IN THE SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
CIVIL DIVISION

PASTOR WILLIAM H. LAMAR IV, PASTOR DELMAN L. COATES, and THE PRAXIS PROJECT, on behalf of themselves and the general public, Plaintiffs, v. THE COCA-COLA COMPANY, and the AMERICAN BEVERAGE ASSOCIATION, Defendants.	Case No. 2017 CA 004801 B Honorable Judge Elizabeth C. Wingo Next Event: Motions Hearing March 15, 2018 at 11:00 AM

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

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INTRODUCTION

Both Plaintiffs and the American Beverage Association (the "ABA") are active participants in the ongoing debate over the relationship between beverages with added sugar and health. Plaintiffs believe that drinking such beverages is uniquely harmful and increases a consumer's health risks regardless of her overall diet and physical activity. *See, e.g.*, Compl. ¶¶ 41-65, Dkt. No. 1. The ABA disagrees. And as explained in the ABA's Rule 12(b)(6) Memorandum of Law, which is incorporated fully herein, many respected scientists and federal scientific and regulatory authorities—including the United States Food and Drug Administration ("FDA") and the Centers for Disease Control and Prevention ("CDC")—side with the ABA's view.

Plaintiffs of course are still entitled to their contrary view, and are entitled to engage on these issues in the court of public opinion. But Plaintiffs instead want this Court to stop the public debate altogether by enjoining the ABA from further participation. *See* Compl. at 39-40 (Prayer for Relief). Plaintiffs' attempt to muzzle the ABA is exactly the type of action that the District of Columbia Anti-SLAPP Act of 2010, D.C. Code §§ 16-5501 *et seq.*, is meant to deter and remedy: a strategic lawsuit against public participation ("SLAPP") "filed by one side of a political or public policy debate aimed to punish or prevent the expression of opposing points of view." *Competitive Enter. Inst. v. Mann*, 150 A.3d 1213, 1226 (D.C. 2016) (quoting D.C. Council, Report of the Committee on Public Safety and the Judiciary on Bill 18-893 (Nov. 18, 2010) ("Comm. Report"), at 1, Declaration of George C. Chipev ("Chipev Decl.") Ex. A).

The Anti-SLAPP Act is designed to ensure meritless suits filed to silence a defendant's speech on matters of public interest are subject to expedited dismissal before the plaintiff can impose substantial discovery costs and chill the speech at issue. Under the Anti-SLAPP Act, a claim that attacks "act[s] in furtherance of the right of advocacy on issues of public interest" must be dismissed unless the plaintiff can "demonstrate[] that the claim is likely to succeed on the

merits." D.C. Code § 16-5502(b). This Court should grant the ABA's special motion to dismiss because the ABA's speech on issues of public health is protected by the Anti-SLAPP Act, and Plaintiffs cannot show that their claim for relief under the D.C. Consumer Protection Procedures Act ("CPPA"), D.C. Code §§ 28-3901 *et seq.*, is likely to succeed on the merits for three independent reasons: (1) the ABA is not a proper defendant under the CPPA; (2) the ABA's speech is not actionable under the CPPA; and (3) Plaintiffs lack standing to bring this action.

BACKGROUND

A. The ABA Is A Nonprofit Trade Association That Neither Makes, Nor Sells, Nor Is Otherwise Involved In The Supply Chain For Beverages With Added Sugar

The ABA is a nonprofit, national trade association representing the non-alcoholic beverage industry, including hundreds of beverage producers, distributors, franchise companies, and support industries. *See* Declaration of Mark Hammond ("Hammond Decl.") ¶ 3; *see* Am. Beverage Ass'n, *Our Mission & History*, http://www.ameribev.org/about-us/our-mission-history/ (last visited October 20, 2017), Chipev Decl. Ex. E.[1] Its members bring to market beverages including carbonated soft drinks, bottled water, sports drinks, energy drinks, 100% juices, juice drinks, and ready-to-drink teas. Hammond Decl. ¶ 4. Unlike its members, the ABA itself does not make or sell beverages with added sugar, and it is not otherwise involved in the supply chain for such

[1] In deciding this motion, the Court may consider the facts alleged in the Complaint, documents incorporated by reference in the Complaint, and documents in the public record. *See* Rule 12(b)(6) Memorandum, at 4 n.2. The Court may also consider "evidence that has been produced or proffered in connection with the motion." *Mann*, 150 A.3d at 1232. Although the ABA, as a defendant, is not required to adduce evidence to support its arguments in support of dismissal under the Anti-SLAPP Act, this Court may consider the ABA's evidence, including affidavits, to determine whether it defeats Plaintiffs' case at this juncture as a matter of law. *See, e.g.*, Hrg. Tr. at 46:23-47:1, *Simpson v. Johnson & Johnson*, No. 2016 CA 1931 B (D.C. Super. Ct. Jan. 13, 2017) (hereinafter "*PCPC* Hrg. Tr."), Chipev Decl. Ex. B; *Traditional Cat Ass'n v. Gilbreath*, 13 Cal. Rptr. 3d 353, 357 (Cal. Ct. App. 2004) (considering defendant's evidence in support of motion to dismiss under California's Anti-SLAPP Act).

products (or any other products). *Id.* ¶ 5. As an *industrywide* trade association, moreover, the ABA does not promote the sale or use of any *particular* products. *Id.* No content on the ABA's website directs readers to purchase specific products or services, nor does the website provide any online functionality to facilitate the purchase of products or services from its member companies. *Id.* Plaintiffs do not allege otherwise. *See* Rule 12(b)(6) Memorandum, at 4-5.

B. The ABA Publicly Communicates Its Views About The Relationship Between Beverages With Added Sugar And Health

The ABA is an active participant in the ongoing public debate over the relationship between beverages with added sugar and health. Among other things, the ABA has developed and participated in initiatives including Clear on Calories, the School Beverage Guidelines, and the Balance Calories Initiative, to reduce calories consumed from beverages in the American diet; educate consumers about the calories contained in soft drinks; encourage families to balance what they "eat, drink, and do"; address the importance of staying hydrated; and highlight the need to offer meaningful solutions to problems such as childhood obesity.[2] The ABA utilizes different forms of media for its speech, including on its website, through press releases, and on public displays. *See, e.g.*, Compl. ¶¶ 104–07.

Plaintiffs claim that the ABA's speech violates the CPPA by "obscur[ing]" the link between the beverages and disease (*id.* ¶ 2) and distracting consumers from Plaintiffs' preferred views. In particular, Plaintiffs challenge three categories of statements made by the ABA: that (a)

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[2] Am. Beverage Ass'n, *Putting Calorie Info Up Front* http://www.balanceus.org/en/industry-efforts/putting-calorie-info-up-front/ (last visited Oct. 20, 2017), Chipev Decl. Ex. F; *Finding a Balance that Works for You*, http://www.balanceus.org/en/ (last visited Oct. 20, 2017), Chipev Decl. Ex. G; *Staying Hydrated With Bottled Water During Summer* (June 7, 2016), http://www.ameribev.org/education-resources/blog/post/staying-hydrated-with-bottled-water-during-summer/, Chipev Decl. Ex. H; *Meaningful Solutions to Complex Challenges* (Apr. 26, 2016), http://www.ameribev.org/education-resources/blog/post/meaningful-solutions-to-complex-challenges/, Chipev Decl. Ex. I.

calories from beverages with added sugar do not contribute to obesity-related chronic diseases differently from other sources of calories, Compl. ¶¶ 106, 169; (b) balancing calories in and calories out helps prevents obesity and related health risks, *id.* ¶ 114-15, 127; and (c) beverages with added sugar, like many other beverages, are a potential source of hydration, *id.* ¶¶ 129, 135-36; *see* Rule 12(b)(6) Memorandum, at 6. The ABA's stated views on these important public health issues are consistent with conclusions reached by the FDA and respected scientists upon whom the agency relied in reaching its conclusions. They are thus well within the mainstream of the ongoing debate over the relationship between beverages with added sugar and health.

First, the FDA agrees with the ABA that "added sugars, including sugar-sweetened beverages, are no more likely to cause weight gain in adults than any other source of energy." *See, e.g.*, 79 Fed. Reg. 11,880, 11,904 (Mar. 3, 2014); *see also* 81 Fed. Reg. 33,742, 33,829 (May 27, 2016) (rejecting proposal that products with added sugar carry a warning asserting they are "linked to obesity, Type II Diabetes, cardiovascular disease, [and other health risks]," because, *inter alia*, such a statement is "not consistent with [the FDA's] review of the evidence"). Other leading scientists, including the former longtime Chief Scientific Officer of the American Diabetes Association, concur that "[t]here is no scientific consensus that added sugar (including added sugar in beverages) plays a unique role in the development of obesity and diabetes." Expert Report of Dr. Richard Kahn at ¶ 14, *Am. Beverage Ass'n. v. City & Cty. of San Francisco*, No. 3:15-cv-03415-EMC (N.D. Cal. Jan. 12, 2016), ECF No. 50-24, Chipev Decl. Ex. C.

Second, the ABA's belief that consumption of beverages with added sugar can be balanced in a healthful way with physical activity and other dietary choices is consistent with prevailing nutrition science. *See* Rule 12(b)(6) Memorandum, at 8-9. The CDC has explained that "[w]eight management is all about balancing the number of calories you take in with the number your body

uses or 'burns off.'" Centers for Disease Control and Prevention, The Caloric Balance Equation (last updated Nov. 16, 2016), http://www.cdc.gov/healthyweight/calories/, Chipev Decl. Ex. J. For that reason, among others, the Ninth Circuit recently preliminarily enjoined a San Francisco ordinance requiring advertisements for beverages with added sugar to warn that "drinking beverages with added sugar contribute[s] to obesity, diabetes, and tooth decay"; the court agreed with the ABA that this warning would be "misleading" and "deceptive in light of the current state of research on this issue." *Am. Beverage Ass'n v. City & Cty. of San Francisco*, 871 F.3d 884, 888, 895 (9th Cir. 2017). As the court explained, even San Francisco's own experts "d[id] not directly challenge the conclusion of the [ABA's] expert that 'when consumed as part of a diet that balances caloric intake with energy output, consuming beverages with added sugar does not contribute to obesity or diabetes." *Id.* at 895; *see also* 81 Fed. Reg. at 33,829 ("[S]ome added sugars can be included as part of a *healthy* dietary pattern." (emphasis added)).

Third, the propositions that consuming beverages with added sugar contributes to hydration and that hydration is essential to human health are factually uncontroversial. *See, e.g.*, Amby Burfoot, *Milk and Other Surprising Ways to Stay Hydrated*, N.Y. Times, June 30, 2016, https://well.blogs.nytimes.com/2016/06/30/milk-and-other-surprising-ways-to-stay-hydrated/?_r=0, Chipev Decl. Ex. K; Rule 12(b)(6) Memorandum, at 9.

ARGUMENT

SLAPPs "masquerade as ordinary lawsuits, but a SLAPP plaintiff's true objective is to use litigation as a weapon to chill or silence speech." *Doe No. 1 v. Burke*, 91 A.3d 1031, 1033 (D.C. 2014) (internal quotation marks and citation omitted). That is Plaintiffs' goal here. Their Complaint strikes at the heart of speech the Anti-SLAPP Act protects, namely, statements by the ABA on its website, in press releases, and in other public forums about a topic of public interest—the relationship between beverages with added sugar and health. *See* D.C. Code § 16-5501(3).

This is not Plaintiffs' first attempt to silence the ABA from participating in the ongoing public debate on this issue. Earlier this year, Praxis filed an almost identical action in the U.S. District Court for the Northern District of California, seeking to enjoin the ABA from communicating its views. *See The Praxis Project v. The Coca-Cola Co. & Am. Beverage Ass'n*, No. 4:17-cv-00016 (N.D. Cal. Jan. 4, 2017). The ABA devoted substantial time, energy, and resources in preparations to defeat that suit. But shortly after the ABA informed Praxis that the ABA planned to file a special motion to dismiss under California's Anti-SLAPP law, Praxis abruptly withdrew its complaint—only to reemerge months later in this Court.

This kind of abusive serial litigation, which at its core is meant to harass and deter the exercise of the ABA's First Amendment rights, is exactly what the Anti-SLAPP Act is intended to address. *See, e.g.*, *Mann*, 150 A.3d at 1226 ("[T]he goal of a SLAPP 'is not to win the lawsuit but to punish the opponent and intimidate them into silence.'" (quoting Comm. Report, at 4)); *Rogers v. Home Shopping Network, Inc.*, 57 F. Supp. 2d 973, 974 (C.D. Cal. 1999) ("SLAPP suits are often brought for 'purely political purposes' ..., not to vindicate a legally cognizable right of the plaintiff.'" (citations omitted)); *Wilcox v. Superior Ct. (Peters)*, 27 Cal. App. 4th 809, 816 (Cal. Ct. App. 1994) ("[L]ack of merit is not of concern to the plaintiff because the plaintiff does not expect to succeed in the lawsuit, only to tie up the defendant's resources for a sufficient length of time to accomplish plaintiff's underlying objective. As long as the defendant is forced to devote its time, energy and financial resources to combating the lawsuit its ability to combat the plaintiff in the political arena is substantially diminished." (citations omitted)).

Plaintiffs are entitled to their views on the relationship between beverages with added sugar and health. But the ABA is equally entitled to hold and communicate its contrary views on this important public issue—particularly as the ABA's views are supported by the findings of federal

regulators and other respected scientists. Because this lawsuit triggers the Anti-SLAPP Act's protections and Plaintiffs cannot show a likelihood of success, this Court should reject Plaintiffs' meritless attempt to "punish the [ABA] and intimidat[e] [it] into silence," Comm. Report, at 4, and dismiss Plaintiffs' claim against the ABA with prejudice pursuant to D.C. Code § 16-5502(b).

I. THE ANTI-SLAPP ACT COMPELS THE DISMISSALL OF PLAINTIFFS' CLAIM

The Anti-SLAPP Act provides that "[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." D.C. Code § 16-5502(a). The Act establishes a two-step process. First, the moving party must make a prima facie showing that the claim "arise[s] from an act in furtherance of the right of advocacy on issues of public interest." *Id.* § 16-5502(b). The burden of proof to make this prima facie showing is "not onerous." *Doe No. 1*, 91 A.3d at 1043 (quoting *Little v. United States*, 613 A.2d 880, 885 (D.C. 1992)). Second, if the moving party meets that burden, the burden shifts to the non-moving party to establish that the claim is "likely to succeed on the merits." D.C. Code § 16-5502(b). This two-step analysis requires dismissal of Plaintiffs' claim.

A. Plaintiffs' Claim Arises From Speech Protected By The Anti-SLAPP Act

1. The ABA's Speech Is Protected Under D.C. Code § 16-5501(1)

The ABA's speech about the relationship between beverages with added sugar and health unquestionably constitutes an "act in furtherance of the right of advocacy on issues of public interest" protected by the Anti-SLAPP Act. The term "acts" is defined broadly to include (1) "[a]ny written or oral statement" made "[i]n 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), or (2) "[a]ny other expression or expressive conduct that involves ... communicating views to members of the public

in connection with an issue of public interest," *id.* § 16-5501(1)(B). The ABA's speech qualifies in both respects under any straightforward application of this definition.[3]

Courts consistently recognize that speech in the fora utilized by the ABA—including its website, press releases, and billboards, among other media—falls within the scope of the Anti-SLAPP Act. *See, e.g.*, *Mann*, 150 A.3d at 1227 (finding that Act applies "because the lawsuit is based on articles that appeared on [defendants'] websites that concern the debate over the existence and causes of global warming"); *Abbas v. Foreign Policy Grp.*, 975 F. Supp. 2d 1, 11 (D.D.C. 2013) (finding statement was "[i]n a place open to the public or a public forum," because "anyone with a working internet connection or access to one can view it"), *aff'd in part on other grounds*, 783 F.3d 1328 (D.C. Cir. 2015); *Farah v. Esquire Magazine, Inc.*, 863 F. Supp. 2d 29, 37, 38 (D.D.C. 2012) (applying Act to online blog post), *aff'd*, 728 F.3d 528 (D.C. Cir. 2013).

The ABA's speech in these public fora, moreover, easily qualify as statements on "issues of public interest." D.C. Code § 16-5501(3) defines an "issue of public interest" expansively to include any "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 ABA's speech about the relationship between beverages with added sugar and health or hydration,

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[3] An "act in furtherance of the right of advocacy on issues of public interest" also includes any 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 ABA's speech falls under this category as well to the extent Plaintiffs' claim encompasses statements the ABA has made related to enacted or pending legislation or regulations regarding beverages with added sugar. *See, e.g.*, Am. Beverage Ass'n, *The Evidence is Clear, Taxes Are Not the Solution to Obesity* (June 29, 2016), http://www.ameribev.org/education-resources/blog/post/the-evidence-is-clear-taxes-are-not-the-solution-to-obesity/, Chipev Decl. Ex. L; *Beverage Companies Respond to FDA Announcement on Nutrition Facts Panel* (May 20, 2016), http://www.ameribev.org/education-resources/blog/post/beverage-companies-respond-to-fda-announcement-on-nutrition-facts-panel/, Chipev Decl. Ex. M; *see also* The Coca-Cola Company's Special Motion to Dismiss, at Background § A (discussing public debate).

and the importance of balancing caloric intake with physical activity, *see* Compl. ¶¶ 103-07, relate directly to "health," "community well-being," and "good[s] ... in the market place." D.C. Code § 16-5501(3). Indeed, Plaintiffs' Complaint concedes that the ABA's representations concern "the characteristics of sugar-sweetened beverages and their effect on human health." Compl. ¶ 102. And the wealth of scientific research, articles, government advocacy, and rulemaking related to these issues attest to the substantial public interest in this subject matter. *See, e.g.*, *Farah*, 863 F. Supp. 2d at 36-37 (applying "public interest" definition according to its terms).

2. No Exception Withdraws The ABA's Speech From The Act's Protections

Plaintiffs may argue that the ABA's speech falls into one of the two exceptions to the Anti-SLAPP Act. Any such attempt should fail.

First, D.C. Code § 16-5505 provides that the Anti-SLAPP Act "shall not apply to any claim for relief brought *against a person primarily engaged in the business of selling or leasing goods or services*, if the statement or conduct from which the claim arises is: (1) [a] representation of fact made for the purpose of promoting, securing, or completing sales or leases of, or commercial transactions in, *the person's* goods or services; and (2) [t]he intended audience is an actual or potential buyer or customer" (emphasis added)). The ABA's speech does not fall within the scope of this exception, both because the ABA is a nonprofit trade association not primarily engaged in the business of selling or leasing consumer goods or services, and because the ABA's statements do not relate to *its* goods or services. *See, e.g.*, Hammond Decl. ¶ 5. This is indisputable, as the ABA does not sell or lease any consumer goods or services at all.[4] *See id.*

[4] The closest that Plaintiffs' Complaint comes to suggesting that the ABA is engaged in the sale of goods or services is a fly-by reference to a section of the ABA's homepage stating: "We are America's beverage companies.... We make American products," Compl. ¶ 96. In context, that

Second, Section 16-5501(3) excludes from the scope of "issue[s] of public interest" certain "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" (emphasis added). Although the ABA's *members* who make and sell products undeniably possess certain commercial interests, the ABA itself does not. Consequently, its speech is not—and cannot be—"directed primarily toward protecting [its own] commercial interests."

D.C. courts—like courts in other jurisdictions interpreting similar anti-SLAPP statutes—have consistently recognized that speech by a nonprofit trade association like the ABA addressing a category of products made by its members is not excluded from anti-SLAPP protection simply because its member entities have for-profit, commercial interests in those products. The Superior Court addressed this issue squarely in its oral ruling in *PCPC* (Chipev Decl. Ex. B), a case where the plaintiffs had argued that speech by a nonprofit trade association (the "Personal Care Products Council" or "PCPC") was designed to advance PCPC's "private interests and the commercial interests of [its] members." *See* Plaintiff's Statement of Points and Authorities in Opposition to Defendant Personal Care Products Council's Special Motion to Dismiss, *PCPC*, at 5 (filed May 19, 2016), Chipev Decl. Ex. D. Judge Demeo rejected that argument, holding that a nonprofit trade organization that "does not manufacture, design or sell any products ... does not have ... a commercial interest to protect." *PCPC* Hrg. Tr., at 39:22-24. In so holding, the court also "distinguish[ed] between when a trade association is promoting a specific product or the benefits of a specific product versus when a trade association is speaking more generally about products

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is obviously and only a description of the ABA's membership. Plaintiffs do not seriously allege that *the ABA itself* sells or leases goods or services or that the ABA's speech pertains to goods or services made or offered *by the ABA*.

and the health and safety of those products as opposed to a specific commercial product named." *Id.* It concluded that PCPC's speech "about the safety of talc in general" fit "squarely within the plain meaning of the statute of issues of public interest." *Id.* at 39-40; *see id.* (noting that "[t]he statute defines public interest to mean, an issue related to health or safety"); *see id.* (distinguishing "PCPC's own speech" from that of "profit-seeking corporations," like Johnson & Johnson, which were PCPC's members, and concluding that "PCPC's own speech is not commercial in nature"). For these reasons, the court held that PCPC's speech was not excluded by the commercial-interests exception from protection under the Anti-SLAPP Act.

The same considerations should produce the same outcome here. Like PCPC, the ABA does not "manufacture, design, or sell any product" and "[a]s a result [it] does not have ... a commercial interest to protect." *Id.* at 39:23-24. And like PCPC's speech, the challenged ABA statements are not designed or oriented towards the sale, marketing, or promotion of a specific product sold by a member entity—such as Sprite, Mountain Dew, or Dr Pepper—as opposed to general commentary about a category of products. Rather, just as the challenged PCPC statements addressed "the safety of talc in general," the challenged ABA statements broadly address "the link between sugar-sweetened beverages and obesity," Compl. ¶ 104; "discussions of high fructose corn syrup," *id.* at ¶ 105; whether beverages with added sugar contribute to weight gain or diabetes differently from other caloric sources, *id.* at ¶ 106-07; and whether drinking beverages with added sugar contributes to hydration, *id.* at ¶ 130. Thus, the ABA's challenged statements are well within what the plain language of the Anti-SLAPP Act defines to be an issue of public interest: an "issue related to health or safety" and an issue related to "a good, product, or service in the market place." D.C. Code § 16-5501(3). The commercial-interest exception is inapplicable to the ABA's speech

about the relationship of sugar-sweetened beverages to health, just as it was inapplicable to PCPC's speech about the safety of talc.[5]

The ABA thus amply satisfies the requisite showing that Plaintiffs' claim arises from the ABA's "act[s] in furtherance of the right of advocacy on issues of public interest."

B. Plaintiffs Cannot Establish Their Claim Is Likely To Succeed On The Merits

Because the ABA's speech is prima facie protected by the Anti-SLAPP Act, this special motion to dismiss must be granted unless Plaintiffs meet their burden to demonstrate that their CPPA claim is "likely to succeed on the merits." D.C. Code § 16-5502(b). This burden requires Plaintiffs "to present legally sufficient evidence substantiating the merits"; mere allegations are insufficient. *Mann*, 150 A.3d at 12337. For the reasons explained in greater detail in the ABA's Rule 12(b)(6) Memorandum and substantiated further by the Hammond Declaration submitted herewith, Plaintiffs cannot come close to meeting that burden for three independent reasons.

First, the ABA is not a proper defendant under the CPPA. It is settled law that only "merchants" can be held liable under the CPPA. *Howard v. Riggs Nat'l Bank*, 432 A.2d 701, 708-09 & n.9 (D.C. 1981). Because the ABA is not the actual seller of the beverages with added sugar about which Plaintiffs complain (or any other products) and the ABA is not otherwise "connected with the 'supply' side of a consumer transaction," *see* Hammond Decl. ¶ 5, the ABA is not a merchant within the scope of the CPPA. 432 A.2d at 708-09 & n.9; *see also* Rule 12(b)(6) Memorandum, at 10-13. In addition, the CPPA provides a right of action against a nonprofit only where the claim arises from the purchase or sale of the nonprofit's own consumer goods or services

[5] Plaintiffs' allegations that the ABA is "influenc[ed]" by or "functions in concert with" Coca-Cola, *e.g.*, Compl. ¶¶ 97, 99, should not affect this conclusion. The ABA is a distinct defendant in this suit, and its relationship with Coca-Cola is legally irrelevant to whether the ABA speech at issue here is protected by the Anti-SLAPP Act.

in the ordinary course of business. D.C. Code § 28-3901(a)(3); *see also id.* § 28-3905(k)(5) (dispute must arise from the purchase or sale of consumer goods in ordinary course of business). That condition is not satisfied here either, because the ABA is a nonprofit trade association that does not produce or sell any goods or services in the ordinary course of its business. Hammond Decl. ¶ 5. For that reason as well, the ABA is not a proper CPPA defendant. *See Dahlgren v. Audiovox Commc'ns Corp.*, No. 2002 CA 007884 B, 2010 WL 2710128, at *14-15 (D.C. Super. Ct. July 8, 2010) (application of CPPA to nonprofits intended to "provide consumers *who purchase from nonprofit businesses* with the same legal protections as consumers who purchase from for-profit businesses" (citing Letter from Anthony A. Williams, Mayor, Dist. of Columbia, to Linda W. Cropp, Chairman, Council of the Dist. of Columbia (May 4, 2006)) (emphasis added)); Rule 12(b)(6) Memorandum, at 13-14. Because the CPPA provides no cause of action against the ABA, the Court need go no further to conclude that Plaintiffs cannot establish their claim is likely to succeed on the merits.

Second, the particular ABA speech challenged by Plaintiffs is not actionable under the CPPA. The CPPA does not cover noncommercial speech like the ABA's, a constitutionally necessary limitation that the CPPA shares with other federal and state consumer protection statutes. *See* Rule 12(b)(6) Memorandum, at 15-16. The CPPA's limitation to commercial speech is fatal to Plaintiffs' claim because the ABA's participation in the ongoing scientific and public debate about the relationship between beverages and health, in public forums and through communications that do not promote any particular product or brand, is (or at minimum is inextricably intertwined with) core noncommercial speech and thus beyond the CPPA's reach. *See id.* at 16-20.

Even if the ABA's speech were construed to be commercial and thus within the scope of the CPPA, Plaintiffs' claim would still fail because, as a matter of law, Plaintiffs cannot establish that the ABA's stated views are false or misleading. To the contrary, the ABA's views are consistent with conclusions of the FDA, the CDC, and many respected scientists, and fall well within the scope of legitimate ongoing scientific debate. Courts interpreting similar consumer protection statutes have recognized that speech by even a commercially invested private party addressing genuinely debated scientific questions, premised on non-fraudulent data, cannot be punished as false or misleading. *See, e.g., In re GNC*, 789 F.3d 505, 516 (4th Cir. 2017) (health representations made on packaging of joint health dietary supplements could not be "false" under state consumer protection acts because plaintiffs could not allege that all reasonable experts in the field agreed representations were false); *ONY, Inc. v. Cornerstone Therapeutics, Inc.*, 720 F.3d 490, 498 (2d Cir. 2013) (reaching similar conclusion regarding statements in scientific journals that were based on non-fraudulent data); *Tibau v. Am. Dental Ass'n*, No. 322100, 2003 Cal. Super. LEXIS 1486, at *43 (Cal. Super. Ct. Aug. 8, 2003) (granting anti-SLAPP motion to dismiss claim under California's Unfair Competition Law based on statements regarding dental amalgam, because evidence showed "a healthy scientific debate regarding the safety and efficacy of dental amalgam" and FDA had recently approved dental amalgam as restorative device); Rule 12(b)(6) Memorandum at 20-26. Indeed, the CPPA cannot constitutionally render actionable as false or misleading statements like the ABA's that echo the views of federal regulators and other respected scientists, because for First Amendment purposes "[e]xpressions of opinion, scientific judgments, or statements as to conclusions about which reasonable minds may differ cannot be false." *United*

States ex rel. Morton v. A Plus Benefits, Inc., 139 F. App'x 980, 983 (10th Cir. 2005) (citation omitted). This is dispositive of Plaintiffs' claims as well.[6]

Third, for the same reasons set forth in Coca-Cola's Rule 12(b) Motion to Dismiss, Plaintiffs lack standing to bring their claim against the ABA. *See* D.C. Super. Ct. R. 12(b)(1).

CONCLUSION

For all of the reasons set forth above, the ABA's special motion to dismiss should be granted, the claim for relief against the ABA should be dismissed with prejudice, and the ABA should be allowed to move for fees and costs.

Dated: October 23, 2017

Respectfully submitted,

/s/ Richard P. Bress

Richard P. Bress (D.C. Bar No. 457504)
Kathryn H. Ruemmler (D.C. Bar No. 461737)
Kevin A. Chambers (D.C. Bar No. 495126)
Michael E. Bern (D.C. Bar No. 994791)
George C. Chipev (D.C. Bar No. 1017882)
LATHAM & WATKINS LLP
555 Eleventh Street, NW
Suite 1000
Washington, D.C. 20004
(202) 637-2200 (telephone)
(202) 637-2201 (facsimile)
rick.bress@lw.com
kathryn.ruemmler@lw.com
kevin.chambers@lw.com
michael.bern@lw.com
george.chipev@lw.com

Counsel for Defendant American Beverage Association

[6]To the extent that Plaintiffs' real complaint is that the ABA's participation in the nutritional debate makes it harder for Plaintiffs to persuade the public of their views than it would be if the ABA ceded the field, that concern cannot support a claim under the CPPA.