**SUPERIOR COURT OF THE DISTRICT OF COLUMBIA**
**CIVIL DIVISION**

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| PASTOR WILLIAM H. LAMAR IV, PASTOR DELMAN L. COATES, *and* THE PRAXIS PROJECT, *on behalf of themselves and the general public*,<br><br>Plaintiffs,<br><br>v.<br><br>THE COCA-COLA COMPANY *and the* AMERICAN BEVERAGE ASSOCIATION,<br><br>Defendants. | Case No. 2017 CA 004801 B<br><br>Honorable Judge Elizabeth C. Wingo<br><br>Next Event: Motion Hearing<br>March 15, 2018, at 11:00 am |

**PLAINTIFFS' MEMORANDUM OF LAW OPPOSING DEFENDANT AMERICAN BEVERAGE ASSOCIATION'S SPECIAL MOTION TO DISMISS PURSUANT TO D.C. CODE §§ 16-5501 *ET SEQ.***

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Plaintiffs respectfully submit this memorandum of law opposing defendant American Beverage Association's ("ABA") special motion to dismiss pursuant to the D.C. Anti-SLAPP Act ("SLAPP Act" or "Act"). D.C. Code §§ 16-5501 *et seq*.

## INTRODUCTION

Notwithstanding ABA's hyperbole about abusive litigation and chilling effects on speech, the main question regarding its motion is simply whether ABA's statements regarding the health effects of sugar-sweetened beverages ("sugar drinks"), including products made by ABA's co-defendant the Coca-Cola Company ("Coke") and other ABA members, are entitled to SLAPP Act protection. The answer is no because ABA's statements, no less than those of its members, were "directed primarily toward protecting the speaker's commercial interests" and are therefore outside the Act's coverage. *Id.* § 16-5501(3).

Because ABA cannot show that its statements are *prima facie* covered under the Act, denial of the motion is appropriate without any consideration of the merits of Plaintiffs' claims. But if this Court were to proceed to the merits after determining that ABA has met its *prima facie* burden, it should determine that Plaintiffs' claims are likely to succeed and deny ABA's motion on that alternative ground.

## ARGUMENT

### I. ABA'S STATEMENTS ARE NOT PROTECTED BY THE ACT

#### A. The Act does not Protect Commercially Motivated Statements

The SLAPP Act's text and structure are straightforward and limited in scope.[1] The Act is triggered *only if* the movant makes a *prima facie* showing that the non-movant's claim arises from

[1] The *purpose* of the SLAPP Act is also limited—*i.e.*, to prevent "Strategic Lawsuits Against Public Participation" that are not intended to succeed on the merits, but rather to "intimidate [the defendant] into silence." *Competitive Enterp. Inst. v. Mann*, 150 A.3d 1213, 1226 (D.C. 2016)

acts by the movant "in furtherance of the right of advocacy on issues of public interest." *Id.* § 16-5502(b). As explained by the D.C. Court of Appeals in *Doe No.1 v. Burke*, 91 A.3d 1031 (D.C. 2014), this *prima facie* requirement has two elements: A movant must show (1) acts in furtherance of the right of advocacy (described by the *Doe* court as the "act element"); *and* (2) that the act relates to "issues of public interest" (the "interest element"). *Id.* at 1040 & n.13. The Act defines the full term, "[a]ct[s] in furtherance of the right of advocacy on issues of public interest." D.C. Code § 16-5501(1). Critically, however, the Act then specifically defines "public interest"—*Doe*'s second element—to expressly exclude "private interests, such as *statements directed primarily toward protecting the speaker's commercial interests* . . . ." *Id.* § 16-5501(3) (emphasis added).[2] These provisions require that a court find that "statements directed primarily toward protecting the speaker's commercial interests" do not satisfy the Act's *prima facie* test, and a SLAPP motion to dismiss claims based on such statements be denied.

### B. ABA's Statements Regarding Sugar Drinks are Commercially Motivated and Outside the Act's Protection

Assuming for purposes of argument that ABA's statements were in furtherance of the right of advocacy, thereby satisfying *Doe*'s "act element," the key question presented by ABA's SLAPP

(citations, internal quotations omitted). Plaintiffs may "intimidate" by, for example, posing the threat of expensive, protracted discovery against those who cannot afford it. *See* D.C. Council, Committee on Public Safety and the Judiciary, Report on Bill 18-983 at 3, 4 (Nov. 18, 2010) (noting that actions "typically drawing [a SLAPP lawsuit] are often . . . the kind of grassroots activism that should be hailed in our democracy" and that the Act is designed to "ensure that a defendant is not subject to the expensive and time consuming discovery that is often used in a [SLAPP lawsuit] as a means to prevent or punish . . . ."), ABA's SLAPP Mem., Ex. A. It is safe to say that ABA's advocacy is not the kind of "grassroots activism" that the Act was principally designed to protect, that ABA can fully afford any discovery that this case might lead to, and that Plaintiffs' action—which they fully believe to have merit—will in no way intimidate ABA or its members into silence on the issue of the health effects of their sugar drinks.

[2] The *Doe* Court itself did not need to address the "act element" but analyzed the "public interest" element with specific reference to the "private interest" exception. 91 A.3d at 1040.

motion remains whether ABA fails to satisfy the second, "public interest" element of the *prima facie* test because its statements fall within the Act's "private interest" exception. The answer is yes.

**i. As a matter of law, trade associations like ABA can and do have commercial interests relating to product categories sold by their members**

ABA argues that the Act's exception for commercially motivated statements does not apply to it because trade associations, unlike companies that market their own particular products, do not and cannot have commercial interests. ABA SLAPP Mem. 10–12.

ABA is wrong. Extensive case law from the U.S. Supreme Court and other federal and state courts unequivocally establishes that trade associations can and do have commercial interests and often engage in commercial speech on behalf of their members' common products (such as sugar drinks). These cases also demonstrate that speech can be commercial even if it does not relate to a specific product, but instead discusses categories of products, rejecting ABA's central thesis to the contrary. *E.g.*, *Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60, 67 & n.13 (1983) ("That a product is referred to generically does not . . . remove it from the realm of commercial speech. . . . *[A] trade association may make statements about a product without specific brand names*." (emphasis added)); *U.S. v. Philip Morris USA, Inc.*, 566 F.3d 1095, 1144 (D.C. Cir. 2009) ("The fact that some of [the tobacco advertisements challenged in that case] involve Defendants as a group joined in advertising their common product, *discussing cigarettes generically without specific brand names*, or link cigarettes to an issue of public debate, does not change the commercial nature of the speech." (emphasis added)); *Nat'l Comm'n on Egg Nutrition v. FTC*, 570 F.2d 157, 163 (7th Cir. 1977) (enforcing Federal Trade Commission order against trade association for egg manufacturers and holding that "[t]he nature of [commercial speech] is not changed when a group of sellers joins in advertising *their common product*" (emphasis added));

*All One God Faith, Inc. v. Organic & Sustainable Industry Standards, Inc.*, 183 Cal. App. 4th 1186, 1210 (Cal. App. 2010) (finding that trade association engaged in commercial speech that was outside the California SLAPP Act and quoting *Nat'l Comm'n on Egg Nutrition*); *Western Sugar Coop. v. Archer Daniels Midland*, Case No. 11 Civ. 3473 (CBM) (AJWx), 2015 WL 12683192, *7 (C.D. Cal. Sept. 21, 2015) (defendant sugar trade association engaged in commercial speech when it acted with "a clear economic motive" in posting information on its website and distributing to consumers and the media information advancing its "mission to educate consumers and promote the consumption of sugar through sound scientific principles." (emphasis removed)).

ABA's motion states that "D.C. Courts—*like courts in other jurisdictions interpreting similar anti-SLAPP statutes*—have *consistently* recognized that speech by a nonprofit trade association . . . addressing a category of products made by its members is not excluded from anti-SLAPP protection simply because its member entities have for-profit, commercial interests in those products." ABA SLAPP Mem. at 10 (emphasis added). But in fact, ABA's entire argument that the Act's "private interest" exception does not apply as a matter of law to trade associations rests solely on Judge Demeo's decision in *Simpson v. Johnson & Johnson*, Case No. 2016 CA 1931 B (D.C. Super.). That decision[3] held that a trade association's statements are not commercially motivated if they refer to a product category in general (*e.g.*, sugar drinks) instead of to specific products (*e.g.*, Coke products). *Simpson* Tr. 39:1–13. With all due respect, that decision was incorrect for several reasons.

*First*, the court ignored the extensive case law cited above holding that trade associations can and do engage in commercial speech even when they are speaking about product categories

[3] Judge Demeo's decision was announced in open court. The transcript of her ruling ("*Simpson* Tr.") is Exhibit B to ABA's SLAPP motion.

and not just specific products within those categories. *See supra* pp. 3–4 (citing, *e.g.*, *Bolger*, *Philip Morris*, *National Comm'n on Egg Nutrition*).

*Second*, the court's reliance on case law interpreting California's anti-SLAPP law on the grounds that California's law was "similar" to the D.C. SLAPP Act, *see Simpson* Tr. 36:16, was wholly misplaced because the two laws differ materially on the relevant issue. The question in *Simpson* was—and in this case is—how to apply the D.C. Act's express exclusion for "statements directed primarily toward protecting the speaker's commercial interests." *The California SLAPP law contains no similar express exemption for commercially motivated statements.* That exclusion and the *prima facie* "public interest" requirement that the "private interest" exception constrains were added during the legislative process to the D.C. SLAPP Act as originally introduced, which initially broadly covered "[a]ct[s] in furtherance of the right of free speech."[4] The California SLAPP law contains broad language similar to the D.C. bill as introduced. Cal. Code Civ. P. § 425.16 (protecting acts "in furtherance of the [defendant's] right of petition or free speech *under the United States Constitution or the California Constitution* . . . ." (emphasis added)). Thus, the D.C. Council's ultimate treatment of commercial speech—both by replacing references to "in furtherance of . . . free speech" with the more narrow "in furtherance of the right of advocacy on issues of public interest" *and* by adding the "private interest" exception—significantly narrows the protection afforded such speech from what was in the original D.C. law *and* is in the existing California SLAPP law.[5] *Simpson* completely failed to account for this important difference in basing its decision on cases interpreting California law.

[4] Original D.C. SLAPP Act, introduced June 29, 2010, Section 2(1), ABA SLAPP Mem., Ex. A at 4, 10.

[5] *See* Testimony of the American Civil Liberties Union before the Committee of Public Safety and the Judiciary of the D.C. Council on the Anti-SLAPP Act of 2010 (noting that the scope of the Act requires "narrower" language than "the 'right of free speech'"), ABA SLAPP Mem., Ex. A at 17.

*Third*, even if the California case law interpreting that states' SLAPP Act provided useful authority for interpreting the D.C. Act, the *Simpson* court misinterpreted that case law to hold that statements by trade associations concerning product categories are not commercial. In one case cited in *Simpson*, *see Simpson* Tr. 38:4–12, *Choose Energy v. American Petroleum Inst.*, 87 F. Supp. 3d 1218 (N.D. Cal. 2015), the statements at issue were general calls to "choose energy" and "choose energy security" that the district court found to "address energy policy." 87 F. Supp. 3d at 1223–1224. These statements have nothing to do with, and are clearly distinguishable from, statements that promote products *or* product categories. *Id.* at 1222. *See also Choose Energy*, Case No. 14 Civ. 04557 (PSG), 2015 WL 5264193, at *3 (N.D. Cal. Sept. 9, 2015), *vacated on other grounds*, 2016 WL 1056140 (N.D. Cal. Mar. 17, 2016) (noting plaintiff's continued failure to allege "any promotional information that encourages consumers to buy petroleum or petroleum-based products" despite court's suggestion that it do so). The other California case relied on in *Simpson*, *L.A. Taxi Cooperative, Inc. v. Independent Taxi Owners Ass'n of Los Angeles*, 239 Cal. App. 4th 918 (Cal. App. 2015), held only that (1) the speech at issue was commercial speech about specific products and not covered by the California SLAPP law and (2) the movant was not a trade association, but a seller of those specific products. Thus, that decision does not address the question of whether *trade associations* discussing *product categories* are engaging in commercial or commercially motivated speech, the proposition for which it is cited by ABA.

*Simpson* did not address the one California case bearing directly on this situation. In *All One God Faith, Inc. v. Organic & Sustainable Industry Standards, Inc.*, 183 Cal. App. 4th 1186 (Cal. App. 2010), the court held that a trade association's formal certification of the products of its dues-paying members was not speech on a public issue and therefore not entitled to protection under the California SLAPP law, notwithstanding that the association itself did not have any of its

own products. 183 Cal. App. 4th at 1210. The court quoted the Seventh Circuit's *Nat'l Comm'n on Egg Nutrition* holding that "[t]he nature of [commercial] communication is not changed when a group of sellers joins in advertising their common product," *id.* (quoting *Nat'l Comm'n on Egg Nutrition*, 570 F.2d at 163) (internal quotations omitted), and concluded that "the certification activities of [the movant trade association] are clearly designed to facilitate commerce in the products bearing its seal" and were therefore not covered under the California SLAPP law, *id.*

Thus, if California caselaw *were* instructive on the D.C. Act's "private interest" exception, the *All One God* decision is compelling precedent for the proposition that a trade association's statements are commercially motivated (and therefore fall outside the D.C. law's coverage) when they are designed to facilitate commerce in the products of their members. As discussed below, that is clearly the case here.

*Finally*, the *Simpson* decision does not apply to this case on its own terms with respect to at least those statements by ABA that do refer to specific products. For example, Plaintiffs' complaint highlights the "Mixify" campaign jointly sponsored by Coke and ABA. *See* Compl. ¶ 115; Coca Cola, *mixify-balance-well-being* (May 13, 2016), https://goo.gl/RWdjV6 (last visited Jan. 11, 2018), Kats Decl.,[6] Ex. A. The Mixify website prominently bears Coke's logo.[7] *Simpson*, even if correct on the facts of that case (in which the moving trade association made no statements about its members' specific products, *Simpson* Tr. 39:18–21), cannot support the conclusion that ABA's statements referencing specific sugar drinks are outside the "private interest" exception.

[6] Declaration of Maia Kats, dated January 30, 2018, Ex. 2.
[7] *Balance Inspiration for a Busy Life*, MIXIFY, http://deliveringchoices.org/mixify/ (last visited Sept. 16, 2016) (website discontinued, now available only on website archives: https://goo.gl/3mY57q), Kats Decl., Ex. B.

### ii. ABA's statements regarding the health effects of sugar drinks were and are commercially motivated

ABA's statements and its own characterization of the interests that motivate its involvement in the sugar drinks discussion make clear that its endorsements and defenses of sugar drinks generally, and sugar drinks made by its members specifically, were and are commercially motivated.

The U.S. Supreme Court has deemed speech to be "commercial" *not only when it proposes a commercial transaction*, but also based on such factors as the speech's audience, its references to specific products or product types, and the speaker's commercial motivation, *even if* the discussion of the product is "linked to a public debate." *Bolger*, 463 U.S. at 66–68. *See also Philip Morris*, 566 F.3d at 1143, 1144 (commercial speech encompasses "material representations about the efficacy, safety, and quality of the advertiser's product, and other information asserted for the purpose of persuading the public to purchase the product," regardless of whether the speech is "link[ed] . . . to an issue of public debate"); *Nat'l Comm'n on Egg Nutrition*, 570 F.2d at 159, 163 (cited in *Bolger* and holding that trade association's campaign to discount the relationship between eggs and heart disease was commercial speech); *CrossFit, Inc. v. Nat'l Strength & Conditioning Ass'n*, Case No. 14 Civ. 1191 (JLS) (KSC), 2016 WL 5118530, *5–8 (S.D. Cal. Sept. 21, 2016) (deeming as commercial speech data published by defendant "with the intention of protecting its market share in the fitness industry . . . .").

ABA's statements clearly fall within the courts' definition of commercial speech. For example, ABA's statements in connection with its "Mixify" joint campaign with Coke display a clear commercial motivation—*e.g.*, its statement offering consumers assistance in "balancing your mix of food, drinks and physical activities" and noting how "*our products* can play a part in that equation." Coca Cola, *mixify-balance-well-being* (May 13, 2016), Kats Decl., Ex. A. This

message, like those at issue in *Philip Morris*, *Nat'l Comm'n on Egg Nutrition*, and *All One God*, is "clearly designed to facilitate commerce in [the trade association's members'] products," *All One God*, 183 Cal. App. 4th at 1210—in this case, by seeking to convince consumers that they can find a healthy balance of diet and exercise using (and therefore buying) "our products." The consumer focus is evident from reports by a "Mixify" consultant that the campaign "reach[ed] more than 25 million teens and 22 million moms" and generated wide interest on social media. *See* GMMB, *Corporate Social Impact: Inspiring Balance with the American Beverage Association*, https://goo.gl/WEa9HH (last visited Jan. 11, 2018), Kats Decl., Ex. C. The role of ABA member companies in this marketing effort is also apparent, reflecting its overall commercial orientation. *Id*. (noting that the campaign was designed to mobilize "the marketing strength of the leading beverage companies—Coca-Cola, Dr. Pepper, and Pepsi").

Other ABA statements likewise aim at associating sugar drinks with good health and a healthy lifestyle, with the obvious objective of getting fitness conscious people to buy these products. *E.g.*, Coke Mem. Supp. Mot. to Dism., Ex. 15–16 ("Just finished an afternoon of Frisbee? Maybe you've earned a little more [soda]."). Still others serve the converse role of disassociating sugar drinks from negative health effects, again with the goal of encouraging consumers to buy (or keep buying) those products. *E.g.*, Kats Decl., Ex. D ("Recently we've seen some food activists allege that sugar-sweetened beverages 'cause' obesity, diabetes and a host of other adverse health conditions. Obviously they are hoping you never look at the science behind their claims. Because it doesn't exist."). It is not hard to recognize that the "you" in this statement is the consumer, who ABA hopes will not be swayed by the "food activists" and will continue to buy—or start buying—products made by ABA's members. *See also* Compl. ¶¶ 105–107, 135.

The fact that these statements were not formal product advertisements does not render them any less commercial or commercially motivated. *Bolger*, 463 U.S. at 66–68; *Philip Morris*, 566 F.3d at 1143; *CrossFit*, 2016 WL 5118530, at *5–8. ABA's statements specifically endorsed/defended sugar drinks to current/potential consumers in an effort to promote those products as supporting good health (and therefore, of course, to promote sales of those products). They therefore constitute commercial speech *and* fit squarely within the Act's exception for "statements directed primarily toward protecting the speaker's commercial interests." [8]

ABA's stance in litigation challenging government efforts to educate the public about sugar drinks further betrays the commercial motivation animating its involvement in this area. In 2015, ABA along with two other trade associations sued the City and County of San Francisco challenging, *inter alia*, an ordinance requiring advertising of sugar drinks to be accompanied by certain statements regarding those products' health effects. ABA and its co-plaintiffs sought a preliminary injunction suspending implementation of this ordinance and alleged that their irreparable harm included "unquantifiable economic and competitive losses"—*i.e.*, "damage [to] the reputation and goodwill associated with their [members'] companies and products." Motion for Preliminary Injunction, *American Beverage Ass'n v. City of San Francisco*, Case No. 15 Civ. 03415 (EMC) (N.D. Cal.), ECF No. 50 at 23, Kats Decl., Ex. E. ABA's identification of the "*economic and competitive*" harm caused by the challenged ordinance leaves no doubt that its engagement on the sugar drinks issue—both in litigation challenging government regulation of

[8] This case differs from *Doe*, in which the D.C. Court of Appeals held that the SLAPP Act does not presumptively treat statements as commercially motivated. Plaintiffs here are not arguing that the burden of disproving commercial motivation falls on ABA, but rather that in this case, unlike in *Doe*, "[commercial] motivation is . . . . apparent from the content of the speech," *Doe*, 91 A.3d at 1043, and other evidence, such as ABA's litigation statements.

those products and in its affirmative outreach to current and potential consumers of ABA members' products—is specifically intended to advance and protect ABA's and its members' commercial interests.[9]

## II. PLAINTIFFS ARE LIKELY TO SUCCEED ON THE MERITS

If ABA is found to have established a *prima facie* case for coverage under the Act (which it has not), Plaintiffs must "demonstrate[] that [their claims] are likely to succeed on the merits." D.C. Code § 16-5502(b). The D.C. Court of Appeals has held that dismissal is appropriate only if a plaintiff fails to put forth specific evidence from which a reasonably instructed jury could find for the plaintiff on the merits. *Mann*, 150 A.3d at 1233–37 (holding that SLAPP Act "likely to succeed on the merits" standard cannot supplant the fact-finding role of the jury). Plaintiffs' claims survive this test.

*First*, contrary to ABA's contentions, ABA SLAPP Mem. at 12, ABA is a proper defendant in a case brought under the D.C. Consumer Protection Procedures Act ("CPPA"). *See* Pls.' Opp. Mem. ABA Mot. to Dism. ("Opp. Mem. ABA MTD.") at Part III.

*Second*, ABA is incorrect when it claims, ABA SLAPP Mem. at 13–14, that ABA statements Plaintiffs claim violate the CPPA are not actionable under that statute as a matter of law. ABA's first argument, that the CPPA does not cover noncommercial speech, is meritless because as discussed above, *supra* Part I.B, and in Plaintiffs' Opposition to ABA's Motion to Dismiss, *see* Opp. Mem. ABA MTD at Part II, ABA statements at issue here *are* commercial

[9] Plaintiffs have sought discovery from ABA relating to the commercial nature of its activities in support of sugar drinks, and their motion to compel such discovery is pending in this Court. To the extent that the existing evidence is insufficient to demonstrate ABA's commercial motivation, due process requires this Court to grant Plaintiffs' motion and consider ABA's SLAPP motion on the basis of a fully developed factual record. *Cf. Mann*, 150 A.3d at 1236 (expressing concern about granting SLAPP motion to dismiss in light of limited opportunities for discovery).

speech. As such, these statements are entitled to no First Amendment protection if they are false or misleading. *E.g.*, *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748, 772 (1976) (noting that the First Amendment does "not prohibit the State from insuring that the stream of commercial information flow cleanly as well as freely"); *Cent. Hudson Gas & Elec. Corp. v. Public Service Comm'n*, 447 U.S. 557, 566 (1980) (holding that in order to receive First Amendment protection, commercial speech "at least must . . . not be misleading"); *Philip Morris*, 566 F.3d at 1143.

ABA's second argument—that Plaintiffs cannot as a matter of law establish that the challenged ABA statements are false and misleading, ABA SLAPP Mem. at 14—misconceives the CPPA's scope. The CPPA is a "comprehensive statute designed to provide procedures and remedies for a broad range of practices which injure consumers," *Atwater v. District of Columbia Dep't of Consumer & Regulatory Affairs*, 566 A.2d 462, 465 (D.C. 1989), and is to be "construed and applied liberally to promote its purpose," D.C. Code § 28-3901(c). *See also Nat'l Consumer's League v. Doctor's Assocs.*, Case No. 2013 CA 006549 B, 2014 WL 4589989, at *5 (D.C. Super. Sept. 12, 2014) (noting liberal construction and application to be afforded the statute). This broad purpose includes "provid[ing] a cause of action when merchants bury the truth and leave false impressions without outright stating falsehoods." D.C. Council, Committee on Public Services and Consumer Affairs, Report on Bill 19-0581 (Nov. 28, 2012) ("2012 CPPA Committee Report"), at 7, Kats Decl., Ex. F.

The D.C. Council expanded the already broad scope of the CPPA when it amended that law in 2012 to add to its list of prohibited acts the "[u]se [of] innuendo or ambiguity as to a material fact, which has a tendency to mislead." D.C. Code § 28-3904(f-1). The Council noted that "in many instances, while facts may exist in the public domain as to veracity of claims made,

merchants nonetheless flood the market with countervailing representations to hide the truth." 2012 CPPA Committee Report at 7 (citing as an example of such behavior cigarette companies' efforts to "confus[e] the public about the link between cigarettes and cancer." (quoting *U.S. v. Philip Morris USA, Inc.*, 449 F. Supp. 2d. 1, 208 (D.D.C. 2006), *aff'd in part and vacated in part on other grounds*, 566 F.3d 109 (D.C. Cir. 2009))). Other CPPA sections that Defendants in this case are alleged to have violated similarly employ the broad "tend to mislead" formulation. *E.g.*, D.C. Code §§ 28-3904(e), (f).

In other words, the CPPA is designed to specifically address the kinds of misleading statements that were found to be illegal in the *Philip Morris* case—*i.e.*, not only statements that were outright false, but also statements designed to obscure and "confuse the public about the link" between a product (or product category) and certain negative health effects. *See also Nat'l Comm'n on Egg Nutrition,* 570 F.2d at 160 (noting that FTC enforcement jurisdiction extends to claims "as to the harmlessness of the advertiser's product asserted for the purpose of persuading members of the reading public to buy the product").

This is precisely the claim in this case, and Plaintiffs have identified numerous specific statements by ABA that a jury could reasonably conclude are false and misleading because, *inter alia*, they use "innuendo or ambiguity as to . . . material facts" and therefore "tend to mislead" through the "flood[ing of] the market with countervailing representations to hide the truth" about the health effects of sugary drinks. *See* 2012 CPPA Committee Report at 7; Opp. Mem. ABA MTD at Part I. The sworn declaration of Dr. Walter Willett strongly supports Plaintiffs' claims that ABA's (and Coke's) statements disassociating sugar drinks from particular adverse health conditions (*e.g.*, the statement that the science linking sugar-sweetened beverages to obesity, diabetes, and other adverse health conditions "doesn't exist") and associating these drinks with

good health and a healthy lifestyle are misleading. *See* Preliminary Report of Dr. Walter Willett, dated January 25, 2018, ¶¶ 28–36, Ex. 1. The fact that some of these statements might contain some truth or have some support in the public domain does not shield them from scrutiny under the CPPA. *See Philip Morris*, 566 F.3d at 1128 ("[E]ven partially true statements can be actionable . . . if . . . misleading."); *Borzillo v. Thompson*, 57 A.2d 195, 197–98 (D.C. 1948) ("It is settled law . . . that . . . a statement . . . which contains only those matters which are favorable and omits all reference to those which are unfavorable is as much a false representation as if all the facts stated were untrue."); *Nat'l Consumer's League*, 2014 WL 4589989, at *6 (holding that "the question in every CPPA case is not whether a particular practice is accurate, but whether it would cause a reasonable consumer to be misled" and that "there can be no argument that literal truth bars suit for the simple reason that innuendo and ambiguity are not capable of being proven true or false").

Whether a finder of fact would determine that Coke's statements have in fact violated the CPPA is not a question that this Court need answer now. Rather, the question of any stage two analysis is whether Plaintiff has put forth specific evidence (as opposed to mere allegations) on the basis of which a jury could reasonably find CPPA violations. *See Mann*, 150 A.3d at 1233–37. Given the statements Plaintiffs have identified, Dr. Willett's sworn declaration, the established science on the link between sugar drinks and adverse health conditions, and the broad purpose and language of the CPPA, the answer is clearly yes.

*Third* and finally, ABA also claims Plaintiffs lack standing. ABA SLAPP Mem. at 15. This is not a "merits" issue under the Act as that term was interpreted in *Mann*, 150 A.3d at 1233 & n.23. *See also Grayson v. AT & T Corp.*, 15 A.3d 219, 229 (D.C. 2011) (noting that standing issue is "independent of the merits of a party's claims"). ABA can and did raise this threshold legal issue

in its 12(b) motion. In any event, Plaintiffs have standing in this case. Opp. Mem. ABA MTD at Part IV.

## CONCLUSION

For the foregoing reasons, and those in Plaintiffs' Opposition to ABA's Motion to Dismiss, this Court should deny ABA's SLAPP Motion. Plaintiffs reserve the right to seek reasonable attorneys' fees should this Court so rule.

Date: January 30, 2018

Respectfully submitted,

By: */s/ Maia Kats*

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**(PROPOSED) ORDER DENYING DEFENDANT AMERICAN BEVERAGE ASSOCIATION'S SPECIAL MOTION TO DISMISS PURSUANT TO D.C. CODE §§ 16-5501 *ET SEQ.***

Before the Court is defendant American Beverage Association's Special Motion to Dismiss Pursuant to D.C. Code §§ 16-5501 *et seq.* Upon consideration of the parties' filings, it is hereby ORDERED that Defendant's Special Motion to Dismiss is denied.

By the Court,

Date: _____

_____
Honorable Elizabeth Wingo
District of Columbia Superior Court

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**SUPERIOR COURT OF THE DISTRICT OF COLUMBIA**
**CIVIL DIVISION**

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| PASTOR WILLIAM H. LAMAR IV, PASTOR DELMAN L. COATES, *and* THE PRAXIS PROJECT, *on behalf of themselves and the general public*,<br><br>Plaintiffs,<br><br>v.<br><br>THE COCA-COLA COMPANY *and the* AMERICAN BEVERAGE ASSOCIATION,<br><br>Defendants. | Case No. 2017 CA 004801 B<br><br>Honorable Judge Elizabeth C. Wingo<br><br>Next Event: Motion Hearing<br>March 15, 2018, at 11:00 a.m. |

## CERTIFICATE OF SERVICE

I hereby certify that on January 30, 2018, I caused a copy of the foregoing memorandum to be electronically served via the CaseFileXpress system on the following:

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Respectfully submitted,

By: */s/ Maia Kats*