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

REPLY 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.*

INTRODUCTION

Plaintiffs cannot prevail on their CPPA claim against the ABA as a matter of law. *See* ABA SMTD 12-15; *see generally* ABA MTD; ABA Reply iso MTD. The ABA's special motion to dismiss must therefore be granted so long as the ABA makes a *prima facie* showing that Plaintiffs' claim arises from speech in connection with an "issue[] of public interest." D.C. Code § 16-5502(b). The burden to make that showing is "not onerous." *Doe No. 1 v. Burke*, 91 A.3d 1031, 1043 (D.C. 2014) (citation omitted). And it is met here. Courts in D.C. and elsewhere have consistently held that speech by trade associations about the health and safety of a class of consumer products addresses a subject of public interest and is entitled to anti-SLAPP protection, just like similar speech by anyone else.

Plaintiffs disagree. They seize on the D.C. Act's exclusion of "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 § 16-5501(3). Noting that trade associations promote the interests of their for-profit members, they argue that trade association speech is commercially motivated and ineligible for anti-SLAPP protection. But the provision on which they rely does *not* exclude all speech tinged with commercial interests. Instead, it requires courts to carefully examine the particular speech at issue to determine whether it is principally about selling the *speaker's* product or service, or instead "comment[s] or shar[es] information about a matter of public significance." As other courts have held in like circumstances, the ABA's speech about important public health issues falls squarely within the latter camp, and therefore squarely within the protection of the Act.

ARGUMENT

Plaintiffs' argument presumes that commercial speech falls categorically outside the scope of speech regarding an "issue[] of public interest." *See* Opp. to SMTD 3-11. As explained

elsewhere, the ABA's advocacy concerning the relationship between sugar-sweetened beverages and health—largely encouraging consumers to balance their calories in and calories out—is not commercial speech. *See* ABA SMTD 13; ABA MTD 16-20; ABA Reply iso MTD 7-9. Regardless, the question here is not whether the ABA's speech is commercial; it is whether it concerns issues of public interest. Courts have held that it is error to conflate the two, because "[c]ommercial speech that involves a matter of public interest ... may be protected by the anti-SLAPP statute." *L.A. Taxi Coop., Inc. v. Indep. Taxi Owners' Ass'n*, 191 Cal. Rptr. 3d 579, 586 (Ct. App. 2015); *see also Indus. Waste & Debris Box Serv., Inc. v. Murphy*, 208 Cal. Rptr. 3d 853, 865 (Ct. App. 2016) ("Whether speech has a commercial or promotional aspect is not dispositive of whether it addresses a matter of public interest."); *Lovett v. Capital Principles, LLC*, 686 S.E.2d 411, 414-15 (Ga. Ct. App. 2009) (commercial speech protected by anti-SLAPP statute).[1]

Plaintiffs' view is also inconsistent with the text of D.C.'s Act, which defines speech on a matter of public interest to include speech addressing a "good, product, or service in the market place" as well as issues concerning health and safety, D.C. Code § 16-5501(3). Citing that definition, Judge Demeo held that a trade association's speech about the health and safety of a class of consumer products "fit[s] squarely within the plain meaning" of speech about "issues of public interest" and is subject to the Act's protection. Hrg. Tr. at 39:14-40:8, *Simpson v. Johnson & Johnson*, No. 2016 CA 1931 B (D.C. Super. Ct. Jan. 13, 2017), SMTD Chipev Decl. Ex. B.

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[1] Consistent with their general disregard for the speech rights of others, Plaintiffs suggest that anti-SLAPP protection is intended only for those with lesser means, such as "grassroots activis[ts]." Opp. to SMTD 1-2 & n.1 (citation omitted). That suggestion is baseless. The Act does not apply any ideological or means-based litmus test to those seeking anti-SLAPP protection. Nor would such discrimination be appropriate. As the Supreme Court has recognized, "[c]orporations and other associations, like individuals, contribute to the 'discussion, debate, and the dissemination of information and ideas' that the First Amendment seeks to foster." *Pac. Gas & Elec. Co. v. Pub. Utils. Comm'n*, 475 U.S. 1, 8 (1986) (plurality opinion) (citation omitted).

Plaintiffs' contrary argument is based on the Act's exclusion of "statements directed primarily toward protecting the speaker's commercial interests rather than toward commenting on or sharing information about a matter of public significance." But that language merely distinguishes speech that does no more than market the speaker's product from speech that addresses an issue of genuine public interest. Plaintiffs do not dispute that the ABA's speech is "about a matter of public significance." And they do not argue that the ABA's speech is directed towards promoting any particular product, much less towards protecting *the ABA's* commercial interests. The most they say is that the ABA's speech is "designed to facilitate commerce in the products of *their members*." Opp. to SMTD 7 (emphasis added). That is false. But even if it were true, it would underscore that the speech at issue in this case is not "directed primarily towards protecting *the speaker*'s commercial interests." D.C. Code § 16-5501(3) (emphasis added).

Plaintiffs' proposed exclusion of all speech motivated (directly or indirectly, in whole or in part, regardless of how tenuously) by commercial concerns is also wrong for another reason—it would render superfluous another provision of the Act, which excludes *otherwise protected* statements that make 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," where "[t]he intended audience is an actual or potential buyer or customer." D.C. Code § 16-5505(1)-(2). If the Act already excluded all speech impacting commercial interests from the scope of speech addressing an issue of public interest, there would be no need for § 5505. The Council's decision to limit § 5505 to statements made for the purpose of securing sales of *the speaker's own products* underscores that speech outside that category may qualify for protection under the Act.

Plaintiffs ultimately concede that their position has been squarely rejected by the only D.C. Superior Judge to address it. Opp. to SMTD 4-7. Plaintiffs urge this Court to reject Judge Demeo's

decision for four reasons. None is persuasive. First, Plaintiffs argue (at 4-5) that Judge Demeo ignored cases finding certain trade association speech commercial in nature. But whether speech qualifies as commercial is not the inquiry demanded by the statute. Judge Demeo properly focused on whether a trade association's speech about the health and safety of products was directed primarily to furthering *its* commercial interests, and concluded that it was not.

Second, Plaintiffs argue (at 5) that Judge Demeo was wrong to consider California's interpretation of its anti-SLAPP law. But the D.C. statute was intended to "follow[] the model set forth in a number of other jurisdictions," D.C. Council, Report of the Committee on Public Safety and the Judiciary on Bill 18-893 at 1 (Nov. 18, 2010), SMTD Chipev Decl. Ex. A, and courts routinely look to California's similar statute and well-developed body of precedent when interpreting D.C.'s Act, *see, e.g.*, *Mann v. Nat'l Review, Inc.*, No. 2012 CA 008263 B, 2013 D.C. Super. LEXIS 7, at *14-16 (Super. Ct. July 19, 2013). Contrary to Plaintiffs' view, California's statute similarly protects only speech "in connection with an issue of public interest." Cal. Civ. Proc. Code § 425.16(e)(3), and likewise excludes speech that merely advances a speaker's private commercial interest in selling "a specific product or service," *L.A. Taxi Coop., Inc.*, 191 Cal. Rptr. 3d at 928.

Third, Plaintiffs argue (at 6) that Judge Demeo erred in concluding that statements by trade associations about general categories of consumer products are protected by California's anti-SLAPP statute. That is again wrong. Thus, in *Western Sugar Cooperative v. Archer-Daniels-Midland Co.*, No. 11-CV-3473(MANx), 2011 U.S. Dist. LEXIS 158249, at *15 (C.D. Cal. Oct. 19, 2011), the Central District of California concluded that a trade association's statements "about the health effects of high fructose corn syrup" constituted speech addressing an issue of public

interest. *See also L.A. Taxi Coop., Inc.*, 191 Cal. Rptr. 3d at 586-87 (distinguishing between speech about a specific product or service from speech about a product category).[2]

Finally, Plaintiffs argue (at 7) that even Judge Demeo's decision would not extend anti-SLAPP protection to the ABA's Mixify Campaign, because ABA members' logos appear in those communications. But the fact that ABA members' logos appear alongside the ABA's distinct logo to signal their participation with the ABA in a joint campaign to encourage consumers to balance their calories in and calories out—as part of larger industry efforts, developed in partnership with the Alliance for a Healthier Generation, to *reduce* consumption of beverage calories—does not remotely convert that important campaign to speech directed primarily toward protecting the speaker's commercial interests rather than toward sharing information about a matter of public significance.

Regardless of the vehemence with which Plaintiffs' disagree with the ABA's views, the ABA's statements about sugar-sweetened beverages and health are speech about a matter of public interest that falls well within the scope of what the Anti-SLAPP Act is intended to protect from meritless lawsuits like this one.

CONCLUSION

For the reasons set forth above, the ABA's special motion to dismiss should be granted.

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[2] Plaintiffs primarily rely on *All One God Faith, Inc. v. Organic & Sustainable Industry Standards, Inc.*, 107 Cal. Rptr. 3d 861 (Ct. App. 2010), (*see* Opp. to SMTD 6-7, 9) but that case supports the ABA. The court held that speech addresses a matter of public interest when "'the statement or activity precipitating the claim involved a topic of widespread public interest,' and 'the statement ... in some manner itself contribute[d] to the public debate.'" 107 Cal. Rptr. 3d at 873 (citation omitted). Applying that standard, the court found that the OASIS trade association's effort to affix "OASIS Organic" labels on its members' products was not speech on a matter of public interest, because it did not "contribute[] to an ongoing public debate about organic standards" but rather was intended solely to facilitate commerce in the products to which it was affixed. *Id.* at 875-76, 880-81. In contrast, the speech challenged here indisputably contributes to a public debate about the relationship between sugar-sweetened beverages and health.

Dated: February 28, 2018

Respectfully submitted,

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