SUPERIOR COURT FOR THE DISTRICT OF COLUMBIA
CIVIL DIVISION

DENISE SIMPSON, ***Plaintiff,*** v.ke **JOHNSON & JOHNSON, *et al.*,** ***Defendants.***	**Case No. 2016 CA 001931 B** **Judge Marisa Demeo** **Next Event: June 17, 2016** **Initial Conference**

MEMORANDUM OF LAW IN SUPPORT OF DEFENDANT PERSONAL CARE PRODUCTS COUNCIL'S SPECIAL MOTION TO DISMISS PURSUANT TO THE DISTRICT OF COLUMBIA'S ANTI-SLAPP ACT (D.C. CODE § 16-5501 *ET SEQ.*)

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INTRODUCTION

This is a products liability lawsuit. In an attempt to compensate for a weak causation argument, Plaintiff has crafted fraud and conspiracy claims. In addition to a product manufacturer and a supplier, she has named as a defendant the trade association Personal Care Products Council ("PCPC"), even though it does not manufacture or sell any products. Plaintiff alleges that, through its public advocacy relating to a health issue, PCPC committed fraud, was negligent and participated in a civil conspiracy. Plaintiff's claims against PCPC must be dismissed with prejudice because they violate the District of Columbia's Anti-SLAPP Act (the "Act"), D.C. Code § 16-5501 *et seq*.

The District of Columbia enacted the Act to combat the chilling effect that lawsuits can have on "the right of advocacy on issues of public interest." Because PCPC's alleged activities arise solely from PCPC's advocacy on issues of public interest, Plaintiff has the burden of demonstrating ***at this stage in the litigation*** that she is "likely to succeed on the merits." This she cannot do. Accordingly, Plaintiff's complaint must be dismissed with prejudice.

STATEMENT OF FACTS

Plaintiff alleges that her use of talcum powder, an ingredient in Johnson & Johnson Baby Powder® and Shower to Shower® (collectively the "Products"), caused her to develop ovarian cancer. Compl. ¶¶ 1. Plaintiff names Johnson & Johnson Consumer Companies, Inc. ("JJCC"), as a defendant because it manufactured the Products. Compl. ¶¶ 5-10, 25-26. Plaintiff also names as defendants JJCC's parent, Johnson & Johnson, Inc. (collectively, "J&J"), and Imerys Talc America, Inc. ("Imerys"), which mines talc and supplies it to JJCC. Compl. ¶¶ 12, 22-24.[1]

[1] Over 1,000 plaintiffs have filed substantially identical lawsuits regarding talcum powder. *See* Decl. of Thomas T. Locke ("Locke Decl.") ¶ 2. PCPC has been dismissed from approximately 90 percent of those lawsuits. (*Id*.)

With respect to PCPC, Plaintiff alleges that it "is the successor or continuation of" the Cosmetic, Toiletry, and Fragrance Association ("CTFA"). Compl. ¶ 13. PCPC is, and CTFA was, a non-profit trade association for the cosmetic and personal care industry. *Id*.; *see* Decl. of Mark A. Pollak ("Pollak Decl.") ¶ 4. Plaintiff does not allege that PCPC manufactured, designed or sold any products. Compl. ¶ 9 (identifying J&J as the sole manufacturer); Pollak Decl. ¶ 7.

Only one paragraph in the Allegations section of the Complaint includes a substantive discussion of PCPC's alleged conduct. That paragraph alleges that PCPC formed a committee for the purpose of lobbying the government and influencing regulatory bodies regarding the safety of talc. Specifically, the paragraph alleges:

> Upon information and belief, in response to the United States National Toxicology Program's study, the Cosmetic Toiletry and Fragrance Association (CTFA), now known as PCPC, formed the Talc Interested Party Task Force (TIPTF). [J&J] and [Imerys] were members of the CTFA and involved in the TIPTF. The stated purpose of the TIPTF was to pool financial resources in order to collectively defend talc use at all costs and to prevent regulation of this industry. TIPTF hired scientists to perform biased research regarding the safety of talc, TIPTF members, including Johnson & Johnson and Luzenac, then edited these scientific reports before they were submitted to governmental agencies. In addition, members of TIPTF knowingly released false information about the safety of talc to the consuming public and used political and economic influence on regulatory bodies. These activities were conducted by these companies and organizations, including Johnson & Johnson and Luzenac, over the past four decades in an effort to prevent regulation of talc and to mislead the consuming public about the true hazards of talc.

Compl. ¶ 34. In other words, the Complaint alleges that PCPC advocated on issues of public interest. This paragraph provides the sole basis for the three causes of action against PCPC: Count IV, negligence (Compl. ¶¶ 76-83); Count XI, fraud (Compl. ¶¶ 137-144); and Count XIII, civil conspiracy (Compl. ¶¶ 152-158).[2]

[2] Plaintiff also filed a punitive damages claim against all parties. However, this is not an independent cause of

ARGUMENT

The Act prohibits lawsuits that target constitutionally-protected activity arising out of "acts in furtherance of the right of advocacy on issues of public interest." D.C. Code Ann. § 16-5502(b). Because Plaintiff's lawsuit violates D.C.'s anti-SLAPP statute and she cannot establish that she is "likely to succeed on the merits," the Act mandates dismissal of the Complaint. *Id*.

I. THE ANTI-SLAPP ACT PROTECTS PCPC'S ALLEGED CONDUCT.

A. The Claims against PCPC Relate Solely to Protected Activity.

D.C. Code Section 16-5502 provides:

> (a) A party may file a special motion to dismiss any claim arising from an act in furtherance of the right of advocacy on issues of public interest within 45 days after service of the claim.
>
> (b) If a party filing a special motion to dismiss under this section makes a prima facie showing that the claim at issue arises from an act in furtherance of the right of advocacy on issues of public interest, then the motion shall be granted unless the responding party demonstrates that the claim is likely to succeed on the merits, in which case the motion shall be denied.

D.C. Code § 16-5502. The Act arose out of a recognition that certain constitutionally-protected activity, such as the right to petition the government, is sacrosanct and must be safeguarded. *See, e.g.*, *Forras v. Rauf*, 39 F. Supp. 3d 45, 53 (D.D.C. 2014), *aff'd on other grounds*, 812 F.3d 1102 (D.C. Cir. 2016) (citations and quotations omitted) (explaining reasons for "broad protections afforded by the Act").

To "make a prima facie showing," a movant must show that the claim arises from (1) "an act in furtherance of the right of advocacy" (2) "on issues of public interest." Here, Plaintiff alleges that PCPC petitioned "regulatory bodies" regarding the "safety of talc." Compl. ¶ 34.

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action. It merely is a theory of relief. *See generally Merrell Dow Pharm., Inc. v. Oxendine*, 593 A.2d 1023, 1025 (D.C. 1991).

The right to petition the government on issues of public interest is precisely what the Act protects.

The statute defines an "[a]ct in furtherance of the right of advocacy on issues of public interest" in three ways, any one of which triggers the statute. An act in furtherance of the right of advocacy includes "[a]ny written or oral statement" made "[i]n connection with an issue under consideration or review by a legislative, executive, or judicial body, or any other official proceeding authorized by law." D.C. Code § 16-5501(1)(A)(i). The Complaint alleges that PCPC formed the TIPTF in response to the United States National Toxicology's study regarding the safety of talc and that PCPC submitted scientific reports to governmental agencies. Compl. ¶ 34. This allegation constitutes an act in furtherance of the right of advocacy.

The statute also defines an "[a]ct in furtherance of the right of advocacy on issues of public interest" to include a "written or oral statement" made in "a place open to the public or a public forum in connection with an issue of public interest." D.C. Code § 16-5501(1)(A)(ii). The Complaint alleges that PCPC released information regarding the safety of talc to the public. Compl. ¶ 34. This allegation also constitutes an act in furtherance of the right of advocacy. *See, e.g.*, *Farah v. Esquire Magazine,* 863 F.Supp.2d 29, 38 (2012) (*quoting* D.C. Code § 16-5501 (1)(A)) (holding that Internet post qualifies as "'written ... statement'" made in a "'place open to the public or a public forum.'"); *Abbas v. Foreign Policy Grp., LLC*, 975 F. Supp. 2d 1, 11 (D.D.C. 2013), *aff'd*, 783 F.3d 1328 (D.C. Cir. 2015) (same).

The statute further defines an "[a]ct in furtherance of the right of advocacy" to include "[a]ny other expression or expressive conduct that involves petitioning the government or communicating views to members of the public in connection with an issue of public interest." D.C. Code § 16-5501(1)(B). The Complaint alleges that PCPC both petitioned the government

and communicated with the public regarding the safety of talc. This third, "catch-all" definition of an act in furtherance of the right of advocacy also applies here.

The Act defines an "issue of public interest" as "an issue related to health or safety; environmental, economic, or community well-being; the District government; a public figure; or a good, product, or service in the market place." D.C. Code Ann. § 16-5501(3).[3] As Plaintiff states in her complaint, the potential consequences of using talc products presents an issue related to health and safety of the public as well as an issue related to a good in the market place. Compl. ¶¶ 19-44.

In short, Plaintiff's claims against PCPC are the exact type of claims encompassed by the Act. The claims are based on PCPC's alleged advocacy on an issue of public interest, the safety of talc. Because PCPC has established a prima face case that the claims "arise[] from an act in furtherance of the right of advocacy on issues of public interest, then the motion [to dismiss] shall be granted unless [Plaintiff] demonstrates that [her claims are] likely to succeed on the merits...." D.C. Code § 16-5502(b).

B. Plaintiff Cannot Meet Her High Burden of Establishing the Likelihood of Success on the Merits.

Because PCPC has made a prima facie showing, to avoid dismissal, Plaintiff has the burden of establishing that her claims are "likely to succeed on the merits." *Id*. *See also Abbas*, 975 F. Supp. 2d at 20 (granting anti-SLAPP motion after defendant made prima facie showing and plaintiff failed to establish likelihood of success on the merits); *Farah*, 863 F. Supp. 2d at 39 (same). Courts have interpreted this standard as being " 'comparable to that used on a motion for judgment as a matter of law.' " *Forras*, 39 F. Supp. 3d at 54 (*quoting Abbas*, 975 F. Supp. 2d at

[3] There is an exception to the Act, inapplicable here, for those who sell or lease products. *See* D.C. Code Ann. § 16-5505. As discussed above, Plaintiff does not allege that PCPC sells or leases products. Complaint ¶ 9 (identifying only J&J as manufacturer). She could not in good faith make that allegation because PCPC does not sell, market, manufacture, lease or distribute any products. Pollak Decl. ¶ 7.

13 (D.D.C. 2013)). A plaintiff, therefore, " 'must demonstrate that the complaint is legally sufficient and supported by a prima facie showing of facts to sustain a favorable judgment if the evidence submitted by the plaintiff is credited.' " *Id*. (*citation omitted*). "If the plaintiff fails to present a sufficient legal basis for the claims or if the evidence offered is insufficiently substantial to support a judgment in favor of the plaintiff, then the defendant's anti-SLAPP motion should be granted." *Arenas v. Shed Media U.S. Inc.*, 881 F. Supp. 2d 1181, 1188 (C.D. Cal.), *aff'd*, 462 F. App'x 709 (9th Cir. 2011) (relied on by *Forras*, 39 F. Supp. 3d at 54).

Plaintiff has asserted three causes of action against PCPC: negligence, fraud, and civil conspiracy. Plaintiff cannot meet her high burden of establishing likely success on the merits.

1. <u>The Negligence Claim Fails Because Plaintiff Cannot Establish That PCPC Owed Her a Duty and PCPC's Advocacy Caused Her Injuries.</u>

To establish that she likely will prevail on her negligence claim, Plaintiff must offer evidence establishing "the existence of a duty, violation of a standard of care, and injury resulting as a proximate cause of the violation." *Jarrett v. Woodward Bros*., 751 A.2d 972, 977 (D.C. 2000). Plaintiff cannot do so.

Plaintiff alleges that "PCPC voluntarily undertook a duty of care to Plaintiff by promulgating standards, norms, and/or bylaws that govern, control, and/or inform the manufacturing, design, labeling, marketing, distribution, and/or branding practices of its member companies." (Compl. ¶ 79.) Plaintiff further alleges that "PCPC had the means and authority to control the safety standards" of J&J and Imerys but breached its duty by "failing to ensure" that they complied with the standards. (*Id.* at ¶¶ 80, 81.) No evidence supports these allegations.

PCPC did not undertake a duty to Plaintiff. It does not regulate the cosmetics industry nor does it regulate its members. (Pollak Decl. ¶ 8.) In 1976, PCPC offered a guideline for testing cosmetic-grade talc to determine whether it excluded asbestos. (*Id*. at 9.) PCPC has no

authority to enforce that guideline. (*Id*.) And, in any event, that guideline is unrelated to Plaintiff's lawsuit, as she has not alleged that asbestos caused her ovarian cancer. (*Id*.) In addition, there is no special relationship between Plaintiff and PCPC that would create a duty. *See, e.g., Hakki v. Zima Co.*, No. 03-9183, 2006 WL 852126, at *4 (D.C. Super. Ct. Mar. 28, 2006) (holding "no duty to protect a plaintiff from illegal conduct by a third party absent a 'special relationship' "). Moreover, contrary to her unsubstantiated allegations, PCPC has no authority to regulate its members. (Pollak Decl. ¶ 8.) PCPC could not have prevented the sale of the Products.

Accordingly, Plaintiff cannot offer evidence establishing her negligence claim.[4]

2. <u>The Fraud Claim Fails Because Plaintiff Cannot Establish That PCPC Knowingly Made a False Statement or That Plaintiff Relied On Any Such Statement.</u>

To demonstrate that she is likely to prevail on her fraud claim, Plaintiff must offer evidence establishing: "(1) a false representation, (2) in reference to material fact, (3) made with knowledge of its falsity, (4) with the intent to deceive, and (5) action is taken in reliance upon the representation . . . ." *Atraqchi v. GUMC Unified Billing Serv*., 788 A.2d 559, 563 (D.C. 2002). Plaintiff cannot produce evidence establishing that PCPC knew that statements it made were false or that Plaintiff relied on those statements. Indeed, Plaintiff likely cannot establish that she had even heard of PCPC prior to this litigation.

Plaintiff alleges that PCPC committed fraud by disseminating "intentionally misleading data to governmental agencies" and releasing scientific data regarding the risks of ovarian cancer which "PCPC knew were incorrect." (Compl. ¶ 140.) Plaintiff further alleges that she "relied on

[4] Discovery will not disclose contrary evidence. In other talc lawsuits, PCPC has produced over 83,000 pages of documents, produced two corporate representatives for testimony, and other defendants and third parties have produced over one million documents. Locke Decl. ¶ 3. Counsel for Plaintiff has access to all of these documents. None of the documents establish that PCPC had regulatory authority.

PCPC's misrepresentations concerning the safety of the PRODUCTS." (Compl. ¶ 143.) There is no legally sufficient evidence to establish Plaintiff's fraud claim. ***First***, as discussed above in part I.A, these alleged activities are presumptively protected by the Act, as they constitute advocacy on issues of public interest, the safety of talc and its presence in the work place.

Second, Plaintiff's allegations relate to constitutionally protected activities. Every allegation regarding PCPC's alleged conduct is protected by the First Amendment under the Noerr-Pennington doctrine. "The Noerr–Pennington doctrine holds that defendants who petition the government, 'whether by efforts to influence legislative or executive action or by seeking redress in court,' are immune from liability for such activity under the First Amendment." *Nader v. The Dem. Nat. Comm*., 555 F. Supp. 2d 137, 156-57 (D.D.C. 2008), *aff'd on other grounds sub nom. Nader v. Dem. Nat. Comm*., 567 F.3d 692 (D.C. Cir. 2009) (*quoting Covad Comm'cns Co. v. Bell Atlantic Corp*., 398 F.3d 666, 677 (D.C. Cir. 2005)); *see also E.R.R. Presidents Conference v. Noerr Motor Freight, Inc*., 365 U.S. 127, 136 (1961); *Cal. Motor Transp. Co. v. Trucking Unlimited*, 404 U.S. 508, 510 (1972).

Although the Noerr-Pennington Doctrine arose in the context of antitrust concerns, subsequent courts have applied the doctrine to tort claims, including product liability claims brought under negligence, concert of action or conspiracy theories. (*Id*.) "Noerr–Pennington protection has been extended to all advocacy intended to influence government action, including to allegedly false statements." *Tuosto v. Philip Morris USA Inc*., No. 05CIV.9384(PKL), 2007 WL 2398507, at *5 (S.D.N.Y. Aug. 21, 2007) (shielding allegedly false statements made in the course of petitioning the government) (*citing Noerr Motor Freight*, *Inc*., 365 U.S. at 140-42); *New York Jets LLC v. Cablevision Sys. Corp*., 2005 WL 2649330, *7 (S.D.N.Y. Oct 17, 2005) ("The alleged misrepresentations fall squarely within the confines of Noerr–Pennington"). Even

statements that may "fall [ ] far short of the ethical standards generally approved in this country" are protected by the Noerr–Pennington doctrine if they are made in the course of petitioning the government. *Noerr*, 365 U.S. at 140. *See also Hamilton v. Accu-tek*, 935 F. Supp. 1307, 1317 (E.D.N.Y. 1996).[5]

Third, even if PCPC made an erroneous statement, Plaintiff cannot offer evidence that the statement was made "with knowledge of its falsity." There is no evidence that PCPC made knowingly false statements. And, as noted above, discovery will not disclose relevant contrary evidence. Plaintiff's counsel already has deposed two PCPC corporate representatives and has received more than 800,000 pages of documents from defendants. Locke Decl. ¶ 3.

Finally, Plaintiff likely cannot establish that she relied upon PCPC's alleged statements or even that she had heard of PCPC prior to this litigation. Each plaintiff who has been deposed in similar talc lawsuits has testified that she had never heard of PCPC prior to filing her lawsuit. Locke Decl. ¶ 4.

Accordingly, Plaintiff cannot establish that she likely will prevailing on her fraud claim.

3. The Conspiracy Claim Fails Because Plaintiff Cannot Establish Her Fraud Claim or That PCPC Performed an Unlawful Act.

To establish that she is likely to prevail on her civil conspiracy claim, Plaintiff must offer evidence establishing:

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[5] There are two exceptions to the *Noerr-Pennington* doctrine, neither of which apply. First, efforts to influence the government are not protected where they are found to be a "sham" that is objectively baseless, *i.e.*, threats, intimidation, and other coercive measures, primarily to harass or discriminate against the plaintiff[ ]." *Jones v. Louisiana State Bar Ass'n*, 738 F. Supp. 2d 74, 80 (D.D.C. 2010), *aff'd*, No. 10-5327, 2011 WL 11025624 (D.C. Cir. Oct. 3, 2011) (citations and quotations omitted)(finding lawyers that lobbied the government to be immune from liability). Plaintiff cannot offer any evidence that PCPC's activities were a sham. The Supreme Court has "explicitly observed that a successful effort to influence governmental action . . . certainly cannot be characterized as a sham." *Prof'l Real Estate Inv'rs, Inc. v. Columbia Pictures Indus., Inc.*, 508 U.S. 49, 58 (1993) (citations and quotations omitted). Here, to the extent that PCPC was successful, as Plaintiff alleges it was, its lobbying efforts cannot be considered evidence of sham lobbying. The second exception to the doctrine arises when an entity uses illegal means to influence the government and to "subvert the integrity of the governmental process." *Fed. Prescription Serv. v. Am. Pharm. Ass'n*, 663 F.2d 253, 262 (D.C. Cir. 1981). Here, PCPC has only lobbied the government through legitimate means, and Plaintiff has not contended otherwise.

(1) an agreement between two or more persons;

(2) to participate in an unlawful act, or in a lawful act in an unlawful manner;

(3) an injury caused by an unlawful overt act performed by one of the parties to the agreement; and

(4) pursuant to, and in furtherance of, the common scheme.

Griva v. Davison, 637 A.2d 830 (D.C. 1994) (*citing Halberstam v. Welch*, 227 U.S. App. D.C. 167 (1983)). "[C]ivil conspiracy depends on the performance of some underlying tortious act. It is thus not an independent action; it is, rather, a means for establishing vicarious liability for the underlying tort." *Weishapl v. Sowers*, 771 A.2d 1014, 1023-24 (D.C. 2001). In addition, conspiracy requires a conscious agreement "to participate in an unlawful act." *Id.* As a result, a claim that the alleged tortfeasor was negligent will not support a conspiracy claim. *See, e.g., Alatishe v. Irwin*, Civ. A. No. 86-479, 1987 WL 17666, at *3 (D.D.C. Sept. 18, 1987); *Chen v. Dist.of Columbia*, 256 F.R.D. 267, 273 (D.D.C. 2009) (explaining that, under D.C. law, "[c]onspiracy is obviously an intentional tort"). A tortfeasor cannot intend to commit negligence. *D.C. v. Chinn,* 839 A.2d 701, 708 (D.C. 2003).

Because she cannot base her conspiracy claim on negligence, Plaintiff bases the claim on fraud. However, as discussed above in part (I)(b)(2)), Plaintiff's fraud claim fails. Therefore, her civil conspiracy claim also must fail. In addition, Plaintiff cannot show any admissible evidence that PCPC either performed an unlawful act or a lawful act in an unlawful manner, or that it authorized a co-conspirator to perform such acts. Indeed, the Noerr-Pennington doctrine also immunizes defendants from conspiracy liability. *See Senart v. Mobay Chem. Corp*., 597 F.Supp. 502, 505–06 (D. Minn. 1984); *Anchorage Joint Venture v. Anchorage Condo. Ass'n*, 670 P.2d 1249 (Colo. App. 1983). In *Senart*, the court rejected a conspiracy claim against defendants who collectively lobbied the Occupational Safety and Health Administration to oppose more

stringent standards of exposure to toxic chemicals. The court reasoned that "defendants' concerted action sought only permissible ends and acted only through permissible means" and that the activity was "clearly permissible" under the First Amendment right to petition. *Senart*, 597 F.Supp. at 506. Thus, to prevail, Plaintiff's conspiracy claims asserted against PCPC must consist of more than just lobbying allegations, even if the lobbying includes allegedly false representations. "A core principle of the Noerr–Pennington doctrine is that lobbying alone cannot form the basis of liability, although such activity may have some evidentiary value. It is not enough to show that the defendants act in some coordinated fashion as an industry." *Accu-tek*, 935 F. Supp. at 1321 (*citing Centrone v. Schmidt*, 114 Misc.2d 840 (Sup.Ct. Nassau Co. 1982)).

Accordingly, Plaintiff cannot show that she has a likelihood of prevailing on her civil conspiracy claim.

II. PCPC IS ENTITLED TO ATTORNEYS' FEES.

The court may award a moving party who prevails, in whole or in part, on a motion brought under § 16-5502 or § 16-5503 the costs of litigation, including reasonable attorney fees. D.C. Code Ann. § 16-5504(a). The D.C. Court of Appeals recently interpreted this statute as entitling "the moving party who prevails . . . to a presumptive award of reasonable attorney's fees on request." *Doe v. Burke*, No. 15-CV-690, 2016 WL 932799, at *6 (D.C. Mar. 10, 2016). Because PCPC's alleged acts of advocacy are protected under the Act, this Court should award it the attorneys' fees it has incurred in the defense of this action.

CONCLUSION

At bottom, PCPC's alleged conduct falls well within the protections of the First Amendment, the common law and the Act. Permitting this case to go forward would chill the very same constitutionally protected speech and conduct the Act was enacted to protect. Because

PCPC's alleged conduct is protected by the Act, and because Plaintiff cannot show a likelihood of success on the merits, all claims asserted against PCPC must be dismissed.

Dated: May 2, 2016

Respectfully submitted,

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