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Anna Maria Hodges
Clerk of Circuit Court
2022CV002488

BY THE COURT:

DATE SIGNED: February 23, 2024

Electronically signed by Thomas J. McAdams
Circuit Court Judge

STATE OF WISCONSIN

CIRCUIT COURT

MILWAUKEE COUNTY

BRANCH 7

CRAIG ROBINSON and KELLY ROBINSON,
Plaintiffs,

v.

Case No. 22-CV-2488

UNIVERSITY SCHOOL OF MILWAUKEE,
Defendant

DECISION AND ORDER ON DEFENDANT’S MOTION FOR JUDGMENT ON THE PLEADINGS

Defendant University School of Milwaukee (“USM”) brings this motion for judgment on the pleadings. Specifically, USM asserts that Plaintiffs’ Wisconsin Deceptive Trade Practices Act (“WDTPA”) claim fails because the diversity affirmations on which the Plaintiffs rely are not actionable as a matter of law. The Court has thoroughly reviewed the parties’ submissions and heard oral argument on the issues. For the reasons stated below, the Court must deny USM’s motion for judgment on the pleadings.

BACKGROUND

For purposes of this motion for judgment on the pleadings, the facts are taken from the complaint. Document No. 2. The facts/allegations obviously are in dispute, but must be recited in detail here.

The Plaintiffs, Craig and Kelly Robinson, have two children—A.O.R., an eleven-year-old boy, and A.Y.R., a nine-year-old boy. Doc. 19 at 2. Both children began attending USM in August 2016. *Id.* USM is an independent college-prep school for pre-k through twelfth grade, with tuition ranging from \$20,000 to \$30,000 per student per year. *Id.* at 8. The Robinson's chose USM because of its excellent reputation, and chose to forgo other educational opportunities because of USM's commitment to diversity. *Id.* at 9.

When enrolling a student at USM, parents or legal guardians must sign an enrollment contract each year (the "Enrollment Contract"). *Id.* at 10. From 2016 to 2020, the Robinsons signed individual Enrollment Contracts each year for each child. *Id.* In February 2021, the Robinsons received enrollment contracts for both children, and they signed A.Y.R.'s Enrollment Contract. *Id.*

In addition to setting forth tuition information and various school policies, the Enrollment Contract states that the agreement's term is for the entire academic year. *Id.* The Enrollment Contract grants USM discretion in deciding whether or not to terminate a student's enrollment. The discretion is limited to "deny[ing] enrollment or reenrollment or dismiss[ing] a student if [USM] officials determine for any reason that enrollment is not in the best interest of the school." *Id.*

USM's discretion to deny enrollment or reenrollment is, however, limited by an express provision incorporated by reference into the Enrollment Contract, which obligates USM to make determinations with fairness and honesty. *Id.* at 11. The Enrollment Contracts provide that the parties "agree to accept the rules, regulations, policies and procedures of [USM] as having been incorporated into this enrollment Contract, including without limitation those that are stated above or which appear in the student handbooks, catalogues, parent mailings, and any other written or verbal communications from [USM] to you and the student." *Id.*

USM's contractually-binding policy is the "Common Trust," which is found on the website and throughout admissions materials. *Id.* It states that USM's mission is to create an "independent school education in a supportive, inclusive community built on the foundation of [USM's] Common Trust." *Id.* The Common Trust is defined as a "pledge" between "the members of the [USM] community to agree to relate to one another and the school with respect, trust, honesty, fairness, and kindness." *Id.*

USM's Middle School Student Handbook ("Student Handbook") is also explicitly incorporated into the Enrollment Contract. The Student Handbook reiterates the principles of the Common Trust, sets forth policies and procedures regarding academics, student activities, and discipline. *Id.* The Student Handbook includes a section on "Bias Incident Policies." This Section states that bias-related misconduct is a "major violation of the Common Trust" and outlines the reporting procedures for bias incidents which includes the submission of a "Bias Incident Reporting Form." *Id.* at 11-12.

The “Parent-School Partnership” is another of USM’s policies and procedures that is explicitly incorporated into the Enrollment Contract. *Id.* at 13. On its website, USM states that it “enters into a Parent-School Partnership with all school parents” and explains that “this partnership is based on the belief that USM faculty and administration must work together with parents in all aspects of school life for the benefit of each child” and that it welcomes diversity because “multiple perspectives and experiences are core to educational excellence and strengthen a community.” *Id.* Further, the Partnership requires that “USM value and listen to parent’s perspectives and concerns regarding their children and the school.” *Id.* at 14. The Parent-School Partnership establishes guidelines for parents to follow when communicating concerns, instructing parents to “communicate directly with the individuals who are best able to address their concerns” and “use the proper channels—first the individual teacher or advisor, then the department chair or division head, and finally, the head of school—and seek a collaborative solution to problems.” *Id.*

Throughout the Robinson children's career at USM, they were recognized as model students by USM faculty and staff, and they both received high marks. *Id.* In the children's 5 years at USM, they met the academic and social expectations set out by the Common Trust, Student Handbook, and other school policies. Likewise, the Robinson's met all of their obligations under the Enrollment Contract and its incorporated documents. *Id.* The Robinsons were active within the USM community and participated in their sons' educational experience. *Id.* Throughout this period, the Robinsons engaged in constructive dialogue with USM faculty about the educational environment, and were told by USM that their assistance was valued and helpful. *Id.* at 14-15.

Due to the COVID-19 pandemic, USM offered remote schooling for the 2020-2021 school year. *Id.* at 15. Because the children were learning remotely from home, the Robinsons gained more insight into their children's classroom experiences. *Id.* During the 2020-2021 school year, the Robinsons noticed several instances where they were troubled by due to a lack of sensitivity toward students of color and other underrepresented students. *Id.*

In accordance with the procedures set forth in the Student Handbook and Parent-School Partnership, the Robinsons communicated their concerns to USM administration. *Id.* The administrators appeared to welcome the feedback, but the Robinsons saw no change in instruction. *Id.* The Robinsons continued to express concerns, and administrators told them to direct their feedback to certain USM administrators who would be better suited to address their concerns. *Id.* In September 2020, the Robinsons then began communicating directly with several USM administrators including Mr. Steve Hancock, USM's Head of School, and Ms. Elaine Griffin, Head of the USM Middle School. *Id.* at 16.

In November 2020, the Robinson's raised concerns directly to Mr. Hancock and Ms. Griffin over a particular worksheet that was offensive to people of color, indigenous Americans, and other underrepresented students. *Id.* The administrators expressed appreciation to the Robinsons for raising their concerns. *Id.* Throughout this time period, USM administrators told the Robinsons that A.O.R. was welcome at USM for the 2021-2022 school year and that A.O.R.'s offer of

enrollment was assured. The Robinsons relied upon these promises and expected to reenroll both of their children. *Id.*

In January 2021, the Robinsons became concerned about classwork that contained socioeconomic insensitivities. *Id.* In response, Mrs. Robinson submitted a bias incident report through the school's reporting system. Mrs. Robinson later inquired about the report, and was told that it wasn't received. USM suggested she resubmit it, which she did on January 14, 2021. *Id.* USM then informed Mrs. Robinson that the concern she raised did not constitute a bias incident and the school took no action. *Id.*

On March 31, 2021, Mrs. Robinson submitted a second bias incident report regarding similarly concerning language used in a classroom assignment. *Id.* at 16-17. The USM declined to take action in response to this report. *Id.*

The Robinsons became frustrated with USM's lack of action, and began to question USM's expressed commitment to diversity and inclusion. *Id.* at 17. The Robinsons became aware of several incidents in years prior in which USM refused to take action against racial insensitivities in the classroom as well as racist behavior from other students. *Id.*

For years, USM required fourth graders to participate in an Underground Railroad simulation in which students were told to act like runaway slaves, and teachers acted as slave catchers. *Id.* Students were told to dress in old clothing from thrift stores and had to navigate through dark hallways and classrooms while sound effects of whips, chains, and horses played. *Id.* Failure to participate would result in a low or failing grade. The practice continued into the 2010s until students of color, parents, and alumni protested the practice. *Id.* USM's attorney recently stated that the school has no regrets about forcing students to participate in this activity. *Id.*

Additionally, multiple white students used racial slurs or acted in a racist manner towards students of color. *Id.* In 2017, a Black kindergartener was repeatedly bullied and called a "monkey" by her fellow classmates. *Id.* at 18. USM defended the behavior of the students and did not implement any disciplinary measures, and one administrator insisted that the students' comments were not racist. *Id.* In 2019, a white student threatened to make a Black classmate look like Emmett Till, the 14-year-old boy who was lynched in

Mississippi in 1955. *Id.* Some students urged others to also participate in racist behavior, saying that they could do so without fear of discipline from USM. *Id.* Many of the students who engaged in these behaviors faced no discipline and were allowed to continue their education at USM. *Id.*

USM has refused to admit its failings regarding racial insensitivities and discrimination within the school. *Id.* In 2020, a Twitter account, “Black@USM” was created to account the racist and insensitive treatment Black student received from faculty, staff, and students. *Id.* In the same year, Black alumnae of the school sent USM a letter detailing their experiences with racist behavior at the school and requesting a dialogue with administrators. *Id.* Administrators met with Black alumnae but refused to address their concerns, and stated that USM should not be compared to its peer schools with regard to racial equity. *Id.* at 18-19.

The Robinsons would not have continued to enroll their children at USM had they known about USM’s failure to create a diverse and inclusive environment. *Id.* at 19.

Following Mrs. Robinson's second bias incident report, the Robinsons continued to raise concerns over the racial insensitivities and treatment of students of color they observed. *Id.* Without prior notice, Mr. Hancock emailed the Robinsons on April 14, 2021 and informed them that A.O.R. would no longer be permitted to enroll at USM for the 2021-2022 school year. *Id.* In his email, Mr. Hancock stated that USM may dismiss a student when a parent "refuses to cooperate reasonably" and that USM expects parents to "respect the expertise and professionalism of the school's faculty, administrators, and staff and seek collaborative solutions to problems." *Id.* at 20. Mr. Hancock asserted that the Robinsons failed to fulfill their obligations by sending numerous emails and texts to USM's teachers about their concerns. *Id.* The April 14th Termination Email cited to no specific communications to support its claim. *Id.*

After receiving this email, the Robinsons reached out to Mr. Hancock in an attempt to understand the termination decision, as well as the decision to terminate the enrollment of only one of their children. *Id.* On June 15, 2021, the Robinsons met with Mr. Hancock. *Id.* The Robinsons did not

hear further until June 21, 2021, when they received a letter terminating the 2021-2022 Enrollment Contracts for both Robinson children. *Id.* at 20-21.

The letter read as follows:

As you know, USM's mission is to provide an exceptional education for all of our students in a supportive and inclusive community built on the foundation of our Common Trust pledge to relate to one another with respect, trust, honesty, fairness, and kindness. Our ability to successfully fulfill our mission depends in significant part upon maintaining a collaborative and respectful partnership with the parents of our students. To this important end, we ask that all school parents enter into and abide by the Parent-School Partnership, which emphasizes our expectations that parents respect the expertise and professionalism of the school's faculty, administrators, and staff and seek collaborative solutions to problems. Additionally, we stress the importance of adherence to our Guiding Principles, which include creating and supporting a physically and emotionally safe environment for the children, faculty, and staff of USM.

As I indicated in my April 15, 2021 correspondence to you, I have concluded that over the course of this school year, you have not fulfilled the foregoing commitments as partners with USM, and especially, with its Middle School teachers and administrators. You neither demonstrated respect for their expertise and professionalism nor consistently related with them in a respectful, trustworthy, fair, or kind manner. Rather—as USM endeavored to navigate the unprecedented challenges of a global pandemic—you repeatedly engaged in disrespectful and demanding communications with and about our teachers and administrators. This conduct—and the damaging repercussions of it—led to my decision to request that you locate another school for to continue his education next year.

Since mid-April of this year, it has only become more evident that there has been a complete breakdown in your family's trust of and respect for USM. You have neither acknowledged your role in nor accepted any responsibility for the circumstances that led to our many meetings, correspondence, and the preliminary decision related to...[your son's] enrollment. What's more, you openly misrepresented the events leading to USM's decision and disparaged the school and our devoted and hardworking teachers and administrators in the process. Considering the foregoing, during our meeting this week I expressed that I was having trouble seeing a path forward with your family and attempted to engage in a dialogue with you. Rather than collaborate or offer possible solutions, you commandeered the conversation, directed me to stand up to the board, and threatened about what was to come if I did not find a way to work this out.

The cumulative effect of these troubling actions not only shows a disregard for your obligations as members of the USM community, but has interfered with USM's operations and entirely precluded a positive and constructive working relationship between you, USM, and its teachers, administrators, and staff. As a result—and although we believe and are students who embody USM's portrait of a graduate—we cannot continue a relationship with your family and must therefore deny reenrollment for both and for the 2021-2022 school year. Enclosed please find a check refunding your previously submitted enrollment deposit fee as well as a copy of the 2021-2022 enrollment agreement.

Document 21.

Similar to the April 14 Termination Email, the June 21 letter contained no reference to a determination of USM's "best interests." *Id.* at 21.

Prior to receiving these termination letters, the Robinsons received no communications from USM that indicated the Robinsons' conduct was inappropriate or close to violating USM rules. *Id.* at 21. Despite multiple instances of serious misconduct by students, USM has only terminated the enrollment contracts of one other family over the past 10 years. *Id.* at 22.

As a result of their children's termination of enrollment, the Robinsons were forced to uproot their children from their school and find new schools within a period of two months. *Id.* at 24. The Robinsons incurred losses including costs related to the search for a new school and lost work time devoted to their children's well being and search for a new school. *Id.*

On April 18, 2022, the Robinsons filed their original complaint. On April 22, 2022 USM communicated to the USM

community that the Robinsons “deprived [USM] teachers and administrators of [a] physically safe and emotionally safe environment.” *Id.* at 23. On April 25, 2022 Mr. Hancock hosted a reception at his home for seniors and their parents. *Id.* At the reception, Mr. Hancock accused Kelly of being belligerent and a bully, and made the claim that she was responsible for sending a USM teacher to the hospital. *Id.* In May 2022, Mr. Hancock held meetings with USM community members in which he repeated some of these claims, and stated that he was responsible for the decision to terminate the children’s enrollment. *Id.* Also in May 2022, USM made comments to the Milwaukee Journal Sentinel, and did not mention that the termination was determined to be in USM’s “best interests. *Id.* at 23.

On June 8, 2022, the Robinsons filed their first amended complaint alleging: (1) breach of contract; (2) violations of Wisconsin Deceptive Trade Practices Act; (3) violations of Wisconsin Unfair Trade Practices Act; (4) Promissory Estoppel; (5) Breach of Implied Covenant of Good Faith and Fair Dealing; and (6) Arbitrary and Capricious Termination.

On June 28, 2022, USM responded with a motion to dismiss pursuant to Wis. Stat. § 802.06(2)(a)(6) for failure to state a claim upon which relief can be granted. This Court dismissed claims one, three, and four, but claims two, five, and six survived the motion to dismiss. Defendants now submit this motion for judgment on the pleadings for count two: an alleged violation of the Wisconsin Unfair Trade Practices Act.

STANDARD OF REVIEW

“After issue is joined between all parties but within time so as not to delay the trial, any party may move for judgment on the pleadings.” Wis. Stat. § 802.06(3). A judgment on the pleadings is essentially a summary judgment decision without affidavits and other supporting documents. *McNally v. Capital Cartage, Inc.*, 2018 WI 46, ¶ 23, 381 Wis. 2d 349, 912 N.W.2d 35. Thus, a court must follow summary judgment analysis when considering a motion for judgment on the pleadings. *Schuster v. Altenberg*, 144 Wis. 2d 223, 228, 424 N.W.2d 159, 161 (1988). “If the complaint is sufficient to state a claim and the responsive pleadings raise no material issues of fact, judgment on the pleadings is appropriate.” *Freedom from*

Religion Found., Inc. v. Thompson, 164 Wis. 2d 736, 741, 476 N.W.2d 318 (Ct. App. 1991).

A court must first determine whether the complaint states a claim for relief. *McNally*, 381 Wis. 2d 349, ¶ 23. “In determining the legal sufficiency of the complaint, ‘the facts pleaded by the plaintiff, and all reasonable inferences therefrom, are accepted as true.’” *Schuster*, 144 Wis. 2d at 228. A complaint is only legally insufficient if “it is quite clear that under no circumstances can the [party] recover.” *Id.* If a court determines that a claim for relief has been stated, then the court looks to the responsive pleadings to determine whether an issue of material fact exists. *McNally*, 381 Wis. 2d 349, ¶ 23. A factual issue is genuine if the evidence is such that a reasonable jury could return a verdict for the nonmoving party. *Id.* ¶ 24. If no genuine issue of material fact exists, the court may enter judgment as a matter of law in favor of the moving party. *Schuster*, 144 Wis. 2d at 228.

ANALYSIS

Defendants move for judgment on the pleadings on count two of Plaintiffs’ complaint, an alleged violation of WDTPA.

The WDTPA prohibits untrue, deceptive, or misleading representations in the sale of goods and services to the public. See Wis. Stat. § 100.18. Count two of Plaintiffs' amended complaint states, in part:

89. As described above, USM made multiple, repeated representations to the public, including Plaintiffs, about USM's commitment to diversity, equity, and inclusion, with the intent to induce the Robinsons to enroll the Robinson Children at USM. These representations occurred repeatedly over the course of five years, from 2016 to 2021.

90. The representations made by USM to the public and Plaintiffs include, but are not limited to, representations that USM would: (i) **“foster an equitable and inclusive community for students, their families, and our administration, faculty, and staff”**; (ii) **“embrace[] diversity in all of these various forms, including race, ethnicity, national origin, socioeconomic status, religions, sexual orientation, ability, gender, and age”**; and (iii) **recognize “and respect [that] the diversity of backgrounds and experiences is fundamental to building a learning community[.]”**

91. As a result of those misrepresentations, Plaintiffs heavily invested in USM by enrolling the Robinson Children at USM for five years, signing ten separate, yearly enrollment contracts and paying private school tuition fees for each child and for each year, volunteering time and money for USM events, and engaging in dialogue regarding the betterment of USM. Each of these years, including for the 2020-2021 school year, USM's repeated false and misleading representations induced Plaintiffs to sign a new Enrollment contract with USM for each child, just as USM had intended. Plaintiffs repeatedly chose to reenroll the Robinson Children and forgo other educational opportunities in reliance on USM's representations and alleged commitment to diversity.

92. USM's representations were untrue, deceptive, and misleading. As described above, USM did not **“foster an equitable and inclusive community,” “embrace[] diversity[,]” or recognize “and respect... the diversity of backgrounds and experience”** of its students.

93. USM knew or should have known its representations were untrue, deceptive, and misleading, and that the Plaintiffs would rely upon the repeated and advertised misrepresentations that occurred over the course of multiple years. Had the Plaintiffs known that USM misrepresented its commitment to diversity as stated publicly on its website and embodied in its Common Trust, the Robinsons would not have enrolled the Robinson Children at USM each year, including for the 2020-2021 school year. The Robinsons further would not have sought to reenroll the Robinson Children at USM for the 2021-2022 school year.

Doc. 19 at 26-27. [emphasis added].

A claim under the WDTPA must allege facts that fulfill three elements: (1) the defendant made representation to one or more members of the public with intent to induce obligation, (2) the representation was untrue, deceptive, or misleading, and (3) the representation materially induced pecuniary loss to the plaintiff. *Hinrichs v. DOW Chemical Company*, 2020 WI 2, ¶ 85, 389 Wis. 2d 669, 937 N.W.2d 37. To plead a violation of § 100.18, a plaintiff must identify the “specific marketing statements they claim materially induced them to incur a pecuniary loss.” *T&M Farms v. CNH Indus. Am., LLC*, No. 19-C-0085, 2020 WL 1082768 at *10 (E.D. Wis. Mar. 5, 2020). The statements at issue must be assertions of fact and not puffery “the truth or falsity of which cannot be precisely determined.” *Tietsworth v. Harley-Davidson, Inc.*, 2004 WI 32, ¶ 41, 240 Wis. 2d 146, 677 N.W.2d 233.

Defendants argue that the representations stated in count two of the Robinsons’ complaint constitute “puffery,” and are therefore not actionable as a matter of law. Puffery is “the exaggeration reasonably to be expected of a seller as to the degree of quality of his product, the truth or falsity of which cannot be precisely determined.” *State v. American TV*, 146

Wis. 2d 292, 201-02, 430 N.W.2d 709 (1988) (quoting *Better Living, Inc. et al.*, 54 F.T.C. 648, 653 (1957), *aff'd.*, 259 F. 2d 271 (3d Cir. 1958)). Examples of puffery include statements that a product is “the best” or “a masterpiece.” *Tietsworth*, 2004 WI 32, ¶ 44. Determining whether affirmations constitute puffery is usually a question of fact, but can sometimes be a question of law. *United Concrete & Const., Inc. v. Red-D-Mix Concrete, Inc.*, 2013 WI 72, ¶ 37, 349 Wis. 2d 587, 836 N.W.2d 807. Courts tend not to draw a bright line rule around puffery, rather “they simply determine, with reference to the specific facts and allegations and the general rules of summary judgment, whether the question can be resolved as a matter of law by the court or instead [the question] requires the consideration of a jury.” *Id.*

Defendant points to several recent cases in support of its argument that statements affirming commitments to diversity, equity and inclusion are nonactionable puffery.¹ However,

¹ See *Smith v. Am. Arb. Ass’n, Inc.*, 233 F.3d 502, 509 (7th Cir. 2000) (“[A]lleged ‘promise’ by AAA to ‘monitor ... balance in terms of gender, racial and ethnic diversity’ or maintain ‘a national panel of experts, diverse in gender and ethnicity,’ was not sufficiently definite to be enforceable.”), *Foote v. Mehrota*, No. CV 21-00169, 2023 WL 7214728, at *7 (D. Del. Nov. 2, 2023) (An affirmation of “commitment to diversity” was aspirational and puffery); *Falat v. Sacks*, No. SACV201782JVSKESEX, 2021 WL 1558940, at *6 (C.D. Cal. Apr. 8, 2021) (Statements of seeking diversity in candidates and “does not tolerate” harassment or discrimination are puffery); *Oceguda on behalf of Facebook v. Zuckerberg*, 526 F. Supp. 3d 637, 651 (N.D. Cal. 2021) (statement that Facebook is “committed to diversity and inclusion” is aspirational and nonactionable puffery); *Lopez v. Ctpartners Exec.*

most of these cases are in the context of securities law, and none of them really delve far into puffery, what it means, and *why* the statements at issue are or are not puffery. Unfortunately, there is little or no reasoning for this court to use here. In the securities cases that Defendant cites to, the courts are assessing diversity-related securities filings going to a general audience, rather than contracts per se. Additionally, none of them is a Wisconsin case, so they technically are not binding on this Court. Primarily because of this factual difference, they are not very helpful to this Court in deciding this issue.

The statements in the case here can also be differentiated from the statements made in Defendant's cited cases because USM's statements, which they now claim are puffery, are expressly incorporated into the enrollment contracts it has with USM families. In many of the cases cited by Defendants,

Search Inc., 173 F. Supp. 3d 12, 26, 28 (S.D.N.Y. 2016) (statements regarding commitment to a "diverse workforce" and "an inclusive and positive working environment" were aspirational and nonactionable puffery); *Kiger v Mollenkopf*, No.21-409-RGA, 2021 WL 5299581, at *2 (D. Del. Nov. 15, 2021) (statement that a committee's goal was to "assemble a board of directors that brings to us a diversity of perspectives and skills" is aspirational and puffery); *City of Pontiac Police & Fire Ret. Sys. V. Jamison*, No. 3:20-CV-00874, 2022 WL 884618, at *2-3 (M.D. Tenn. Mar. 24, 2022) (statement affirming "[w]e believe that a diverse and inclusive workplace will enhance our ability to attract and retain the best talent to better serve our customers" was puffery); *Retail Wholesale & Dep't Store Union Loc. 338 Ret. Fund v. Hewlett-Packard Co.*, 845 F.3d 1268, 1276 (9th Cir. 2017) (a statement of "shared values" is not "capable of objective verification").

the statements were determined by the court to be “aspirational.” Here, the statements made by USM are promises incorporated into various documents like the Common Trust, the Parent-School Partnership, and the Guiding Principles, which are all incorporated in to the enrollment contracts. The Robinsons argue that these statements are the type that reasonable families would take seriously when deciding where to enroll their children at school, and are therefore not puffery.

While Defendants cited a number of cases that can be differentiated from the one here, the Plaintiffs have also cited cases that are not necessarily on point.² In addition to these cases being unpublished, non-Wisconsin cases, the cases Plaintiffs cite do not involve diversity, equity, and inclusion

² See *Rawson v. ALDI, Inc.*, No. 21-CV-2811, 2022 WL 1556395, at *1, *3 (N.D. Ill. May 17, 2022) (rejected the argument that a label stating “Simple. Sustainable. Seafood.” on a salmon product was puffery because “a reasonable inference can be made that ALDI’s label suggests, at a minimum, that its product is made in such a way that minimizes negative impact to the environment, which can be actionable as something beyond puffery.”); *Lee v. Canada Goose US, Inc.*, No. 20 CIV. 9809, 2021 WL 2665955, at *7 n.6 (S.D.N.Y. June 29, 2021) (the statement “the ethical, responsible, and sustainable sourcing and use of real fur” is not puffery); *Bush v. Rust-Oleum Corp.*, No. 20-cv-03268-LB, 2024 WL 308263, at *4 (N.D. Cal. Jan 26, 2024) (rejecting the argument that labeling cleaning products as “non-toxic” and “Earth friendly” are so general and nonspecific as to make it “extremely unlikely” that a consumer would rely on it); *Delaware ex rel. Jennings v. BP Am. Inc.*, C.A. No. N20C-09-097 MMJ CCLD, 202 WL 98888, at *25 (Del. Super. Ct. Jan 9, 2024) (“the Court finds that there is a difference between misrepresentation and puffery. The issue of commercial speech, as opposed to misleading statements, involves fact-intensive analysis. It is inappropriate for resolution on this motion to dismiss”).

statements. The Plaintiffs cite to cases which mostly involve statements on sustainability and the environment. They involve “green representations.” It is also difficult to compare the statements in those case to the statements made here by USM.

It is not clear to this Court that USM’s statements are or are not nonactionable puffery. But what is clear from the case law, is that puffery should often be decided by the jury. The most recent Wisconsin case on the issue of puffery is *United Concrete*. In *United Concrete*, the court held that if the court cannot decide an issue on summary judgment³ because there are material facts in dispute, and the record does not clearly favor the movant, the case should go to the jury. *United Concrete*, 2013 WI 72, ¶32. This case raises factual issues that should not be addressed on a motion for judgment on the pleadings.

Further, the parties have presumably not completed discovery and additional fact development could be necessary

³ As noted above, a judgment on the pleadings is essentially a summary judgment decision without affidavits and other supporting documents. *McNally v. Capital Cartage, Inc.*, 2018 WI 46, ¶ 23, 381 Wis. 2d 349, 912 N.W.2d 35. Thus, a court must follow summary judgment analysis when considering a motion for judgment on the pleadings. *Schuster v. Altenberg*, 144 Wis. 2d 223, 228, 424 N.W.2d 159, 161 (1988). Here, there is no showing of entitlement to judgment.

for a jury or the Court to decide the question. “It is better to allow the parties to proceed through discovery, which will demonstrate whether a particular statement is false or even capable of being proven false.” *Weaver v. Champion Petfoods USA Inc.*, No. 18-cv-1996, 2019 WL 2774139, at *4 (E.D. Wis. July 1, 2019).⁴ Because the specific facts are still disputed, this issue requires consideration by a jury.

CONCLUSION

Based on the analysis above this Court must deny USM’s motion for judgment on the pleadings as to count two.

⁴ Wis. Stat. § 809.23(3)(b) allows this court to cite to *Weaver* for persuasive value.

SO ORDERED.

Dated this 23rd day of February, 2024

BY THE COURT:

The Honorable Thomas McAdams
Milwaukee County Circuit Court, Branch 7