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**

REPLY IN SUPPORT OF DEFENDANT PERSONAL CARE PRODUCTS COUNCIL'S SPECIAL MOTION TO DISMISS PURSUANT TO THE ANTI-SLAPP ACT

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Plaintiff argues that the Anti-SLAPP Act (the "Act") is inapplicable because PCPC's advocacy related to commercial interests. That argument fails because: (1) the regulation of talc involves the public's safety; (2) the government requested or authorized PCPC to comment on the safety of talc; (3) PCPC's advocacy was limited to the scientific basis for the safety of talc; (4) case law supports that trade associations are entitled to anti-SLAPP protections; and (5) the legislative history contemplates protection against conspiracy claims arising from acts of advocacy by organizations like PCPC. Because PCPC has made a prima facie case that the Act applies, and Plaintiff has failed to meet her burden of showing a likelihood of success on the merits, Plaintiff's claims against PCPC must be dismissed.

I. PCPC HAS MADE A PRIMA FACIE CASE FOR ANTI-SLAPP PROTECTION.

As explained in PCPC's Opening Brief, to "make a prima facie showing" that the Act applies, a movant must show that the claim against it arises from (1) "an act in furtherance of the right of advocacy" (2) "on issues of public interest." (PCPC Opening Br. at 4.) Because Plaintiff's Opposition focuses on part (2), PCPC's reply will begin with that part.

A. PCPC's Advocacy was Related to an "Issue of Public Interest."

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) (emphasis added). Plaintiff does not dispute that the government's interest in talc falls under this definition. (Pl. Opp. Br. at 4-5; Compl. ¶¶ 19-44.) Instead, Plaintiff disingenuously accuses PCPC of concealing a portion of the statute that is inapplicable, likening it to Defendants' alleged "concealment of the risk of ovarian cancer." While it is true that the definition further provides that "[t]he term 'issue of public interest' shall not be construed to include private interests, such as statements directed primarily toward protecting **the speaker's commercial interests rather than toward**

commenting on or sharing information about a matter of public significance," this portion of the definition is not applicable to PCPC. (D.C. Code § 16-5501(3) (emphasis added)).

The government requested or authorized PCPC to comment on and share information about the safety of talc. For example, in 1993, the Food & Drug Administration (the "FDA") requested that PCPC provide materials, speakers and funding for a 1994 FDA workshop regarding the safety of talc. (Ex. 1, *Talc: Consumer Uses and Health Perspectives*, 21 REGULATORY TOXICOLOGY AND PHARMACOLOGY (1995) at 213 (reporting on the FDA Workshop).) Likewise, in 2000, when the National Toxicology Program solicited comments regarding whether talc was a carcinogen, PCPC submitted materials pursuant to the government's procedures. (Ex. 2, Summ. Min. of the NTP Bd. of Sci. Counselors Rep. on Carcinogens Subcomm. Mt'g, Trial Ex. D-1008 at 15 (*Ristesund v. Johnson & Johnson*, No. 1422-CC0901201 (Cir. Ct., St. Louis, MO))) Plaintiff's claims arise from these scientific submissions to the government. Those submissions clearly relate to an issue of public interest—the government's interest in the safety of talc.

Moreover, PCPC is a non-profit trade association. It does not manufacture, design or sell any products. (Pollak Decl. ¶ 4.) As a result, PCPC—the "speaker" under the Act—has no commercial interest to protect. Indeed, Plaintiff's own purported regulatory expert, David Steinberg, has testified that PCPC provides a public service by sharing information regarding cosmetic ingredients. (Ex. 3, Steinberg Trial Tr. Vol. 5A, Apr. 14, 2016, at 916:12-917:6 (*Ristesund v. Johnson & Johnson*, No. 1422-CC0901201 (Cir. Ct., St. Louis, MO))).

Even if its actions served some of the interests of a minority of its membership, that is insufficient to place PCPC's advocacy in the realm of "private interests." Notably, Plaintiff does not allege that PCPC made any representations regarding a particular product. And, the Act

precludes only those in the business of selling goods and services from invoking its protections. D.C. Code Ann. § 16-5505. If the D.C. legislature wanted, it could have exempted trade organizations or any entity tangentially related to a commercial product. It did not. The unambiguous language of the statute should be afforded its plain meaning.[1]

Although no court applying District of Columbia law has addressed the issue, courts in other jurisdictions have held that trade associations are protected by Anti-SLAPP Acts. Courts applying D.C. law have looked "to decisions from other jurisdictions (particularly California, which has a well-developed body of case law interpreting a similar California statute) for guidance in predicting how the D.C. Court of Appeals would interpret the District's Anti–SLAPP statute." *Abbas v. Foreign Policy Grp., LLC*, 975 F. Supp. 2d 1, 9 (D.D.C. 2013), *aff'd*, 783 F.3d 1328 (D.C. Cir. 2015). In California, courts have conferred anti-SLAPP protection on trade associations, reasoning that "the statute protects both private and corporate speech . . . and that an issue of public interest 'is any issue in which the public is interested.' " *Choose Energy, Inc. v. Amer. Petroleum Inst*., 87 F. Supp.3d 1218 (N.D. Cal. 2015) (*quoting Nygard Inc. v. Uusi-Kerttula*, 159 Cal. App. 4th 1027, 1043 (2008)). Plaintiff's argument that the Act is intended to protect only "grass roots activism" is simply false.

Even if it were a for-profit corporation, PCPC still would be entitled to anti-SLAPP protection. In *Farah v. Esquire Magazine, Inc*., 863 F. Supp. 2d 29, 38 (D.D.C. 2012), *aff'd*, 736 F.3d 528 (D.C. Cir. 2013), a for-profit corporation published a blog post on esquire.com satirizing plaintiffs' upcoming book and website. The court rejected plaintiffs' argument that the magazine was not protected by the Act because of the commercial interests exception, holding

[1] To the extent that Plaintiff implies that PCPC is the alter ego of its members, that argument also fails. The defendants are distinct entities, and the actions of each of them cannot be imputed to the others. *See, e.g.*, *Sec. Indus. & Fin. Markets Ass'n v. U.S. Commodity Futures Trading Comm'n*, 67 F. Supp. 3d 373, 406 (D.D.C. 2014); *W. Sugar Co-op. v. Archer-Daniels-Midland Co.*, No. 11-CV-3473 CBM MANX, 2011 WL 11741501, at *7 (C.D. Cal. Oct. 21, 2011).

that the magazine was immune from liability with respect to plaintiffs' tortious interference claims because the blog post related to a matter of public interest. That the defendant was a for-profit company that may have been motivated by increasing circulation was of no moment.

Furthermore, the legislative history of the Act does not support Plaintiff's position. To the contrary, the very ACLU testimony that Plaintiff cites offers an example involving organizations with opposing private agendas. In the ACLU's view, public advocacy by either organization would be protected by the Anti-SLAPP Act, thus highlighting the importance of the government's "evenhanded treatment to speech on all sides of public issues." (Pl. Opp. Br., Ex. 3, Comm. Report, ACLU Test. at 8-9.) The ACLU urged the DC Board of Commissioners not to frame the Act in a way that courts applying it would need to consider the merits of an issue of public interest. *Id*. The fact that advocacy relates to an issue of public interest is sufficient. *Id*. The ACLU also noted that claims implicated by the Act "tend to fall into predictable categories such as defamation, interference with prospective economic advantage, invasion of privacy **and conspiracy**." (*Id*. at 2 (emphasis added)) Conspiracy is the very claim that Plaintiff asserts here.

In sum, PCPC's advocacy, which was authorized by the government, and related solely to the scientific properties of talc, clearly involved an issue of public interest—the safety of talc.

B. The Allegations Against PCPC Arise Out of Acts in Furtherance of PCPC's Right of Advocacy.

With respect to the first part of PCPC's prima facie showing—that the claim arises from "an act in furtherance of the right of advocacy"—Plaintiff concedes that the allegations contained in the Complaint constitute acts of advocacy. (Pl. Opp. Br. at 4-5, n. 1). Nonetheless, Plaintiff half-heartedly argues that the Act should not apply because PCPC engaged in other acts unrelated to advocacy. That argument fails. Neither the Complaint nor Plaintiff's Opposition

identify what those non-advocacy acts may be. Nor does Plaintiff explain how those other acts give rise to her conspiracy, fraud and negligence claims against PCPC.

PCPC's alleged acts were "in furtherance of the right of advocacy." The plain language of the Act protects statements made "[i]n connection with an issue under consideration or review" by the government, regardless of whether those statements were made public. Indeed, the legislative history shows the intent to offer broad protection for both statements made "in connection with an issue under consideration or review" as well as statements made before a public forum. The ACLU promoted this broad definition of "[a]ct in furtherance of the right of advocacy on issues of public interest," which was adopted. Pl. Opp. Br., Ex. 3, Comm. Report, ACLU Test. at 4. The revision clarifies that the Act applies to all communications relating to an issue of public interest, regardless of whether the communications were made to the government. Thus, Plaintiff cannot argue that PCPC's petitioning of government agencies are protected but internal communications made in connection with such petitioning are not.

II. PLAINTIFF HAS FAILED TO COME FORWARD WITH ANY EVIDENCE THAT SHE LIKELY WILL SUCCEED ON THE MERITS OF HER CLAIMS.

Because PCPC has made a prima facie showing, to avoid dismissal, Plaintiff has the burden of establishing that she likely will succeed on the merits. Plaintiff does not even attempt to argue that she will prevail. And, any argument that Plaintiff needs additional discovery is disingenuous. Plaintiff does not dispute that her counsel has already deposed two PCPC corporate representatives and has received more than 800,000 pages of documents.

CONCLUSION

For the foregoing reasons and as discussed in PCPC's Opening Brief, PCPC's Special Motion to Dismiss must be granted.

Dated: May 26, 2016

Respectfully submitted,

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