IN THE SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
Civil Division

DENISE CECELIA SIMPSON	)	
	)	Civil Action No. 2016 CA 001931 B
	)	Judge Marisa J. Demeo
Plaintiff	)	
	)	
v.	)	NEXT SCHEDULED EVENT: Initial
	)	Scheduling Conference on June 17, 2016
JOHNSON & JOHNSON, et al.	)	
	)	
	)	
Defendants	)	

PLAINTIFF DENISE SIMPSON'S STATEMENT OF POINTS AND AUTHORITIES IN OPPOSITION TO DEFENDANT PERSONAL CARE PRODUCTS COUNCIL'S SPECIAL MOTION TO DISMISS PURSUANT TO THE DISTRICT OF COLUMBIA ANTI-SLAPP ACT (D.C. CODE § 16-5501, ET SEQ.)

Plaintiff Denise Simpson files this Opposition to the Special Motion to Dismiss pursuant to the D.C. Anti-SLAPP Act ("the Act") filed by Defendant Personal Care Products Council ("PCPC"). In its Motion, PCPC argues that its activities and statements that form the basis of Ms. Simpson's claims against it are protected by the Act. But as discussed below, PCPC's activities and statements do not fall under the protection of the Act, and its Motion should be denied.

FACTS AND PROCEDURAL HISTORY

For decades, all Defendants—in furtherance of their private, commercial interests—have actively concealed and misrepresented the serious risk of ovarian cancer caused by the genital use of Talc-based cosmetic body powders, specifically Johnson's Baby Powder and Shower to Shower ("the Products"). As a result of the concealment and misrepresentations, countless women were unaware of the serious risk caused by the use of the Products. Following years of

regular and habitual use of the Talc-based Products in her genital area, Plaintiff Denise Simpson was diagnosed with ovarian cancer. Compl. ¶ 1. Ms. Simpson, a life-long DC resident, filed her Complaint in this Court on March 18, 2016 against (1) Johnson & Johnson (J&J) and its subsidiary, Johnson & Johnson Consumer Companies, Inc. (JJCC) – the manufacturers of the Products; (2) Imerys Talc America, Inc. (Imerys) – a supplier of Talc for use in the Products; and (3) PCPC – the current name of the trade association that has represented the interests of J&J, JJCC, and Imerys for decades.

Ms. Simpson alleges that PCPC, in concert with J&J, JJCC, and Imerys, coordinated their defense of the use of Talc in the Products following a series of studies that linked the use of Talc in the genital area to an increased risk of ovarian cancer. Compl. ¶¶ 32−34, 138−141. In their defense and commercial promotion of these dangerous Products, the Defendants misrepresented and concealed information from the government and the public concerning the risk associated between genital use of Talc and ovarian cancer. *Id.* Specifically, PCPC "formed the Talc Interested Party Task Force (TIPTF)" in cooperation with the other Defendants. Compl. ¶ 34 Through the TIPTF, Defendants "hired scientists to perform biased research" and "used political and economic influence on regulatory bodies" in order to "prevent regulation of talc and to mislead the consuming public about the true hazards of talc." *Id.* These statements and actions form the basis of Ms. Simpson's claims of negligence, fraud, and civil conspiracy against PCPC. *See* Compl. ¶¶ 76−83, 137−144, 152−158.

On May 2, 2016, Defendant PCPC filed a Special Motion to Dismiss, arguing that PCPC's statements and actions that form the basis of Ms. Simpson's claims are protected under the Act.

ARGUMENT

I. D.C.'s Anti-SLAPP Act does not protect PCPC's private, commercial activities and statements.

The District of Columbia Anti-SLAPP Act of 2010 ("the Act") "was enacted by the D.C. Council to protect the targets of suits intended as a weapon to chill or silence speech." *Doe v. Burke*, 2016 WL 932799 at *1 (D.C. Mar. 10, 2016) (internal punctuation omitted). The intent of the Act is to provide defendants who are sued based on actions falling under the protection of the Act with the option to "file a special motion to dismiss any claim arising from **an act in furtherance of the right of advocacy on issues of public interest** . . . ." D.C. Code Ann. § 16-5502(a). First, pursuant to the Act, the moving party must "make 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," which PCPC has failed to do. *Id.* at § 16-5502(b). Second, if a defendant meets its burden of establishing a prima facie case, then the burden shifts to the responding party to "demonstrate[] that the claim is likely to succeed on the merits." *Id.*

Here, PCPC (the moving party) has failed to establish a prima facie case that the claims alleged in Ms. Simpson's Complaint against PCPC arise from acts in furtherance of the right of advocacy on issues of public interest. PCPC's involvement in this case, and the claims against it, are based on actions and statements that PCPC undertook for the private, commercial interests of itself and its members. The Court should deny PCPC's Special Motion to Dismiss at this stage of the litigation. As a result, the burden does not shift to Ms. Simpson to prove the likelihood of her success on the merits.

In its Motion, PCPC asserts—and Ms. Simpson agrees—there are two elements that PCPC must prove to make a prima facie showing under the Act: (1) "an act in furtherance of the right of advocacy," and (2) "on issues of public interest." Def.'s Mem. Special Mot. Dismiss at 3

("Def.'s Mem."); D.C. Code Ann. § 16-5501. For the reasons below, PCPC fails to make a prima facie showing under both elements.

1. PCPC fails to make a prima facie showing—as required—that the Act protects all of the private, commercial statements and actions that form the basis of Plaintiff's claims.

PCPC alleges that its statements to the government and the public are acts in furtherance of the right of advocacy. *See* Def.'s Mem. at 3−5. But Ms. Simpson's claims are not limited to the statements made by PCPC to the government or the public. Importantly, in her Complaint Ms. Simpson alleges that PCPC and the other Defendants acted in concert to pool their substantial resources to defend Talc use in the Products. Compl. ¶ 34. Therefore, the statements and actions *among the Defendants* about the defense of Talc form part of Ms. Simpson's claims. PCPC's statements and actions directed to the government and public are only part of these claims. The underlying bases of the claims involve not only statements to the government and public, but also statements among the Defendants, which are not "acts in furtherance of the right of advocacy." For that reason, PCPC fails to establish a prima facie case under this first element.

2. PCPC acted in furtherance of its own and its members *private, commercial interests* and not on issues of *public interest.*

The second element, "issue of public interest," is defined as follows in the Act:

> "Issue of public interest" means 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. **The 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.**

D.C. Code Ann. § 16-5501(3) (emphasis added).

In presenting its Motion to the Court, PCPC cites to the first sentence of the section of the Act quoted above. However, PCPC conceals from the Court the most important part of the

section. In this section, the Act specifically excludes "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." D.C. Code Ann. § 16-5501(3) (emphasis added). [1] In similar fashion, PCPC's concealment of this pivotal part of the statute is analogous to Defendants concealment of the risk of ovarian cancer caused by genital Talc use.

Rather than advocating on issues of public interest, PCPC advocated with its private interests and the commercial interests of the members as its primary motivators. PCPC, in concert with the other Defendants, made statements to the government and the public defending the safety of Talc as used in the Products. Compl. ¶ 34. Any statements made by PCPC concerning this were not made with the primary purpose of "commenting on or sharing information about a matter of public significance."

To this point, PCPC's senior executive vice president, Mark Pollak, testified that PCPC is the "trade association for the cosmetic and personal care products industry," which represents more than 600 member companies who manufacture, distribute, and supply personal care products in the U.S." Pollak Decl. ¶¶ 4−5. The Defendants who use or supply Talc in cosmetic products (J&J, JJCC, and Imerys) are among PCPC's members. *Id.* at ¶ 6. PCPC would not exist as a trade association without the members of the association and therefore has an inherent private interest in advocating for its members. PCPC promotes the benefits of membership on its website by stating that members can "[p]articipate in Council committees to help develop programs and find solutions that **benefit the industry**." *Benefits of Council Membership*,

[1] Plaintiff concedes that if PCPC's advocacy was truly on issues of public interest rather than on issues of private, commercial interest, then *some* of its advocacy would meet this first element (see discussion on Section I(1)) .

Personal Care Products Council (May 19, 2016), http://www.personalcarecouncil.org/member-benefits (emphasis added) (attached as Exhibit 1).

Mr. Pollak even admits that instead of advocating on issues of *public interest*, PCPC advocates "on issues of *interest to some or all of its members.*" *Id.* at ¶ 10 (emphasis added). On its website, PCPC advertises that it "represents the industry at the federal, state, and local level on issues of *interest to the cosmetic and personal care industry.*" *Legislative Advocacy*, Personal Care Products Council (May 18, 2016), http://www.personalcarecouncil.org/legislation-regulation/legislative-advocacy (attached as Exhibit 2). Although Mr. Pollak states that these issues of interest to its members "*may* involve issues of health, safety, and/or products[,]" it is clear that the private, commercial interests of its members *primarily* drove PCPC's actions alleged in Ms. Simpson's Complaint. *Id.* (emphasis added).

PCPC makes the spurious claim that it advocated only "on an issue of public interest, the safety of talc." Def.'s Mem. at 5. But in reality, PCPC advocated on an issue of private, commercial "interest to some of all of its members"—the defense of Talc used in Products manufactured or supplied by its members.

Because PCPC advocated on issues of private, commercial interests instead of interests of the public, PCPC has failed to establish a prima facie case under this element. Therefore, the Court should deny its Special Motion to Dismiss.

3. The legislative history confirms Ms. Simpson's position that PCPC is not entitled to the protection of the Act.

Other than the clear statutory language and statements made by PCPC, the legislative history confirms that PCPC is not entitled to the protection of the Act. In discussing the Anti-SLAPP Act, the D.C. Council Committee on Public Safety and the Judiciary stated, "[t]he actions that typically draw a SLAPP are often, as the ACLU noted, the kind of grassroots

activism that should be hailed in our democracy." D.C. Council, Comm. on Pub. Safety & the Judiciary, Report on Bill 18-893, at 3 (Nov. 18, 2010) ("Comm. Report") (attached as Exhibit 3). Furthermore, an ACLU representative testified to the Committee that the plaintiff in these actions is "usually the side with deeper pockets and ready access to counsel." Comm. Report, Testimony of the American Civil Liberties Union of the Nation's Capital before the Comm. on Pub. Safety & the Judiciary, at 1 (Sept. 17, 2010).

Here, PCPC's alleged activities are the exact opposite of "grassroots activism"; rather, its activities were driven by the interests of its corporate members. As such, PCPC is certainly the "side with the deeper pockets and ready access to counsel." The D.C. Council never intended for the Anti-SLAPP Act to apply private, commercial activities and statements, and this Court should not extend the protection of the Act.

Additionally, the Committee Report to the Act cited a study that showed that "[t]he vast majority of the cases identified by the study were brought under legal charges of defamation (such as libel and slander), or as such business torts as interference with contract." Comm. Rep. at 2 (citing George W. Pring, *SLAPPS: Strategic Lawsuits against Public Participation*, Pace Env. L. Rev., Paper 132, 1 (1989)). Ms. Simpson has not brought any such claims against PCPC in this case.

4. Because PCPC failed to establish a prima facie case, the burden has not shifted to Ms. Simpson to prove the likelihood of her success on the merits.

Only if PCPC "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," would Ms. Simpson have to respond by demonstrating the likelihood of her success on the merits. D.C. Code Ann. § 5502(b). But PCPC has failed to meet its burden to establish a prima facie case because its statements and

actions alleged in the complaint all relate primarily to its private, commercial interests. Therefore, the burden has not shifted to Ms. Simpson.

Alternatively, should the Court find that PCPC made a prima facie showing, Ms. Simpson would be prejudiced without additional, limited discovery as provided under the Act. D.C. Code Ann. § 16-5502(c)(2). Currently, no documents been produced in this case. While documents has been exchanged in other similar cases, including a companion case filed in D.C. Superior Court the Honorable Brian Holeman, the documents have been produced under protective orders signed by all counsel. Significantly, the parties have not yet agreed to a protective order in this case.

Regardless, PCPC has failed in its Motion to make a prima facie showing under the Act, and Ms. Simpson does not have the burden to prove the likelihood of her success on the merits at this stage of the litigation.

II. Because PCPC's Special Motion to Dismiss is frivolous within the meaning of the Act, the Court should award Ms. Simpson the reasonable costs and attorneys' fees incurred by opposing the motion.

The Anti-SLAPP Act allows the Court to "award reasonable attorney fees and costs to the responding party if the court finds that a motion brought under § 16-5502 or § 16-5503 is frivolous or is solely intended to cause unnecessary delay." D.C. Code Ann. § 16-5504(b) (emphasis added). Ms. Simpson asserts that the motion is frivolous. In support of their Motion, PCPC concealed from the Court the most significant sentence of the statute: "The 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 commenting on or sharing information about a matter of public significance." D.C. Code Ann. §§ 16-5501(3), 16-5504(b) (emphasis added). Ms. Simpson has demonstrated that asserting the protection of the

Anti-SLAPP in this case is without merit and therefore frivolous. Accordingly, the Court should award Ms. Simpson the reasonable attorneys' fees and costs to compensate her for having to respond to this Motion.

CONCLUSION

The claims alleged against PCPC in Ms. Simpson's Complaint all clearly relate to PCPC's statements and actions on issues of private, commercial interest; not issues of public interest. Additionally, statements and actions between the Defendants (as opposed to the government or the public) at issue in the claims do not fall under the protection of the Act. As a result, PCPC has failed to make a prima facie showing, and its Special Motion to Dismiss should be denied.

RESPECTFULLY SUBMITTED,

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