordano v. Sherwood*, 968 A.2d 494, 497-498

(D.C. 2009) (citation omitted). The jury, however, "may not be allowed to engage in idle *speculation*." *Id*. at 498 (citations omitted) (emphasis added).

Defendant's arguments establish genuine disputes of material fact and raise issues that cannot be disposed of by summary judgment. Questions as to the "purported beliefs" of Plaintiff's experts, whether the sample size Plaintiff used was "too small," statistical significance, and the relevance of samples tested after January 2011 are issues to be addressed and resolved at trial. (Mot. for Summary Judgment 11.); *see Giordano* at 498; *see supra* ¶ 1, at 10.

Regarding Defendant's third argument, Defendant asserts that it is entitled to summary judgment on Counts I and III because Defendant did not violate a "reasonable consumer's expectation" upon selling Pompeian to Plaintiff. (Mot. for Summary Judgment 11, 12.); *Pearson v. Chung*, 961 A.2d 1067, 1075 (D.C. 2009). However, the "reasonable consumer's expectation" is considered upon deciding whether a plaintiff has met his burden to prove by "clear and convincing evidence" any claim of intentional misrepresentation under the CPPA. *See Pearson*, 961 A.2d at 1074-1076 (stating "the clear and convincing standard applies to claims of intentional misrepresentation under the CPPA" and that "clear and convincing evidence is defined as the evidential standard . . . ") (citations omitted). The question whether Plaintiff has met this burden remains for trial.

V. SUMMARY JUDGMENT ON COUNTS II AND IV

Defendant advances two (2) arguments for summary judgment in favor of Defendants on Counts II and IV of the Final Complaint. First, Defendant alleges the Plaintiff is using "the CPPA to enforce what is, at best, an alleged violation of the

[federal] Tariff Act;" Defendant asserts that this Court lacks jurisdiction to consider that claim. (Mot. for Summary Judgment 13.) Second, Defendant asserts that Plaintiff has "failed to present any evidence that the label misrepresented the country of origin" in violation of the CPPA. (*Id.*)

The crux of Plaintiff's claims in Counts II and IV is that Defendant *sold* Pompeian, and that Pompeian made a *misrepresentation or omission* as to its alleged Italian *origin.* Plaintiff asserts that this would render Defendant liable under the CPPA for selling a product in breach of an express warranty that the product was from Italy. *See supra* note 4, at 9.

The proffered supportive evidence is taken from packaging. The front label of the bottle shows text, "Quality Since 1906 Pompeian . . . imported *Extra Virgin* Olive Oil . . . First Cold Press . . . Robust Flavor" with a label from the North American Olive Oil Association ("NAOOA"). (S EVOO 0085.) The front label has a picture of olives, farmland, and a greenish-blue sky. The top cap of the bottle has a serial number and "best by" date. (S EVOO 0087.) On the back label of the bottle, there is text that reads, "Packed in U.S.A. by Pompeian, Inc., Baltimore, MD 21224 . . . Product contains select high-quality olive oil from *Spain, Italy, Tunisia, Greece and Argentina*." (S EVOO 0086.) (emphasis added). Contrary to Plaintiff's assertions, there is no label, marking, or any other text on the bottle of Pompeian that states that Pompeian is "imported from Italy," solely "from Italy," "of Italian origin," or any other plain text representantation that the bottle came solely from Italy or is solely of Italian origin. (*See* Mot. for Partial Summary Judgment 34.)

Plaintiff's first argument is that the use of the term "Pompeian" is derived from the city of Pompeii, Italy, and that would "lead consumers to understand that the olive oil sold by Defendant is from Pompeii." (Pl. Mot. for Partial Summary Judgment 23-37; *See also* Pl. Opp'n to Def.s Motion for Summary Judgment 21) This assertion requires speculation as to the common geographic knowledge of the reasonable person and whether the reasonable person would likely infer that "Pompeian" refers to the city of Pompeii, Italy. Even if this Court accepted Plaintiff's assertion, Plaintiff is unable to demonstrate that there is any genuine dispute of material fact whether Defendant made a *mis*representation.

The elements of fraudulent misrepresentation includes "(1) false representation, (2) in reference to a material fact, (3) made with knowledge of its falsity, (4) with the intent to deceive . . . " *Railan v. Katyal*, 766 A.2d 998, 1009 (D.C. 2001) (citations omitted). Given the plain meaning of "misrepresentation," i.e. false, misleading, or incorrect representation, the pertinent question is whether Defendant made a *false*, *misleading, or incorrect* representation of the Italian origin of the bottle of Pompeian. *See Osbourne v. Capital City Mortg. Corp.*, 727 A.2d 322, 325 (D.C. 1999) (stating that a claim for intentional misrepresentation falls under the CPPA").

Observed from the front, top, and back of the bottle of Pompeian, the packaging plainly does not attempt to represent that Pompeian is solely of Italian origin or imported solely from Italy. The front label merely states, "Imported," without any additional modifier. (S EVOO 0085.) The back label clearly identifies several countries of origin for Pompeian, not just Italy. (S EVOO 0086.) The top label does not state anything regarding a country of origin or country of export. (S EVOO 0087.) The back label

mentions that Pompeian is a "key component of a healthy Mediterranean diet." (S EVOO 0086.) The plain meaning of "Mediterranean" is the geographic area and countries surrounding the Mediterranean Sea, which includes Italy but also includes Greece, Tunisia, and Spain.

Further, "Pompeian" is the name of the corporation that sells bottles of Pompeian. *See supra* ¶ 2, at 12. The essence of Plaintiff's argument is that the very name of the corporation is deceptive or a misrepresentation, and that Pompeian, Inc. should not be allowed to use the name under which the business incorporated. The origin of the name of the corporation is not an issue in this matter. Apple, Inc., a popular seller of electronic products, does not misrepresent the sale of Granny Smith, Fuji, Gala, Golden Delicious, or Jonagold. Apple, Inc., like other business enterprises incorporated in the United States, has the right to affix its own company name and symbol onto its products.

Plaintiff's second argument is that Defendant "ignores the strong association olive oil has with Italy in the minds of consumers . . . advertising campaigns . . . " (Opp'n 22.) This argument is unsubstantiated by evidence, speculative, and self-serving. Even if this Court accepts, *arguendo*, Plaintiff's premise that consumers presume that *any* olive oil comes from Italy based on a "strong association" of olive oil to Italy, it does not follow that this association is directly and proximately caused by any representation Defendant made in selling Pompeian. If a consumer presumes that Pompeian comes from Italy merely because Pompeian is olive oil, then no representation by either Defendant or the makers of Pompeian is even necessary to create an erroneous impression of the olive oil's origin.

Plaintiff's third argument is that the use of gold, red, and green coloration on the front label alludes to the "color associated with the Italian flag and Italy," thus forming a misrepresentation. (Mot. for Partial Summary Judgment 11.) This argument is unavailing. The front label does not display any flag. (S EVOO 85.) Further, the colors of the Italian flag are green, *white*, and red, not green, gold, and red. Still further, Plaintiff erroneously suggests that any usage of color inherently creates a strong association with a particular country, regardless of context

Plaintiff's fourth argument is that there are genuine disputes of material fact whether Defendant violated the Tariff Act and 19 C.F.R. § 134.46; those violations would also constitute violations of the CPPA. Plaintiff asserts that "trade practices in violation of consumer protection statutes like the Tariff Act fall within the purview of the CPPA" and that D.C. Code § 28-3904(x) "expressly incorporates the violations of federal law into the CPPA." (Opp'n 26-27.) *See supra* note 4, at 9.

19 C.F.R. § 134.46 states:

> In any case in which the words "United States," or "American," the letters "U.S.A.," any variation of such words or letters, or the name of any city or location in the United States, or the name of any foreign country or locality other than the country or locality in which the article was manufactured or produced appear on an imported article or its container, and those words, letters or names may mislead or deceive the ultimate purchaser as to the actual country of origin of the article, there shall appear legibly and permanently in close proximity to such words, letters or name, and in at least a comparable size, the name of the country of origin preceded by "Made in," "Product of," or other words of similar meaning.

19 C.F.R. § 134.46 only applies where use of the name of the locality where the item was manufactured or produced might mislead or deceive the consumer. As applied here, the operative language might be 'Packed in Italy' or 'Imported from Italy'" or some

other explicit statement that Pompeian is solely "from Italy." The bottle of Pompeian in question does not state that it is "Packed in Italy," "Imported from Italy," or otherwise solely "from Italy," nor does it contain any other language that might mislead or deceive as to locality of origin.

Regarding the Tariff Act, this Court lacks the subject matter jurisdiction to consider any alleged violation. Looking to the federal courts for guidance, the United States Circuit for the District of Columbia has affirmed that the Tariff Act "does not provide for a private right of action." *Potter v. Toei Animation, Inc.*, 839 F. Supp. 2d 49, 53 (D.D.C. 2012), *aff'd*, 2012 U.S. App. LEXIS 20979 (D.C. Cir. 2012), *cert. denied*, 133 S. Ct. 936 (2013). Further, the *Potter* court cited authority suggesting that a party's reliance on the Tariff Act to prove violations of other statutes "does not cure its lack of standing." *See Potter*, 839 F. Supp. 2d at 53 (citing *Mugworld, Inc. v. G.G. Marck & Assocs., Inc.*, 563 F. Supp. 2d 659, 666 (E.D. Tex. 2007) (stating "argument that it is relying on the Tariff Act in order to prove [Marck's] Lanham Act claim does not cure its lack of standing")). In any event, fatal to any Tariff Act claim made here is Plaintiff's failure to file a complaint with the International Trade Commission for investigation and determination whether a violation of 10 U.S.C. § 1337 exists. *See* 839 F. Supp at 53.

Taking all reasonable inferences in the light most favorable to Plaintiff, Defendant is entitled to judgment as a matter of law on Counts II and IV of the Final Complaint.

VI. PLAINTIFF'S REPRESENTATIVE CLAIMS

Plaintiff brings his suit individually and in "his representative capacity, in the interests of the general public." (Final Compl. 32.) D.C. Code § 28-3905(k)(1) permits an individual to bring an action on behalf of the "general public." In order to pursue a

representative claim "on behalf of the general public," Plaintiff must demonstrate there are genuine disputes of material fact whether misleading or misrepresentative claims were made to individuals other than Plaintiff in violation of the CPPA. *See Va. Acad. of Clinical Psychologists v. Group Hospitalization & Med. Servs.*, 878 A.2d 1226, 1240 (D.C. 2005) (stating "to pursue a claim on behalf of the 'general public,' appellants would have to point to misleading, fraudulent statements made to individuals other than [the individual appellants].")

There exist genuine disputes of material fact as to Defendant's alleged misrepresentations and breach of warranty under the CPPA and whether evidence of violations for individual bottles can be extrapolated to multiple bottles of Pompeian sold to the general public. *See supra* ¶ 1, at 11.

Plaintiff cites statements of co-Defendants and the fact that Plaintiff relies on a study done using EVOOs purchased in California. (Opp'n 40-41.) This evidence merely establishes a tenuous chain of circumstantial evidence supporting Plaintiff's representative claims. However, this Court is constrained to leave questions of weight, credibility and circumstantial evidence to the finder of fact, especially in light of the fact that the 2010 Study apparently established that 17 of 21 Pompeian samples failed. (2010 Study 7.); *See supra* ¶ 1, at 10.

WHEREFORE, it is this 12th day of November, 2013, hereby

ORDERED, that Defendant's Motion for Summary Judgment is **GRANTED IN PART**; and it is further

ORDERED, that Plaintiff's individual and representative claims in Counts II and IV of the Second Amended Complaint, Misrepresentation and Omissions of Material Fact

Regarding Italian Origin and Selling Consumer Goods in a Condition and Manner Inconsistent with D.C. Law – Italian Origin, are **DISMISSED, WITH PREJUDICE** and it is further

ORDERED, that Plaintiff's Motion for Partial Summary Judgment on Certain Issues is **DENIED**.

BRIAN F. HOLEMAN
JUDGE

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