**SUPERIOR COURT OF THE DISTRICT OF COLUMBIA**
**Civil Division**

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| **THE PRAXIS PROJECT, et al.,** | Case No. 2017 CA 004801 B |
| **Plaintiffs,** | |
| **v.** | Honorable Judge Elizabeth C. Wingo |
| **THE COCA-COLA COMPANY, et al.,** | Next Event: Motion Hearing<br>March 15, 2018 at 11:00 a.m. |
| **Defendants.** | |

**MEMORANDUM OF LAW IN SUPPORT OF COCA-COLA'S SPECIAL MOTION TO DISMISS PURSUANT TO DISTRICT OF COLUMBIA ANTI-SLAPP ACT, D.C. CODE § 16-5501 *ET SEQ.***


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## PRELIMINARY STATEMENT

This suit is an attempt to bar The Coca-Cola Company ("Coca-Cola") from participating in public discussion about obesity, diabetes and heart disease. As these conditions have increased in prevalence, a national debate—among scientists, policymakers and citizens—has ensued about the causes of that trend and strategies for reversing it. Some, including Plaintiffs, argue that sugar-sweetened beverages ("SSBs") are "uniquely" to blame for obesity. This viewpoint has led lawmakers at various levels to consider, and in some cases adopt, restrictions on the marketing and sale of SSBs, such as SSB-specific taxes and health warnings.

Others, such as Coca-Cola and the U.S. Food and Drug Administration ("FDA"), question the science underlying these initiatives. They maintain that numerous lifestyle factors contribute to obesity and that prevention depends on balancing overall calories consumed with those expended through physical activity. They credit the considerable scientific literature that shows that, to quote FDA, "sugar-sweetened beverages[] are no more likely to cause weight gain in adults than any other source of energy." 79 Fed. Reg. 11880, 11903-04 (Mar. 3, 2014). Coca-Cola therefore opposes, and FDA has thus far rejected, measures that would require SSBs to bear health warnings.

Plaintiffs argue that Coca-Cola's participation in this health policy debate—even in such non-commercial contexts as media interviews and scientific symposia—is unlawful under the District of Columbia Consumer Protection Procedures Act, D.C. Code § 28-3901 *et seq.* ("CPPA"). They assert that their ideology regarding SSBs and obesity reflects a "scientific consensus," and that statements contradicting this perspective should be outlawed. They thus ask this Court to enjoin Coca-Cola from making any statements, including ***truthful statements of fact***, that either contradict or "switch the focus" from their preferred theory.

As detailed in Coca-Cola's accompanying motion to dismiss under Super. Ct. Civ. R. 12(b)(6) and 12(b)(1), Plaintiffs' audacious request must be denied for multiple reasons, including that the First Amendment precludes their complaint in its entirety. But a subset of Plaintiffs' claims—those arising from Coca-Cola's statements to the media and at scientific conferences—is barred for an additional reason. The District of Columbia Anti-SLAPP[1] Act, D.C. Code § 16-5501 *et seq.*, was enacted to prevent lawsuits such as this, which seek "to muzzle speech or efforts to petition the government on issues of public interest." *See* Council of the District of Columbia, Report of Committee on Public Safety and the Judiciary on Bill 18-893 (Nov. 18, 2010) ("Committee Report") at 1. The statute embodies the bedrock principle that efforts to petition the government are entitled to absolute First Amendment protection.

The Anti-SLAPP Act thus permits the filing of a "special motion to dismiss" in any lawsuit that "aris[es] from an act in furtherance of the right of advocacy on issues of public interest." D.C. Code § 16-5502(a)-(b). Here, aside from the few that have appeared in Coca-Cola's advertising, all of the disputed statements fall within the class of "speech or efforts to petition the government" that the statute protects. *See* Committee Report at 1. Accordingly, to the extent the complaint arises from Coca-Cola's non-advertising statements, it should be dismissed pursuant to the Anti-SLAPP Act.

## BACKGROUND

### A. The Public Debate On SSBs

As set forth in Coca-Cola's companion motion, there is no "scientific consensus" supporting Plaintiffs' belief in a "unique" link between SSBs and obesity. (Compl. ¶¶ 36, 58) Even the studies Plaintiffs rely upon acknowledge that obesity is "a complex, systemic, multi-

[1] SLAPP stands for "Strategic Lawsuit Against Public Participation."

causal problem" and that "[t]he role of [SSBs] in promoting obesity is controversial." *See* Mot. to Dismiss at 5-6 (citing Compl. ¶¶ 50 n.19, 59 n.27).[2] Accordingly, while some scientists and policymakers share Plaintiffs' view, many do not.

This diversity of perspectives has led to a vibrant public debate about how communities can reduce the occurrence of obesity and related conditions. FDA, for example, has recognized that "[m]any factors contribute to weight gain and obesity," 79 Fed. Reg. 11880, 11903-04 (Mar. 3, 2014), and declined to adopt a rule that would single out products with added sugars for inclusion of "warning statements" concerning their purported "link[] to obesity, type [2] diabetes, [and] cardiovascular disease," 81 Fed. Reg. 33742, 33829 (May 27, 2016). Such a warning, in FDA's view, is "not consistent with [its] review of the evidence." *See id.* at 33830.

Some lawmakers, however, have been more receptive to Plaintiffs' view that SSB restrictions are an effective means of combating obesity. In recent years the U.S. Congress and state legislatures of California, Connecticut, New York, and Washington have all considered measures to deter SSB consumption, either by imposing a tax on SSBs or by requiring them to

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[2] *See also* Declaration of Jane Metcalf, Ex. 1, Ravi Dhingra et al., *Soft Drink Consumption and Risk of Developing Cardiometabolic Risk Factors and the Metabolic Syndrome in Middle-Aged Adults in the Community*, 116 CIRCULATION 480, 485 (2007) (cited in Compl. ¶ 49 n.18) (describing disagreement among researchers on whether "intake of sugar-sweetened beverages induces less compensation than intake of artificially sweetened soft drinks"); Ex. 2, Vasanti S. Malik et al., *Sugar Sweetened Beverages and Weight Gain in Children and Adults: A Systematic Review and Meta-Analysis*, 98 AM. J. CLINICAL NUTRITION 1084, 1084 (2013) (cited in Compl. ¶ 49 n.18) (observing that "the relation between consumption of sugar-sweetened beverages (SSBs) and body weight has become a matter of much public and scientific interest" and "controversy remains" over whether there is a causal link between SSBs and obesity because recent studies displayed "mixed" results); Ex. 3, Cara B. Ebbeling et al., *A Randomized Trial of Sugar-Sweetened Beverages and Adolescent Body Weight*, 367 NEW ENG. J. MED. 1407, 1408 (2012) (cited in Compl. ¶ 49 n.18) (explaining that results from randomized controlled trials on the effects of SSBs have "not been conclusive" and observing that "the use of public health measures to reduce the consumption of sugar-sweetened beverages remains controversial"); Ex. 4, Sonia Caprio, *Calories from Soft Drinks—Do They Matter?*, 367 NEW ENG. J. MED. 1462, 1462-63 (2012) (cited in Compl. ¶ 57 n.25) (describing evidence on the "hypothesis" that SSBs elicit a different response than other forms of sugar as "inconclusive").

bear health warnings.[3] And multiple municipalities, including Philadelphia, Pennsylvania and Berkeley, California, have actually imposed "soda taxes" on SSBs sold within their borders.[4]

The controversial nature of SSB restrictions has also led some lawmakers to pass these measures and then promptly withdraw them—in response to backlash from local businesses, challenges to the restrictions' legality, or both. For example, Cook County, Illinois imposed a tax on soft drinks in 2016, but recently yielded to pressure from retailers to repeal it.[5] In 2012, the New York City Board of Health promulgated a citywide ban on certain SSB serving sizes, only to have a group of labor unions and nonprofit organizations persuade New York's highest court that the measure exceeded the Board's authority. *See In re N.Y. Statewide Coalition of Hispanic Chambers of Commerce v. N.Y.C. Dep't of Health & Mental Hygiene*, 16 N.E.3d 538, 541 (N.Y. 2014). The New York City restriction generated intense public interest. The Board of

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[3] *See* Metcalf Decl., Ex. 5, Sugar-Sweetened Beverages Tax Act of 2015, H.R. 1687, 114th Cong. 1st Sess. (Mar. 26, 2015) (bill to impose a $0.01 tax per 4.2 grams of caloric sweetener on certain distributors of SSBs); *id.*, Ex. 6, Healthy California Fund, Assembl. 2782, 2015-2016 Sess. (Cal. Feb. 19, 2016) (bill to impose a $0.02 tax per fluid ounce on certain distributors of SSBs); *id.*, Ex. 7, An Act Imposing a Tax on Sugary Soft Drinks, Gen. Assembl. 5461, 2015 Sess. (Conn. Mar. 19, 2015) (bill to impose a $0.01 tax per ounce on carbonated beverages with any added caloric sweetener); *id.*, Ex. 8, An Act to Amend the Agriculture and Markets Law, In Relation to the Labeling of Sugar-Sweetened Beverages with Warnings, Assembl. AO2320B, 2015 Leg. Sess. (N.Y. Jan. 15, 2015); *id.*, Ex. 9, Concerning Mitigation of the Adverse Impacts of Sugar-Sweetened Beverages, H.R. HB 2798, 2016 Reg. Sess. (Wash. 2016).

[4] Metcalf Decl., Ex. 10, Julia Terruso, *Philly: Soda tax revenue to fall short*, THE INQUIRER (June 13, 2017), *available at* http://www.philly.com/philly/news/city-soda-tax-revenue-to-fall-short-20170613.html; *id.*, Ex. 11, Allison Aubrey, *How Did Berkeley Pass A Soda Tax? Bloomberg's Cash Didn't Hurt*, NATIONAL PUBLIC RADIO (Nov. 5, 2014), *available at* http://www.npr.org/sections/thesalt/2014/11/05/361793296/how-did-berkeley-pass-a-soda-tax-bloombergs-cash-didnt-hurt.

[5] Metcalf Decl., Ex. 12, Greg Trotter & Becky Yerak, *Cook County retailers cheer soda tax repeal: 'This was a nightmare'*, CHICAGO TRIB. (Oct. 11, 2017) *available at* http://www.chicagotribune.com/business/ct-biz-soda-tax-repeal-reaction-20171011-story.html; *id.*, Ex. 13, Hal Dardick & John Byrne, *Vote to repeal Cook County soda tax delayed a month, as ad campaigns continue*, CHICAGO TRIBUNE (Sept. 14, 2017), *available at* http://www.chicagotribune.com/news/local/politics/ct-cook-county-board-soda-pop-tax-met-0914-20170913-story.html.

Health received a "substantial number of comments," reflecting "a groundswell of public interest and concern." The Court of Appeals similarly received a wide array of amicus briefs, another "indication of the interest of the subject to diverse persons." *Id.* at 541, 543.

More recently, San Francisco passed an ordinance that would have required SSB advertisements in that city to feature "warnings" that SSBs "contribute[] to" obesity and diabetes. *American Bev. Ass'n v. City and County of San Francisco*, 2017 U.S. App. LEXIS 18150, at *4 (9th Cir. Sept. 19, 2017). But last month, the Ninth Circuit enjoined the ordinance from taking effect, holding that the American Beverage Association ("ABA"), Coca-Cola's co-defendant in this case, was likely to succeed on its First Amendment challenge to the law. The Ninth Circuit concluded that the ordinance unconstitutionally required SSB advertisers to disseminate a "controversial" scientific viewpoint despite ongoing "debate over whether [SSBs] pose unique health risks." *Id.* at *21-22.

As this narrative reflects, policy proposals to restrict SSBs have attracted considerable attention and generated vigorous debate over the past several years. This debate has occurred not only among legislators and administrative bodies, but also labor unions, retailers, trade associations, and private citizens. Accordingly, the question whether SSB consumption is a unique risk factor for obesity is not just an academic or medical issue, but a political one as well.

**B. Plaintiffs' Allegations About Coca-Cola's Participation in the Debate**

Although Plaintiffs present their complaint as one of "misleading advertising" (Compl. ¶ 1), in fact their claims arise primarily from Coca-Cola's contributions to this public discussion. Plaintiffs challenge the following statements that Coca-Cola has made in public fora about the causes of obesity and limited science supporting SSB restrictions.

- Plaintiffs cite various statements that Coca-Cola executive Katie Bayne made to *USA Today* in 2012, including that "our drinks offer . . . hydration" and "[t]here is

no scientific evidence that connects sugary beverages to obesity." (Compl. ¶¶ 75, 130; *see also* Metcalf Decl., Exs. 14-15) Ms. Bayne gave the interview to provide Coca-Cola's perspective on the proposed SSB restriction in New York City. During the interview she was asked, *inter alia*, what she "would say to [New York City] Mayor Bloomberg if he were sitting across from [her]." (*Id.*, Ex. 15) The article containing Ms. Bayne's remarks began "Sorry Mayor Bloomberg, but the folks at Coca-Cola say you've got your facts fizzy." (*Id.*, Ex. 14)

- Plaintiffs claim that Coca-Cola CEO James Quincey has "joined the campaign of deception" by asserting, in a 2013 interview with CNN, that "[a] calorie is a calorie." (Compl. ¶ 77) Mr. Quincey made this remark in response to a reporter's questioning about Coca-Cola's efforts to "take the front foot in the world's fight against obesity." (Metcalf Decl., Ex. 20, 21 at 2:1-7, 5:5-13) In the same interview, Mr. Quincey referenced Coca-Cola's "belie[f] that businesses need to exert leadership and always engage with government and society [o]n the big issues of the day." (*Id.*, Ex. 20, Ex. 21 at 6:2-6)

- Plaintiffs object to a 2013 statement of Dr. Rhona Applebaum, then-Chief Science and Health Officer at Coca-Cola, that Coke is "safe, it hydrates, it's enjoyable." (Compl. ¶ 131) Dr. Applebaum made this comment during a one-hour speech at a symposium sponsored by the Canadian Obesity Network that explored the causes and prevention of obesity. (Metcalf Decl., Ex. 16, Ex. 17 at 4:17-25)

- Plaintiffs take issue with a 1998 statement to a Brazilian newspaper, attributed to then-CEO Douglas Ivester, that "Coca-Cola is an excellent complement to the habits of a healthy life." (Compl. ¶ 76, Metcalf Decl., Ex. 22)

Each of these statements reflects Coca-Cola's contributions to a public policy debate.[6] By expressing its views in the media and other public platforms, Coca-Cola encourages informed nutritional choices and critical evaluation of the science purportedly supporting SSB restrictions.

Plaintiffs' attempts to classify these statements as "false advertising" are misguided—

[6] The complaint also alleges that Coca-Cola violated the CPPA by expressing its views about nutrition and obesity in television ads. (Compl. ¶¶ 109-117) Those commercials are not the subject of this Special Motion to Dismiss. Notably, however, Plaintiffs' counsel, the Center for Science in the Public Interest ("CSPI"), has stated that these ads are also part of Coca-Cola's contributions to public policy debate. In 2013, CSPI asserted in its newsletter that Coca-Cola's "Coming Together" commercial, which Plaintiffs challenge here, represented an effort to "forestall sensible policy approaches to reducing sugary drink consumption, including taxes, further exclusion from public facilities, and caps on serving sizes such as the measure proposed by [New York City] Mayor Bloomberg." Metcalf Decl., Ex. 23, CSPI on New Coca-Cola Advertising Campaign & Obesity (Jan. 14, 2013), *available at* https://cspinet.org/new/201301142.html.

particularly since, in an earlier complaint, they described the same statements as part and parcel of Coca-Cola's political opposition to SSB restrictions. Prior to filing their complaint in this Court, Plaintiff The Praxis Project ("Praxis"), a nonprofit organization allegedly devoted to "build[ing] healthier communities" (Compl. ¶ 23), filed a similar action in the United States District Court for the Northern District of California. *See* Metcalf Decl., Ex. 24 ("Praxis I Complaint"). There, Praxis took issue with many of the statements listed above, including Ms. Bayne's statement to *USA Today* and Dr. Applebaum's remarks at the Canadian obesity symposium. (Praxis I Compl. ¶¶ 51-53, 101) In that pleading, Praxis explicitly recognized that these comments were intended to influence legislative outcomes, alleging that "[a] ***primary purpose*** of these [statements] is . . . to thwart and delay efforts of government entities to regulate [SSBs] through warning labels, taxes, and other measures." (Praxis I Compl. ¶ 8 (emphasis added)); *see also id.* ¶ 42 (alleging that Coca-Cola directed its statements at "city, county, and state regulators . . . [who] were openly discussing a variety of measures intended to address the epidemics of obesity, diabetes, and cardiovascular disease").)

Shortly after filing the California case, Praxis abruptly withdrew it, only to resurface several months later with this one. Along with its co-plaintiffs Pastors William H. Lamar IV and Delman L. Coates—who allege that they have been forced to spend too much time counseling congregants affected by obesity—Praxis claims that Coca-Cola violated the CPPA by expressing its views on these issues. This time, Praxis has scrubbed its complaint of explicit acknowledgments that the statements constituted petitioning activity, apparently having realized that such conduct is protected by the First Amendment. But Praxis still alleges that Coca-Cola's public statements have "forced" it to "expend resources attempting to educate . . . policy-makers about the inaccuracy of Defendants' messages," and to engage in SSB "advocacy" including

"meetings with policy makers in various local and state regulatory bodies." (Compl. ¶¶ 160, 164) As these allegations reflect, Coca-Cola's statements are part of the ongoing legislative and policy debate over the science of SSBs and the wisdom of SSB restrictions. They are accordingly protected by the First Amendment, and Plaintiffs' attack on them is subject to dismissal under the Anti-SLAPP Act.

**ARGUMENT**

Public speech in furtherance of a legislative outcome is absolutely privileged under the First Amendment. The Anti-SLAPP Act prohibits use of the courts as retribution for statements made in connection with an "issue under consideration or review by a legislative, executive, or judicial body," or any "issue of public interest." D.C. Code 16-5501(1)(A)-(B). The Act provides defendants with a means to "expeditiously and economically dispose of" lawsuits arising from such statements by, among other things: (1) imposing an automatic stay of discovery upon the filing of a special motion; (2) requiring plaintiffs to make a prompt evidentiary showing of "likely . . . succe[ss] on the merits"; and (3) awarding attorneys' fees to successful Anti-SLAPP movants. Committee Report at 4; D.C. Code §§ 15-5504; 16-5502(b)-(c). Although the Court may consider materials outside the pleadings on an Anti-SLAPP special motion, and the plaintiff is *required* to make an evidentiary showing in order to withstand dismissal, there is no "corresponding evidentiary demand on the defendant who invokes the Act's protection." *Competitive Enter. Inst. v. Mann*, 150 A.3d 1213, 1237 (D.C. 2016).

The statements Plaintiffs challenge here fall squarely within the class of "speech or efforts to petition the government" the statute protects. Moreover, because their claims are constitutionally and statutorily barred, Plaintiffs necessarily cannot make the showing of likely success on the merits required to defeat an Anti-SLAPP motion. Accordingly, to the extent their

complaint arises from Coca-Cola's non-advertising statements, it should be dismissed pursuant to the Anti-SLAPP Act.[7]

## I. PLAINTIFF'S CLAIMS ARE BARRED BY THE ANTI-SLAPP ACT

### A. The Challenged Statements Are Protected By the First Amendment

A statement made in connection with an effort to "persuade the legislature or the executive to take particular action" is absolutely privileged under the First Amendment. *E.R.R. Pres. Conference v. Noerr Motor Freight*, 365 U.S. 127, 136 (1961). This principle, known as the *Noerr-Pennington* doctrine, encompasses not only statements made directly to government authorities, but also those made in connection with a "publicity campaign to influence governmental action." *Id.* at 140. In *Noerr*, for instance, the Supreme Court held that the First Amendment protected the defendant railroads' efforts to encourage stricter government oversight of the trucking industry by "conduct[ing] a publicity campaign against the truckers. . . [and] creat[ing] an atmosphere of distaste for the truckers among the general public." *Id.* at 129; *see also Feld Entm't, Inc. v. ASPCA*, 873 F. Supp. 2d 288, 307-08 (D.D.C. 2012) (*Noerr-Pennington* applicable to "participat[ion] in press conferences[,] . . . statements to news outlets, and . . . letters [to] organizational websites," where those activities "were part of a publicity campaign to influence government action.") (internal quotation marks and alteration omitted).

Although the doctrine originated as a limitation on Sherman Act liability, it operates as a bar to any private claim that would curtail a defendant's right to petition the government. *See, e.g., Sliding Door Co. v. KLS Doors*, 2013 U.S. Dist. LEXIS 71304, at *23-24 (C.D. Cal. May 1,

[7] Although no District court has considered a SLAPP motion directed at some, but not all, allegations of a complaint, the California Supreme Court has permitted such motions when applying that state's similar statute. *See Baral v. Schnitt*, 376 P.3d 604, 614-15 (Cal. 2016) (holding that application of California's analogous statute does not "turn on how the challenged pleading is organized" and rejecting argument that plaintiffs may "escape[]"an Anti-SLAPP motion simply by including allegations arising from conduct outside the scope of the statute).

2013) (false advertising and unfair-competition claims "barred by the *Noerr-Pennington* doctrine"); *Brownsville Golden Age Nursing Home, Inc. v. Wells*, 839 F.2d 155, 160 (3d Cir. 1988) (same for tortious-interference claims).

The absolute protection afforded by *Noerr-Pennington* extends even to statements that are intentionally false when made. Indeed, the Supreme Court in *Noerr* applied the protection to the defendants' efforts to "deliberately deceive[] the public and public officials," through "manufacture of bogus sources of reference [and] distortion of public sources of information." *Noerr*, 365 U.S. at 140, 145. The Court has since reiterated that "[a] publicity campaign directed at the general public" enjoys *Noerr-Pennington* protection "even when the campaign employs unethical and deceptive methods." *Allied Tube & Conduit Corp. v. Indian Head*, 486 U.S. 492, 499-500 (1988).[8]

Coca-Cola's public contributions to a scientific and policy debate cannot be proven "false," let alone deliberately so. But they enjoy absolute First Amendment protection in any event, because they were part of a "publicity campaign to influence governmental action" by opposing SSB restrictions. *Noerr*, 365 U.S. at 140. Indeed, Ms. Bayne's 2012 remarks to *USA Today*, in which she discussed the SSB restriction then under consideration in New York City, were explicitly associated with that campaign. *See* Metcalf Decl., Exs. 14-15. Mr. Quincey, when making the challenged remarks to CNN, likewise emphasized Coca-Cola's global efforts

[8] In *Philip Morris v. United States*, 566 F.3d 1095, 1123 (D.C. Cir. 2009), the D.C. Circuit concluded that "the [*Noerr-Pennington*] doctrine does not protect deliberately false or misleading statements." Although, as noted above, Plaintiffs do not plausibly allege that the challenged statements were false or misleading—let alone deliberately so—the statements would be protected even if Plaintiffs had so alleged. The D.C. Circuit's contrary conclusion in *Philip Morris* is irreconcilable with Supreme Court precedent expressly extending the protection to "deceptive" and "bogus" statements. *Noerr*, 365 U.S. at 140; *Allied Tube*, 486 U.S. at 499; *see also Feld Entm't*, 873 F. Supp. 2d at 307-08 (applying doctrine to "false or misleading statements" made "as part of publicity campaign[] to influence governmental action") (internal quotation marks and alteration omitted).

to "engage with government and society" in fighting obesity. (*Id.*, Ex. 20, Ex. 21 at 6:2-6) And all of Coca-Cola's critiques of the core theory underlying SSB restrictions—that SSBs are "uniquely" to blame for obesity—were essential to its efforts to influence legislative action, as Praxis acknowledged in its earlier complaint. Its public statements on this issue are thus entitled to *Noerr-Pennington* protection.

**B. The Challenged Statements Fall Within the Scope of the Statute**

Because lawsuits directed at petitioning activity are inimical to First Amendment values, the Anti-SLAPP Act provides for prompt dismissal of any suit "arising from an act in furtherance of the right of advocacy on issues of public interest." D.C. Code § 16-5502(a). Such an act includes any 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." *Id.* § 16-5501(1)(A)(i). It further encompasses ***all*** public statements made "[i]n a place open to the public or a public forum . . . in connection with an issue of public interest." *Id.* § 16-5501(1)(A)(ii). Issues of public interest include, *inter alia*, those related to "health or safety," "community well-being," or "a good . . . in the market place." *Id.* § 16-5501(3).

Coca-Cola's statements easily fall within these parameters. As set forth above, over the past decade lawmakers across the nation have considered, debated, and sometimes adopted SSB restrictions. These deliberations have generated intense public scrutiny. Private citizens and interest groups have grappled with the economic effects of SSB restrictions, their encroachment on individual freedoms, and the limited scientific evidence that they will appreciably reduce obesity. Coca-Cola's public remarks on that question thus pertain to "an issue . . . under consideration" by legislative bodies throughout the United States. *Id.* § 16-5501(1)(A)(i).

Coca-Cola's statements also trigger the Anti-SLAPP Act for the independent reason that they relate to "an issue of public interest," which expressly includes issues related to "health or safety." *Id.*. §§ 16-5501(1)(B), 16-5501(3). The question of how individuals can best maintain a healthy weight is among the most widely discussed topics of our time. *Id.* Coca-Cola's public discussion of that question would thus fall within the reach of the Anti-SLAPP Act even absent its clear connection to Coca-Cola's legislative goals.

That Coca-Cola's speech on this topic may have indirectly served its commercial interests does not preclude invocation of the Anti-SLAPP Act. The statute embraces ***all*** statements about "issue[s] . . . under consideration" by legislative bodies—even commercially motivated ones—unless those statements are "made for the purpose of promoting . . . commercial transactions" to an "intended audience" of "actual or potential buyer[s]." *Id.* § 16-5505. The challenged statements here, which do not even mention the purchase of any Coca-Cola products and were made in the non-commercial settings of media interviews and scientific conferences, satisfy neither criterion.

Although the statute's protection of statements on "issue[s] of public interest" excludes those "directed ***primarily*** toward protecting the speaker's commercial interests," *id.* § 16-5501(3) (emphasis added), this Court need not reach the question whether that exclusion applies, because the statements' relevance to issues "under consideration" by legislative bodies independently qualifies them for Anti-SLAPP protection. But the exclusion does not apply in any event. D.C. courts have held that an interested party's statements regarding "the safety of [a product category] in general," as opposed to representations regarding a particular product, are not "directed primarily" toward the speaker's commercial interests. Metcalf Decl., Ex. 25, *Simpson v. Johnson & Johnson*, No. 2016 CA 1931 B, Tr. of Oral Ruling at 39:18-21 (Jan. 13, 2017); *see*

*also Farah v. Esquire Magazine, Inc.*, 863 F. Supp. 2d 29, 38-39 (D.D.C. 2012), aff'd, 736 F.3d 528 (D.C. Cir. 2013) (statements disparaging thesis of a competitor's book constituted statements on "issue of public interest" despite potential for commercial benefit to speaker). The challenged statements are thus protected under the Anti-SLAPP Act both because of their pertinence to legislative debate and because of their connection to issues of public interest.

### C. Plaintiffs Cannot Demonstrate That Their Claim Is Likely to Succeed

Upon a prima facie showing that the Anti-SLAPP Act applies, the defendant is entitled to dismissal with prejudice "unless the [plaintiff] demonstrates that the claim is likely to succeed on the merits." D.C. Code § 16-5502(b). Unlike a Rule 12(b)(6) motion to dismiss, this showing "requires more than mere reliance on allegations in the complaint, and mandates the production or proffer of evidence that supports the claim." *Mann*, 150 A.3d at 1233. In other words, the Anti-SLAPP Act "up[s] the ante" by requiring the Plaintiffs to put forward *evidence*, not just allegations, at an early stage of the litigation. *Id.* at 1238.

As set forth in Coca-Cola's accompanying motion, Plaintiffs cannot even satisfy the more lenient standards of Rule 12(b), for three primary reasons. *First*, all of the statements that Plaintiffs challenge are protected by the First Amendment. *See* Mot. to Dismiss at 11-17.

*Second*, Plaintiffs lack standing to sue in this Court because they have not alleged that they suffered "injury-in-fact" as a result of Coca-Cola's alleged misconduct. *Grayson v. AT&T Corp.*, 15 A.3d 219, 225 (D.C. 2011). They do not allege that they were deceived by Coca-Cola's purported misstatements or even that they consumed Coca-Cola products. Rather, they premise standing on their "exposure" to Coca-Cola's conduct and their belief that Coca-Cola's statements hindered their efforts to disseminate their own views about obesity among their constituencies. Neither of these constitutes an "injury-in fact" sufficient to confer standing. *See*

Mot. to Dismiss at 17-26.

*Third*, Plaintiffs' allegations are insufficient to state a claim under the CPPA for several reasons, including that they are time-barred and involve conduct beyond the geographical reach of the statute. *See* Mot. to Dismiss at 26-30.

These deficiencies defeat Plaintiffs' claims even when all of their allegations are presumed to be true, as Rule 12(b) requires. It follows *a fortiori* that they cannot meet the more demanding standard of the Anti-SLAPP Act, which requires an evidentiary showing of likelihood of success on the merits. Accordingly, Plaintiffs' claims based on Coca-Cola's non-advertising statements should be dismissed under the Anti-SLAPP Act as well as Rule 12(b).

## II. COCA-COLA IS ENTITLED TO OTHER RELIEF

In addition to providing for dismissal of SLAPP suits, the Anti-SLAPP Act confers certain procedural benefits on SLAPP defendants. Upon the filing of an Anti-SLAPP special motion such as this, "discovery proceedings on the claim shall be stayed until the motion has been disposed of." D.C. Code § 16-5502(c)(1). Although a limited exception exists "[w]hen it appears likely that targeted discovery will enable the plaintiff to defeat the motion and . . . discovery will not be unduly burdensome," *see id.* § 16-5502(c)(2), that is not the case here. It is apparent from Plaintiffs' allegations that they fall within the purview of the Anti-SLAPP Act and that, even if true, they are insufficient to state a claim. Coca-Cola should not be subject to the burdens of discovery (much less costly electronic discovery, as Plaintiffs' counsel suggested at the October 20, 2017 status conference) under these circumstances.

The Anti-SLAPP Act also entitles Coca-Cola to "an expedited hearing on the special motion to dismiss," a ruling "as soon as practicable after the hearing," dismissal with prejudice, and "the costs of litigation, including reasonable attorney fees." *Id.* §§ 16-5502(d), 16-5504(a).

The Court has set a hearing date of March 15, 2018 on defendants' various motions to dismiss. Coca-Cola reserves the right to seek attorneys' fees should it prevail on this motion.

## CONCLUSION

Over the past decade, lawmakers, public health officials and citizens have vigorously debated the effectiveness of SSB restrictions in reducing the occurrence of obesity and related conditions. Coca-Cola has participated in this debate, arguing in media outlets and at scientific symposia that such measures have negligible scientific support.

Plaintiffs are free to disagree with these arguments, but they may not use the courts to silence Coca-Cola's views altogether. The First Amendment guarantees Coca-Cola the right to express its opinions in public debate, and the D.C. Anti-SLAPP Act protects its right to do so without the interference and expense of meritless lawsuits such as this one. The Court should grant this motion and dismiss Plaintiffs' claims under the Anti-SLAPP Act to the extent they arise from Coca-Cola's non-advertising statements.

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Respectfully submitted,

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