SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
CIVIL DIVISION

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

PLAINTIFFS' MEMORANDUM OF LAW OPPOSING DEFENDANT COCA-COLA COMPANY'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 The Coca-Cola Company's ("Coke") special motion to dismiss pursuant to the D.C. Anti-SLAPP Act ("SLAPP Act" or "Act"). D.C. Code §§ 16-5501 *et seq*.

INTRODUCTION

Coke's SLAPP motion does not seek to dismiss any of Plaintiffs' consumer protection claims against Coke that are based on the company's core commercial advertising. Rather, the question Coke's motion presents is whether certain statements it characterizes as something other than core commercial advertising—*e.g.*, statements "to the media and at scientific conferences" regarding the health effects of Coke products specifically and sugar-sweetened beverages ("sugar drinks") generally—are entitled to the Act's protections. Coke SLAPP Mem. at 2. The answer is no because those statements, no less than Coke's core commercial advertising, were "directed primarily toward protecting [Coke's] commercial interests" and are therefore outside the Act's coverage. D.C. Code § 16-5501(3). Thus, Coke fails to make a *prima facie* case under the Act, and its motion must be denied. *Id.* § 16-5502(b). Coke's statements, whether in core or less traditional commercial format, also fall outside the Act's scope under D.C. Code § 16-5505.

Because Coke cannot show that its statements are *prima facie* covered under the Act, denial of the motion is appropriate before any consideration of the merits of Plaintiffs' claims. But if this Court were to proceed to the merits after determining that Coke has met its *prima facie* burden, it should determine that Plaintiffs' claims are likely to succeed and deny Coke's motion on that alternative ground.

ARGUMENT

I. COKE FAILS TO ESTABLISH A *PRIMA FACIE* CASE OF COVERAGE UNDER THE ACT

A. Coke's Statements Fall Within the "Private Interest" Exception to SLAPP Coverage Under D.C. Code § 16-5501(3)

i. The SLAPP Act does not protect "statements directed toward protecting the speaker's commercial interests"

Notwithstanding Coke's rhetoric about abusive litigation and chilling effect on speech, whether its SLAPP motion should be granted depends on the language and structure of the Act itself, which is straightforward and limited in scope and which Coke's motion largely ignores.[1]

The Act is triggered *only if* the movant makes a *prima facie* showing that the non-movant's claims arise from acts by the movant "in furtherance of the right of advocacy on issues of public interest." D.C. Code § 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 requirement has two separate elements: A movant must show (1) acts in furtherance of the right of advocacy (the "act element"); *and* (2) that the act relates to "issues of public interest." *Id.* at 1040 & n.13. The Act defines the full phrase "[a]ct[s] in furtherance of the right of advocacy on issues of public interest." D.C. Code § 16-5501(1).

[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) (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 Coke's advocacy is not the kind of "grassroots activism" that the Act was principally designed to protect, that Coke 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 Coke into silence on the issue of the health effects of its sugar drinks.

Critically, however, the Act then expressly defines "public interest"—*Doe*'s second element—to exclude "private interests, such as *statements directed primarily toward protecting the speaker's commercial interests* . . . ." *Id.* § 16-5501(3) (emphasis added).[2] These provisions make clear that "statements directed primarily toward protecting the speaker's commercial interests" do not meet the Act's *prima facie* test, and a SLAPP motion to dismiss claims based on such statements must be denied.

ii. Coke's statements are directed toward protecting Coke's commercial interests and are outside the Act's protection

Coke concedes that statements "in [its core] advertising" are not the subject of its SLAPP motion, *see* Coke SLAPP Mem. at 2, 6 n.6, presumably because even it must admit those statements are commercially motivated. But the statements that *are* identified as the subject of Coke's motion and characterized as "statements to the media and at scientific conferences," *id.* at 2, are *also* "directed toward protecting [Coke's] commercial interests." Coke so acknowledged in a recent SEC filing, in which it explained that public concerns regarding consumption of sugar drinks, increased taxes on and regulation of those drinks, and negative publicity from legal actions relating to the marketing and sale of those drinks "*may reduce demand for . . . our [products], which could adversely affect our profitability*." Coca-Cola Company, SEC Form 10-K Report, Fiscal Year Ending December 31, 2016 at 10, https://goo.gl/h6TddJ (emphasis added), Kats Decl.,[3] Ex. A. Coke's SEC filing explained further that:

> [p]ublic debate and concern about perceived negative health consequences of certain ingredients in our beverage products . . . *may affect consumers' preferences and cause them to shift away from some of our beverage products*. In addition, increasing public concern about actual or perceived health consequences of the

[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.
[3] Declaration of Maia Kats, dated January 30, 2018, Ex. 2.

> presence of such ingredients or substances . . . could result in additional government regulations concerning the marketing, labeling or sale of our beverages; possible new or increased taxes on our beverages by government entities; and negative publicity, or actual or threatened legal actions against us or other companies in our industry, *all of which could damage the reputation of, and may reduce demand for, our beverage products*.

Id. at 11 (emphasis added).

This self-analysis leaves no doubt: *all* of Coke's public statements responding to concerns about the health effects of its products and sugar drinks generally are inextricably intertwined with, and primarily (if not exclusively) motivated by, its interest in protecting its commercial brand and preserving/increasing consumer demand for, and therefore profits from, its products. It also shows how absurd it is for Coke, one of the largest and most successful companies in the world, to suggest that this lawsuit would somehow stifle its voice on a matter of such fundamental importance to its business.

The statements that are the focus of Coke's SLAPP motion transparently reflect the company's commercial motivation. For example, the comments made in a 2012 *USA Today* interview by Coke executive Katie Bayne touted the healthiness of Coke products ("What our drinks offer is hydration . . . . We offer great taste and benefits whether it's an uplift or carbohydrates or energy"); dismissed the evidence linking sugar drinks to obesity ("There is no scientific evidence that connects sugary beverages to obesity."); and talked enthusiastically about her and her family's consumption of Coke as part of their daily routine (*e.g.*, "[i]f my son has lacrosse practice for three hours, we go straight to McDonald's and buy a 32-ounce Powerade [which is a Coke product with 76 grams, or approximately 19 teaspoons, of added sugar] . . . . In the middle of the afternoon, I may have an 8-ounce Coke. I'd rather have that than a candy bar or cookie for a pick-me-up."). Coke SLAPP Mem. at 5–6 & Ex. 15. These endorsements of Coke products, circulated to millions of *USA Today* readers (and current/potential Coke customers)

across the country, are no less commercial than core, traditional paid advertising. And Coke's suggestion that these nationally-circulated statements were really directed at New York City Mayor Bloomberg, *see id*. at 6, is laughable.

Other statements Coke highlights in its motion betray the same motivation. *E.g.*, *id.*, Ex. 17 at 4:19–20 (statement of its then-Chief Science and Health Officer that Coke "[is] safe. It hydrates. It's enjoyable"); *id.*, Ex. 22 at 5 (statement of Coke's then-CEO that Coke "is an excellent complement to the habits of a healthy life"). These are not "contributions to a scientific and public policy debate." *Id.* at 10. They are soundbites promoting Coke's commercial brand. And even if such statements were aimed in part at policymakers and scientific thought leaders as well as at consumers, Coke's outreach to these audiences too, as its SEC filings make clear, was designed to fend off action threatening *its commercial interests*.

Given Coke's status as one of the largest and most successful companies in the world, it would be fair to presume that *all* of its statements are commercially motivated. But even if that blanket rule did not apply, Coke's SEC filings make clear that its statement *about sugar drinks* are so motivated.

The fact that such speech was not part of Coke's traditional, core commercial advertising does not matter. 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 format, its references to specific products, and the speaker's commercial motivation, *even if* the discussion of the product is "linked to a public debate." *Bolger v. Youngs Drug Products Corp*., 463 U.S. 60, 66–68 (1983). *See also U.S. v. Philip Morris, USA, Inc.*, 566 F.3d 1095, 1143, 1144 (D.C. Cir. 2009) (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 v. FTC*, 570 F.2d 157, 159, 163 (7th Cir. 1976) (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 to be commercial speech data published by defendant "with the intention of protecting its market share in the fitness industry . . . ."). Coke's statements specifically endorsed/defended its products in the media in a self-admitted effort to protect its brand and bottom line. They are commercial speech *and* fit squarely within the Act's exception for "statements directed primarily toward protecting the speaker's commercial interests."[4]

iii. Coke's efforts to evade the "private interest" exception fail

1. Coverage under the SLAPP Act must be measured by the statute's express language, not the First Amendment

Notwithstanding the "private interest" exception, Coke claims its statements are protected by the Act because they are "absolutely privileged under the First Amendment," specifically the *Noerr-Pennington* doctrine. Coke SLAPP Mem. at 9–11. The Act, however, does not mention the First Amendment or *Noerr-Pennington*, and its scope is defined by its express coverage of "[a]cts in furtherance of the right of advocacy on issues of public interest" *and* its equally express limitation of "public interest" to exclude, *inter alia*, "statements directed primarily toward protecting the speaker's commercial interests." *Doe*, 91 A.3d at 1036 (noting that a SLAPP Act

[4] 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 Coke, but rather that in this case, unlike in *Doe*, "[commercial] motivation is . . . . apparent from the content of the speech," 91 A.3d at 1043, and the rest of the evidence, such as Coke's SEC filings.

movant "must show that his speech is of the sort that *the statute* is designed to protect" (emphasis added)).

The Act's legislative history is telling. The law's original version covered "[a]ct[s] in furtherance of the right of free speech," a scope that aligns closely with the First Amendment.[5] However, the D.C. Council replaced this broad language with "act[s] in furtherance of the right to advocacy on issues of public interest," which it then *further* limited to exclude "private interests."[6] *Compare*, *e.g.*, 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)). The D.C. Council could have referred to the First Amendment or *Noerr-Pennington* in the Act, but it did not, and both its conscious choice of "narrower" language and its addition of the "private interest" exception reflect a clear intent to limit the scope of the act to something less than full First Amendment protection.

Coke has made the argument that its statements are protected under the First Amendment in its 12(b) motion to dismiss. That is where this argument, even if meritless, belongs. But Coke cannot use the First Amendment as a stand-in for the Act to avoid the latter's *prima facie* "public interest" requirement or its express "private interest" exemption.

2. There is no "independent" SLAPP Act coverage for commercially motivated statements to legislative bodies

Coke next tries to avoid the Act's "private interest" exception by arguing that even if its statements were commercially motivated, the exception does not apply to statements on issues

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

[6] *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.

under consideration by legislative bodies because the Act's "under consideration" provision, unlike the provisions identifying other protected conduct, does not use the term "issue of public interest" and is therefore not limited by the statute's "private interest" exception. Coke SLAPP Mem. at 11 (citing D.C. Code § 16-5501(A)(1)(i) and comparing it to D.C. Code §§ 16-5501(A)(1)(ii), (B)). This argument, however, ignores the fundamental structure of the Act. And indeed, most of Coke's SLAPP motion is devoted to showing that sugar drinks are the subject of legislative consideration across the country, without regard for how *Coke's statements are treated under the Act's text and structure*.

The statute is clear. *All* conduct protected by the Act *must* relate to an "issue of public interest" as only such conduct can support a *prima facie* case under the Act. And the Act in turn expressly and without qualification defines "public interest" to exclude statements that are commercially motivated, *regardless of the forum in which the issue is being discussed*. D.C. Code § 16-5501(3). Coke's insistence that the overarching "public interest" requirement and the "private interest" exception can simply be ignored in certain instances would improperly read both of these two key interlocking provisions out of the statute. *See In re McGough*, 737 F.3d 1268, 1275 (10th Cir. 2013) (rejecting interpretation of Religious Liberty and Charitable Donation Protection Act that "improperly reads key language out of the statute").

Moreover, Coke's suggestion that language establishing the basic criteria for coverage under the Act should negate an express exemption from coverage reverses traditional rules of statutory construction, which treat statutory exceptions as "exempting something which would otherwise be covered by an act." Sutherland Statutory Construction § 47.11 (7th ed. 2014). In other words, the Act sets forth what constitutes "act[s] in furtherance of the right of advocacy of issues

of public interest" and then qualifies the term "public interest" to exclude conduct that the Act would otherwise cover. Coke cannot turn this basic principle on its head.

Coke's interpretation would also be inconsistent with the D.C. Court of Appeals' two-prong formulation of the *prima facie* requirement in *Doe*, under which a movant must show both (1) an act in furtherance of the right of advocacy (what *Doe* called the "act element"); and (2) that the act relates to "issues of public interest." 91 A.3d at 1040 & n.13. In the *Doe* formulation, statements to legislative bodies satisfy the "act element" because they constitute acts of advocacy, but only satisfy the second, "interest" element if they are not commercially motivated. Coke's statements are commercially motivated, as discussed above, but its reading of the statute would simply dispense with the second of the *Doe* requirements.[7]

Finally and importantly, the D.C. Act is alone among SLAPP laws in distinguishing between protected "public" interests and unprotected "private" interests through an express statutory exemption. And indeed, the overarching "public interest/private interest" dichotomy was a late change to the Act, which as noted above did not originally include the "public/private interest" language and instead broadly protected "[a]ct[s] in furtherance of the right of free speech." Coke cannot simply ignore key operational and definitional amendments to the statute that reflect the intended limited scope of the Act.

3. Coke's self-created "product-specific" exception to the private interest exclusion gets it nowhere

Finally, Coke claims that even if the "private interest" exception applied generally to all conduct covered under the Act, Coke's specific statements do not fall within the exception because

[7] In any event, *none* of the statements Coke cites in its SLAPP motion was made in governmental proceedings or even directed specifically at governmental bodies. *See* Coke SLAPP Mem. at 5–6. Thus, Coke also fails the first prong of the *Doe prima facie* test.

they concerned representations regarding "the safety of a product category in general" and not "representations regarding a particular product." Coke SLAPP Mem. at 12 (citations, internal quotations omitted).

This argument fails first on its own terms because most, if not all, of the allegedly protected statements Coke identifies in its SLAPP Motion do in fact specifically refer to Coke products. *See, e.g.*, Coke SLAPP Mem. at 5–6 & Ex. 15 (comments of Coke executive Katie Bayne that, *inter alia*, "*our drinks* offer . . . hydration . . . . *We* offer great taste and benefits whether it's an uplift or carbohydrates or energy" (emphasis added)); *id.* at 6 & Ex. 17 (statement of Coke's then-Chief Science Officer that *Coke* "[is] safe. It hydrates. It's enjoyable"); *id.* & Ex. 22 at 5 (statement of then-Coke CEO that "*Coca-Cola* is an excellent complement to the habits of a healthy life" (emphasis added)).

In any event, there is no authority for the proposition that statements about a category of products *made by a company selling some of those products* are not commercially motivated. The two cases Coke cites, *id.* at 12–13, do not support its point. The first case, the unreported decision of Judge Demeo in *Simpson v. Johnson & Johnson*, Case No. 2016 CA 1931 B (D.C. Super.),[8] was wrongly decided, for the reasons set forth in Plaintiffs' Memorandum in Opposition to ABA's Special Motion to Dismiss at Part I.B.i. Moreover, *Simpson* held that a trade association's allegedly false statements are not commercially motivated under the D.C. SLAPP Act if they refer to a product category in general (*e.g.*, sugar drinks) instead of to specific products (*e.g.*, Coke). *E.g.*, *Simpson* Tr. 39:1–13. It has no relevance to claims against *a company* whose statements refer to the specific products they sell or to product categories that include those products. Indeed, Johnson

[8] Judge Demeo's decision was announced in open court on January 13, 2017. The transcript of her ruling ("*Simpson* Tr.") is Exhibit A to ABA's SLAPP motion.

& Johnson, a private company named as a co-defendant in *Simpson* for its own allegedly false statements, tellingly did *not* file a SLAPP motion in that case.[9] And *Farah v. Esquire Magazine*, 863 F. Supp. 2d 29 (D.D.C. 2012), *aff'd*, 736 F.3d 528 (D.C. Cir. 2013), simply holds that "satirical comment on an issue of public concern"—clearly *not* the type of speech at issue here—does not qualify as commercially motivated speech under the Act. *Farah*, 863 F. Supp. 2d at 39. It did not, as Coke suggests, Coke SLAPP Mem. at 13, treat plaintiff and defendant as commercial competitors.

B. Coke's Statements Fall Within the Exception Set Forth in D.C. Code § 16-5505

Separate and apart from the "private interest" exception to the prima facie "public interest" requirement, the Act does not apply to:

> Claim[s] . . . brought against a person primarily engaged in the business of selling . . . goods or services, if the statement . . . from which the claim arises is:
>
> (1) A representation of fact made for the purpose of promoting, securing, or completing sales . . . of . . . or commercial transactions in . . . the person's goods or services; and
>
> (2) The intended audience is an actual or potential buyer or customer.

D.C. Code § 16-5505. Coke is indisputably "primarily engaged in the business of selling . . . goods." And Plaintiffs' claims arise out of Coke's factual representations for the purpose of promoting product sales to potential customers. *See, e.g.*, Coke SLAPP Mem. 5–6 & Ex. 15 (comments of Coke executive Katie Bayne that, *inter alia*, "*our drinks* offer . . . hydration . . . . *We* offer great taste and benefits whether it's an uplift or carbohydrates or energy" (emphasis added)); *id.* at 6 & Ex. 17 (statement of Coke's then-Chief Science Officer that *Coke* "[is] safe. It hydrates.

[9] As discussed in Plaintiffs' opposition to the separate SLAPP motion filed in this case by Coke's co-Defendant, ABA, *Simpson* also does not provide a basis for dismissal of Plaintiffs' claims against ABA.

It's enjoyable."); *id.* & Ex. 22 at 5 (statement of then-Coke CEO that "*Coca-Cola* is an excellent complement to the habits of a healthy life" (emphasis added)). Thus, Coke's conduct is also exempted from the Act's coverage under this section, and its SLAPP motion should be denied for this additional reason.

II. PLAINTIFFS ARE LIKELY TO SUCCEED ON THE MERITS

If Coke 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 has failed 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, Plaintiffs can prevail as a matter of law because they have identified ample evidence sufficient to convince a jury that Coke's statements were false and misleading in violation of various sections of the D.C. Consumer Protection Procedures Act ("CPPA"), D.C. Code § 28-3901 *et seq*., as amended in 2012. *See* Compl. ¶¶ 168–186 (listing CPPA claims). 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, Comm. on Public Services and Consumer Affairs, Report on Bill 19-0581 (Nov. 28, 2012) ("2012 CPPA Committee Report"), at 7, Kats Decl., Ex. B.

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 this case, Plaintiffs have identified numerous specific statements by Coke 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; Pls.' Opp. Mem. Coke Mot. to Dism. ("Opp. Mem. Coke MTD") at Part I. The sworn declaration of Dr. Walter Willett strongly supports Plaintiffs' claims that Coke's (and ABA's) statements disassociating sugar drinks from particular adverse health conditions (*e.g.*, Ms. Bayne's statement that "[t]here is no scientific evidence that connects sugary beverages to obesity") 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. 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 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 this Court need answer now. Rather, the question 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. *Mann*, 150 A.3d at 1233–37. Given Plaintiffs' statements, the established science on the link between sugar drinks and adverse health conditions, Dr. Willett's sworn declaration, and the broad purpose and language of the CPPA, the answer is yes.

Coke's principal merits argument is that its statements are absolutely protected by the First Amendment. Coke SLAPP Mem. at 13. But as described above, *supra* Part I.A.ii, and in Plaintiffs' Opposition to Coke's Motion to Dismiss, *see* Opp. Mem. Coke MTD at Part II, Coke's statements regarding its products constitute commercial speech, even if they did not expressly propose a commercial transaction and even if they related to a current public debate. And the law is clear that commercial speech that is false and misleading, as were Coke's statements, is not entitled to *any* First Amendment protection, the *Noerr-Pennington* doctrine notwithstanding. *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.

Contrary to Coke's argument, Coke SLAPP Mem. at 14, Plaintiffs' claims are also neither time-barred nor involve conduct outside the scope of the CPPA, *see* Opp. Mem. Coke MTD at Part IV.

Coke also claims Plaintiffs lack standing. Coke SLAPP Mem. at 13. This is not a "merits" issue under the Act as that term was interpreted in *Mann*. 150 A.3d at 1233 & n.23 (pointing to the dictionary definition of "merits" that includes only "[t]he elements or grounds of a claim or defense"). *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"). Coke can and did raise this threshold legal issue in its 12(b) motion. In any event, Plaintiffs have standing in this case. Opp. Mem. Coke MTD at Part III.

CONCLUSION

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

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Date: January 30, 2018

Respectfully submitted,

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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*, Plaintiffs, v. THE COCA-COLA COMPANY *and the* AMERICAN BEVERAGE ASSOCIATION, Defendants.	Case No. 2017 CA 004801 B Honorable Judge Elizabeth C. Wingo Next Event: Motion Hearing March 15, 2018, at 11:00 a.m.

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

Before the Court is defendant Coca-Cola Company'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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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*