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SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
Civil Division

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 March 15, 2018 at 11:00 a.m.
Defendants.	

REPLY MEMORANDUM OF LAW IN FURTHER 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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Plaintiffs do not dispute that the statements at issue in this Special Motion were made in the context of a national legislative debate over SSB restrictions. Nor do Plaintiffs deny that they seek to bar Coca-Cola from mounting any further defense of its products' health or safety in connection with that ongoing discussion. They claim, however, that the "commercial motivations" that animate Coca-Cola's speech on this subject render its statements ineligible for protection under the Anti-SLAPP Act.

Plaintiffs are incorrect. Although the Act carves out from its protections ***some*** statements motivated by commercial interests, that exception does not apply to speech such as Coca-Cola's, which pertains to issues of live legislative debate. Such statements are also entitled to immunity under the *Noerr-Pennington* doctrine, a showing Plaintiffs have failed to rebut. Coca-Cola's Special Motion to Dismiss should be granted.

I. COCA-COLA'S STATEMENTS ARE PROTECTED BY *NOERR-PENNINGTON*

The *Noerr-Pennington* doctrine affords absolute First Amendment protection to "publicity campaign[s] to influence governmental action." *E.R.R. Presidents Conference v. Noerr Motor Freight, Inc.* 365 U.S. 127, 140 (1961); *see also Feld Entm't, Inc. v. ASPCA*, 873 F. Supp. 2d 288, 307-08 (D.D.C. 2012) (extending protection to "participat[ion] in press conferences" and "statements to news outlets"). Plaintiffs do not dispute that the statements at issue here were made in the course of such a "campaign." Indeed, they previously admitted that influencing governmental action was Coca-Cola's "primary purpose" (*see* Coca-Cola Mov. Br. 7 (citing *Praxis I* complaint)), and now concede that proposed restrictions on SSBs are "the subject of legislative consideration across the country." (Opp. 8)

Plaintiffs nevertheless contend that Coca-Cola's speech is *not* entitled to *Noerr-Pennington* protection because, under *United States v. Philip Morris*, 566 F.3d 1095, 1131 (D.C.

Cir. 2009), that doctrine supposedly does not cover "intentionally fraudulent" statements.[1] (Mot. to Dismiss Opp. 14 n.17) Even if that assertion were correct as a matter of law, Plaintiffs have not plausibly alleged that the statements were "fraudulent." Moreover, the *Philip Morris* court's holding was irreconcilable with *Noerr*, in which the Supreme Court extended protection to efforts to "deliberately deceive[] the public and public officials." *Noerr*, 365 U.S. at 140, 145. Plaintiffs' contention that Coca-Cola forfeited its *Noerr-Pennington* privilege through "intentionally fraudulent" speech is thus neither legally sound nor supported by their allegations.

II. COCA-COLA'S LEGISLATIVE ADVOCACY IS PROTECTED EVEN IF "DIRECTED PRIMARILY" TOWARD ITS PRIVATE INTERESTS

Though they do not dispute that statements made "[i]n connection with an issue under consideration or review by a legislative . . . body" presumptively fall within the Anti-SLAPP Act, Plaintiffs claim that the speech at issue is disqualified from protection by the limited exception for statements directed to "private interests." That exclusion, however, does not apply here. The statute protects "acts in furtherance of the right of advocacy on issues of public interest," defined in §§ 16-5501(1) and (3) as follows:

> [(1)] (A) ***Any*** written or oral statement made:
>
> > (i) ***In connection with an issue under consideration or review*** by a legislative, executive, or judicial body, or any other official proceeding authorized by law; or
> >
> > (ii) In a place open to the public or a public forum in connection with ***an issue of public interest***; or
>
> (B) Any 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***.

[1] Plaintiffs insist that Coca-Cola's *Noerr-Pennington* doctrine argument "belongs" in its motion to dismiss, rather than its Anti-SLAPP motion, because the scope of protected activity under the Act is "narrower" than that protected by the First Amendment. (Opp. 7) This question is academic: whether Coca-Cola's public advocacy statements are privileged under the First Amendment, the Anti-SLAPP Act, or both, Plaintiffs' complaint must be dismissed.

> (3) . . . 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.

D.C. Code § 16-5501 (emphases added). Thus, ***any*** statement made in connection with an issue under legislative consideration is *per se* "in furtherance of the right of advocacy on issues of public interest" under paragraph (1)(A)(i), regardless of whether it also satisfies paragraphs (1)(A)(ii) or (B).

Not only is this clear from the text of the statute, but it makes intuitive sense. Every issue "under consideration" by a legislative body is by definition one of public interest. The same cannot be said, however, of every topic discussed "[i]n a place open to the public." Discussions in the latter category are entitled to protection only if they satisfy the alternative definition of "issues of public interest" set forth in § 16-5501(3) (*e.g.*, they concern "environmental, economic, or community well-being").

Indeed, though Plaintiffs accuse Coca-Cola of reading "key . . . provisions" out of the statute, it is their interpretation that renders the references to "issues of public interest" in § 16-5501(1)(A)(ii) and (B) surplusage. The Council's use of that phrase to limit some categories of protected speech, but not others, must be given effect. *Dean v. United States*, 556 U.S. 568, 573 (2009) (holding that when "[a legislature] includes particular language in one section of a statute but omits it in another section . . . it is generally presumed that [the legislature] acts intentionally."). Plaintiffs' interpretation would also render superfluous § 16-5505, the Act's narrow exception for statements made to "promot[e] sales": if ***all*** statements in a party's "private interests" were unprotected, there would be no need for that specific exception.

Plaintiffs argue that, because the Act generally protects "the right of advocacy on issues of public interest," no statement can qualify for its protection without fulfilling the "public

interest" criteria of § 16-5501(3). But that ignores the fact that the full phrase is expressly defined to include "any" statement made in connection with an issue under legislative consideration. § 16-5501(1)(A)(i). The Court need only apply that statutory definition to hold that Coca-Cola's speech is within the Act's scope. *See Stenberg v. Carhart*, 530 U.S. 914, 942 (2000) ("When a statute includes an explicit definition, [courts] must follow" it).[2]

III. COCA-COLA'S STATEMENTS WERE NOT IN FURTHERANCE OF A COMMERCIAL TRANSACTION

Plaintiffs also make a perfunctory argument that the statements fall into the statutory exception for "representation[s] of fact made for the purpose of promoting . . . sales," where the "intended audience is an actual or potential buyer." D.C. Code §16-5505. That contention is unavailing. The statements at a scientific symposium were not accessible to consumers, let alone "intended" for them. And as noted in Coca-Cola's reply in support of its motion to dismiss, the media interviews challenged Coca-Cola executives to respond to pointed criticisms. If Coca-Cola's aim was to promote sales to consumers, these were peculiar platforms for doing so.

Plaintiffs suggest that this exception applies because the statements included references to Coca-Cola SSBs. (Opp. 11) But that was not because the statements' purpose was to "promot[e] sales"; it was because SSBs are what the underlying legislative debate is about. In any event, Plaintiffs' assertion has no basis in the text of the exception, which encompasses only promotions of sales to consumers, not all references to a speaker's goods. Coca-Cola has established its *prima facie* entitlement to dismissal under the Act.

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[2] The lone case relied upon by Plaintiffs, *Doe No. 1 v. Burke*, 91 A.3d 1031, 1040 & n.13 (D.C. 2014), contains no discussion of the question whether the "private interest" exception applies to conduct covered by § 16-5501(1)(A)(i), because the Anti-SLAPP movant in that case did not contend that his speech was protected by that provision. Instead he agreed that, in the circumstances presented, he was required to establish that the speech addressed an "issue of public interest," and the only question before the court was whether he had done so.

IV. PLAINTIFFS ARE NOT LIKELY TO SUCCEED ON THE MERITS

Finally, Plaintiffs assert that they can overcome Coca-Cola's *prima facie* showing by "demonstrat[ing] that [their underlying claim] is likely to succeed on the merits." D.C. Code §16-5502(b). That standard requires them to "proffer[] [evidence]" from which a jury "could reasonably find that the claim is supported." *Competitive Enter. Inst. v. Mann*, 150 A.3d 1213, 1232 (D.C. 2016). Here, the sole evidence Plaintiffs put forward is the opinion of Dr. Walter Willett that SSBs are "unequivocally" linked to obesity and that "[Coca-Cola's] advertising claims" are "misleading and obfuscatory." (Willett Decl. ¶¶ 7, 28, 33)

This lone opinion is insufficient for several reasons. *First*, Coca-Cola's "advertising claims" are not at issue in this motion—its advocacy on legislative initiatives is. *Second*, to the extent Dr. Willett contends that Coca-Cola's noncommercial statements are somehow misleading (and they are not), that opinion cannot change the fact that they are protected by the First Amendment. Finally, Dr. Willett's opinions have been rejected by a panel of the Ninth Circuit, in a case involving an ordinance requiring "warnings" in SSB ads. *See Am. Bev. Ass'n v. City and Cnty. of San Francisco*, 871 F.3d 884, 895 (9th Cir. 2017) (reh'g granted, 2018 U.S. App. LEXIS 2194 (9th Cir. 2018)). The panel declined to credit Dr. Willett's opinion that a "clear scientific consensus [holds] that [SSBs] contribute to obesity and diabetes," and concluded that this assertion was "deceptive in light of the current state of research." *Id.* at 887, 895.

CONCLUSION

Plaintiffs' lawsuit is an attempt to stifle Coca-Cola's speech on issues of legislative debate. The Anti-SLAPP Act provides for prompt dismissal of claims that seek to punish such an exercise of a "right of advocacy." Coca-Cola's Special Motion should be granted.

Dated: February 28, 2018

Respectfully submitted,

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