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: Motion Hearing March 15, 2018, at 11:00 am

PLAINTIFFS' MEMORANDUM OF LAW OPPOSING DEFENDANT COCA-COLA COMPANY'S MOTION TO DISMISS PURSUANT TO SUPER. CT. CIV. R. 12(B)(6) AND 12(B)(1)

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INTRODUCTION AND COUNTERSTATEMENT

Plaintiffs claim that defendants The Coca-Cola Company ("Coke") and the American Beverage Association ("ABA") have engaged in a campaign of consumer deception and obfuscation by associating sugar-sweetened beverages ("sugar drinks") with good health and nutrition, and conversely, as disassociating them from adverse health effects, *e.g.*,: "[t]here is no scientific evidence that connects sugary beverages to obesity"; "all calories are equal"; "[t]he experts are clear . . . [a] calorie is a calorie"; "all calories are the same regardless of food source"; sugar drinks aren't merely "empty calories" but "essential hydration"; and sugar drinks are part of the solution to the obesity crisis ("Just finished an afternoon of Frisbee? Maybe you've earned a little more [soda]."). Compl. ¶¶ 70, 75, 76, 106, 114, 115, 129–131. In order to protect consumers from this campaign of deception and obfuscation, Plaintiffs seek injunctive relief.

Contrary to Defendants' portrayal, Plaintiffs *do not* claim that sugar drinks are the *sole* or the *unique* cause of obesity and obesity-related disease. Nor do they say that sugar drinks are harmful to consume occasionally. They do not deny the importance of physical activity in maintaining a healthy lifestyle. They do emphasize the undisputed facts that sugar drinks are the leading source of added sugar in the American diet. A single 16-ounce bottle of Coke contains 12 teaspoons of added sugar, *double* the amount recommended for women and children by the American Heart Association ("AHA"), and well in excess of the AHA's recommended daily limit for adult males (9 teaspoons). Further, Plaintiffs emphasize that sugar drinks are linked to obesity, type 2 diabetes, and cardiovascular disease, according to numerous scientific studies and health authorities. *Id*. ¶¶ 44–47, 49–58.

Defendants misleadingly argue that their promotion of routine sugar drink consumption as part of a healthy diet and lifestyle is in line with views of the Food and Drug Administration

("FDA") and the Centers for Disease Control ("CDC"). They ignore that FDA and CDC, and other leading authorities, have long recognized scientific evidence linking sugar drinks with obesity and disease. Indeed, CDC has warned that:

> Frequently drinking sugar-sweetened beverages is ***associated with weight gain/obesity, type 2 diabetes, heart disease, kidney diseases, non-alcoholic liver disease, tooth decay and cavities, and gout, a type of arthritis***. ***Limiting the amount of SSB intake can help individuals maintain a healthy weight and have a healthy diet.***

CDC, *Get the Facts: Sugar-Sweetened Beverages and Consumption*, https://goo.gl/uevB8N (last visited Jan. 12, 2018) (emphasis added), Ex. 1.[1] *See also* CDC, The CDC Guide to Strategies for Reducing Consumption of Sugar Sweetened Beverages (2010), https://goo.gl/QxXYhs, Ex. 2. They also ignore CDC's declaration that sugar drinks, notwithstanding that they are "a source of water," have "*poor nutritional value.*" *See* CDC, *Beverage Consumption Among High School Students—United States, 2010* (June 17, 2011), https://goo.gl/aAD5ba (last visited Jan. 12, 2018) (emphasis added), Ex. 3.

Defendants seize on FDA's statement that sugar drinks are "no more likely to cause weight gain in adults than any other source of energy," *see, e.g.*, Coke Mem. Supp. Mot. to Dism. ("Coke

[1] In deciding this 12(b)(6) motion, the Court may consider "documents the authenticity of which are not disputed by the parties; . . . official public records; . . . documents central to plaintiffs' claim; or . . . documents sufficiently referred to in the complaint." *See Watterson v. Page*, 987 F.2d 1, 3 (1st Cir. 1993). This includes SEC filings. *See Schmidt v. Skolas*, 770 F.3d 241, 249 (3d Cir. 2014) ("[T]he SEC filings attached by a number of the defendants . . . are matters of public record of which the court can take judicial notice."); *Pet Quarters, Inc. v. Depository Tr. & Clearing Corp.*, 545 F. Supp. 2d 845, 847 (E.D. Ark. 2008), *aff'd*, 559 F.3d 772 (8th Cir. 2009) ("The Court may consider [public disclosures filed with the SEC] when considering a motion to dismiss because they are public record."). Further, where *plaintiffs* introduce documents, "[t]he problem that arises when a court reviews statements extraneous to a complaint . . . is largely dissipated." *See Watterson*, 987 F.2d at 4. *See also Hillbroom v. PricewaterhouseCoopers LLP*, 17 A.3d 566, 569 (D.C. 2011) ("[A] plaintiff is free, in defending against a motion to dismiss, to allege without evidentiary support any facts he pleases that are consistent with the complaint . . . ." (internal quotation marks omitted)). Finally, all these materials may be considered in evaluating Coke's and ABA's special motion to dismiss.

MTD Mem.") at 4, eliding the qualifier "under *isocaloric controlled conditions*," *see* 79 Fed. Reg. 11,880, 11,904 (Mar. 3, 2014) (emphasis added). That omission is critical because sugar drinks lead people to consume excess calories. They ignore FDA's recognition therein of "strong evidence . . . that children who consume sugar-sweetened beverages have increased adiposity (increased body fat)." *Id*. (emphasis added). They ignore FDA's subsequent recognition that "*strong and consistent evidence*" shows an association between sugar drinks and excess body weight in children and adults. 81 Fed. Reg. 33,742, 33,803 (May 27, 2016) (emphasis added).

Denying the existence of scientific evidence linking sugar drinks with obesity and chronic disease clashes with the scientific record, including that recognized by FDA and CDC, and is deceptive and misleading. Claiming that "all calories are equal" is a half-truth at best, obfuscating the fact that sugar drinks lead to excessive caloric intake overall, given the common failure to compensate for liquid calorie intake by reducing food intake. Equating calories also obfuscates the fact that sugar drinks are devoid of nutrient value. Saying that sugar drinks provide "essential hydration" contradicts CDC. Saying that the key to obesity is "balance" fosters the illusion that the negative health effects from sugar drinks are likely to be offset by mild physical activity, and that sugar drinks promote health.

Defendants' promotion of sugar drinks is deceptive as claimed. Overblown rhetoric aside,[2] Plaintiffs seek to restrain Defendants' deceptive marketing practices and that is *all* they seek to restrain. As did the tobacco industry, Defendants claim the full protection of the First Amendment for their deceptive representations, including but not limited to those that employ Coke's covert

[2] Defendants pose as victims of "an improper attempt to inhibit debate" over the health effects of sugar drinks. *See, e.g.*, Coke MTD Mem. at 1.

sponsorship of research[3] and funding of health professionals[4] for the express purpose of producing messaging denying the adverse effects of sugar drinks. Defendants' deceptions are no less commercial and no less devoid of the First Amendment protection than those of big tobacco and others before them.

Defendants' contention that their contested representations are non-commercial in character is contradicted by Coke's own 10-K filing with the Securities & Exchange Commission ("SEC"). In the 10-K, Coke states, *inter alia*:

- "Increasing public concern about *obesity*" and other health-related public concerns "may *reduce demand* for . . . our sugar-sweetened beverages" and "*adversely affect our profitability*";

- "Business may suffer" depending "in large part on our *ability to maintain the brand image of our existing products* . . . .";

- "We cannot assure . . . that our continuing investment in *advertising and marketing* . . . will have the desired impact on *our products' brand image* and on *consumer preferences.*"

Coca-Cola Company, SEC Form 10-K Report, Fiscal Year Ending December 31, 2016 at 10, 17, https://goo.gl/h6TddJ (emphasis added), Ex. 4.[5]

Plaintiffs Pastor William H. Lamar IV and Pastor Delman L. Coates, as ministers serving congregations with large numbers of African American congregants who live in the District of Columbia, Compl. ¶¶ 10, 19–21, 61–64, and Plaintiff The Praxis Project, which addresses health

[3] *See, e.g.,* Compl. ¶ 84 & n.47 (2016 study by Schillinger *et al.* found that *all* "negative" studies, which reported no link between sugar drinks and obesity and related diseases, were industry-funded whereas just one "positive" study was industry funded); *id.* ¶¶ 81, 85–90 & nn.42, 48–52 (Coke's Chief Science and Health Officer Rhona Applebaum resigned after reports of her secret orchestration of obesity research).

[4] *See e.g.*, Compl. ¶¶ 92–94, nn.53–55 (Coke funded network of dieticians to produce pieces for trade journals promoting Coke consumption designed to look like regular stories).

[5] False statements in reports filed with the SEC are, of course, criminal offenses subject to heavy fines and imprisonment. *See* 15 U.S.C. § 78ff(a).

disparities in the Latino and other vulnerable populations, *id.* ¶¶ 23–24, are concerned with the impact of sugar drinks on the communities they serve and communities at large, *see* CDC, *Beverage Consumption Among High School Students—United States, 2010* (June 17, 2011), Ex. 3. *Forty-seven percent* of adults in the District of Columbia are estimated to have diabetes or pre-diabetes, Compl. ¶ 63, and at least forty percent of the residents in wards seven and eight are obese, *id.* ¶ 61. All three Plaintiffs have standing to complain of Defendants' misleading promotion of sugar drinks in the District of Columbia.[6]

ARGUMENT

I. THE COMPLAINT STATES A CLAIM THAT COKE'S STATEMENTS ARE FALSE AND MISLEADING IN VIOLATION OF THE CPPA

Relying primarily on arguments that its contested representations are protected by the First Amendment and that Plaintiffs lack standing, Coke devotes two short paragraphs to the contention that Plaintiffs allege "no statement that is objectively misleading or otherwise actionable under the CPPA." Coke MTD Mem. at 27–28. Coke is manifestly mistaken.[7]

Plaintiffs' Complaint is replete with actionable allegations of misleading and deceptive representations. These include assertions by Coke that are readily disprovable—such as that *no* contrary science exists, or that any contrary science is generally regarded as unsound. Plaintiffs'

[6] The standard of review is set forth in Plaintiffs' Opposition to ABA's Motion to Dismiss.

[7] Coke relies exclusively on *Nat'l Consumers League v. Gerber Products Co.*, 2015 WL 4664213 (D.C. Super. Aug. 5, 2015) ("NCL") (citing *In re GNC*, 789 F.3d 505 (4th Cir. 2015)). Both cases considered the sufficiency of allegations contesting representations as "literally false." *NCL*, 2015 WL 4664213, at *6–7; *GNC*, 789 F.3d at 514–515 ("Because Plaintiffs [pled] the Companies' representations are *false* rather than *true but misleading*, we must determine whether the CAC states facts showing that the representations are *literally false*." (emphasis added)). Coke ignores the court's *caveat* in *GNC*: "[w]e need not decide . . . whether any of the representations made on the Companies' products are misleading, because Plaintiffs *chose not to include such allegations* in the CAC." *Id.* at 516 (emphasis added). *See also* Pls.' Mem. Opp. ABA Mot. to Dism. ("Opp. Mem. ABA MTD") at Part I.A (distinguishing *GNC*).

allegations are not conclusory. They are supported in each instance by citations to respected, credible scientific research and statements of public health authorities. *See* Compl. ¶¶ 41–58.

In its statements about sugar drink consumption, Coke has, *inter alia*, "den[ied] outright established science," "represent[ed] . . . that [its] positions on [sugar drinks] are consistent with objective scientific criteria," implied that sugar drink "consumption is not central to concerns about obesity and, by corollary, that mild exercise can redress such concerns," and made "material omissions about the science and safety of [sugar drinks] and their effect on human health." *See, e.g.*, *Id.* ¶¶ 3–5, 150, 169.[8]

Such deceptive and misleading statements by Coke, or attributable to Coke, include:

- "[T]here is *no scientific evidence* that connects sugary beverages to obesity";
- "Coca-Cola is an *excellent complement* to the habits of a *healthy life*";
- "The experts are clear—the academics, the government advisors, diabetes associations. . . . *A calorie is a calorie*";
- "Sugary drinks can be part of *any diet* as long as your calories in balance with the calories out";
- "All calories count. No matter where they come from including Coca-Cola and everything else with calories"; and
- "What our drinks offer is hydration. That's essential to the human body. . . . *We don't believe in empty calories.* We believe in hydration."

See, e.g., *Id*. ¶¶ 75–77, 81, 114–116, 130 (emphasis added). *See also* Opp. Mem. ABA MTD at Part I (identifying misleading statements by ABA, which are attributable to Coke).

Coke's statements and conduct must be seen in the collective context of an "aggressive campaign" to mislead consumers regarding the effects of sugar drinks. *See* Compl. ¶ 2. For

[8] These allegations give the lie to Coke's assertion that Plaintiffs merely allege that "Coca-Cola's speech tends to 'drown[] out'" their contrary viewpoint. *See* Coke MTD Mem. at 27.

example, Coke's promotion of physical activity events—in which it implies that "exercise [is] the panacea to the obesity crisis," "heavily promote[s] consumption of Coke," and *deceptively brands Coca-Cola itself as part of the obesity "solution," see id*. ¶¶ 120, 122, 124, 125, 128—cannot be disassociated from its multimillion dollar advertising campaigns, in which it misleadingly implies that the "public . . . can or will 'balance' routine consumption of sugar-sweetened beverages through casual exercise," *see id.* ¶¶ 108, 109, 113, 115, 116, 120. Such activities are part and parcel of Coke's unlawful efforts to "flood the market with countervailing representations to hide the truth." *See* Council of the District of Columbia, Committee on Public Services and Consumer Affairs, Report on Bill 19-0581, at 7 (Nov. 28, 2012) ("2012 Committee Report"), Ex. 5.[9] Contrary to Coke's contention, it is well-established that such representations are actionable. *See* Opp. Mem. ABA MTD at Part I.A.

Seeking to avoid this result, Coke attempts to align its representations with statements of FDA and CDC. *See* Coke MTD Mem. at 4. Coke's selective citations to FDA and CDC are variously seized from context or incomplete and omit references to statements of these agencies

[9] Coke also asserts that Plaintiffs have failed to identify misrepresentations by its network of paid health professionals and dietician-bloggers. *See* Coke MTD Mem. at 7. Setting aside the fact that Plaintiffs assert that at least one such statement was misleading, *see* Compl. ¶ 92 (post by "Coca-Cola['s] paid dietitians . . . included the suggestion that a soda could be a healthy snack, 'like . . . packs of almonds'"), the Federal Trade Commission ("FTC") has made clear that advertisements, including "user-generated social media [or] personal blogs," that fail to adequately disclose the sponsoring advertiser "are deceptive even if the product claims communicated are truthful and non-misleading," *see* FTC, Enforcement Policy Statement on Deceptively Formatted Advertisements at 9–10 (Dec. 22, 2015), https://goo.gl/yXLaUt, Ex. 6. *See also id.* at 9, 13, 15–16 (failing to disclose the advertisement's source "lead[s] consumers to give greater credence to advertising claims . . . . "; "A disclosure [of the sponsoring source] must be made in 'simple, unequivocal' language, so that consumers comprehend what it means"; "[T]he Commission views as material any misrepresentations that advertising content is . . . [from] scientific research."). Plaintiffs allege that Coke's advertisements through paid health professionals were "designed to look like regular stories" and "rarely, if ever . . . ma[de] clear that Coca-Cola paid for the columns." *See* Compl. ¶ 93. Accordingly, these allegations amply state a claim for misleading advertising.

that expose the challenged representations as misleading and deceptive. *See* Opp. Mem. ABA MTD at Part I.B (explaining the ways in which Defendants misrepresent FDA's and CDC's positions).

Contrary to Coke's assertion, CDC and FDA, along with numerous respected health authorities, have publicly recognized the link between the consumption of sugar drinks and obesity and obesity-related diseases and have called for reduction in the consumption of sugar drinks as a means to control obesity and chronic disease, including: 2015 Dietary Guidelines Advisory Committee ("DGAC"); Institute of Medicine; World Health Organization ("WHO"); American Heart Association ("AHA"); American Medical Association ("AMA"); American Public Health Association ("APHA"); and American Diabetes Association ("ADA"). *See id.* (quoting these organizations).[10]

The misleading character of Coke's statements by way of obfuscation, material omissions, and half-truths is demonstrable by reference to statements of FDA and CDC, agencies which Coke and ABA embrace as authoritative. Such statements as, "[t]here is no scientific evidence that

[10] Coke takes false comfort from *American Bev. Ass'n v. County of San Francisco*, 871 F.3d 884 (9th Cir. 2017), *pet. for reh. en banc granted*, Case Nos. 16-16072–73, ECF Nos. 98, 100. *See, e.g.*, Coke MTD Mem. at 4, 11, 27. First, the Ninth Circuit has issued an order that it will rehear this case *en banc*, so its initial decision reversing the trial court is precarious support for any proposition. Even assuming for purposes of argument here that the decision would be affirmed, however, here too Coke mischaracterizes. The Court held that the statement required by San Francisco's ordinance—that "[d]rinking beverages with added sugar(s) contributes to obesity, diabetes, and tooth decay"—is deceptive in that it can be read to state that drinking sugar drinks is harmful "regardless of the quantity consumed or other lifestyle choices." 871 F.3d at 895. The Court faulted the warning for not stating that "*overconsumption* of sugar-sweetened beverages contributes to obesity, diabetes, and tooth decay," *id.* (emphasis added), suggesting it would have viewed such a statement as factual and noncontroversial. Defendants applaud disapproval of San Francisco's warning as misleading but at the same time defend statements that all calories are equal and that no science links sugar drinks to obesity, which, under the initial analysis of the Ninth Circuit, are equally misleading. *See also* Opp. Mem. ABA MTD at Part I.C (distinguishing decision on additional bases).

connects sugary beverages to obesity," Compl. ¶ 38, are false and misleading. The existence of such evidence has long been recognized. *See, e.g.*, CDC, The CDC Guide to Strategies for Reducing the Consumption of Sugar-Sweetened Beverages at 4–5 (2010) ("High consumption of SSBs has been associated with obesity"; "Several other health conditions have been associated with the consumption of SSBs," including, *e.g.*, diabetes and cardiovascular disease.), Ex. 2. They are contradicted by the 2010 DGAC's recognition of "strong evidence that children who consume sugar-sweetened beverages have increased adiposity (increased body fat)" and "moderate . . . evidence that greater consumption of sugar-sweetened beverages is associated with increased body weight in adults . . . ." *See* 79 Fed. Reg. at 11,904. The statements are further contradicted by the 2015 DGAC's recognition that "***strong and consistent evidence***" shows an association between sugar drinks and excess body weight in children and adults. 81 Fed. Reg. at 33,803 (emphasis added).

Statements such as "a calorie is a calorie," "all calories are equal," "all calories count," "there's nothing unique about beverage calories when it comes to obesity," "all calories are the same regardless of food source," Compl. ¶¶ 70, 104, 106, 107, are highly misleading. While it is surely true that all calories are equal units of energy, such statements obfuscate the consensus differentiating empty sugar drink calories from calories providing needed nutrients. They obfuscate FDA's recognition of the need "to avoid the excess contribution of empty calories." 81 Fed. Reg. at 33,766. And they obfuscate the abundant scientific research specifically linking sugar drinks with obesity, type 2 diabetes, and cardiovascular disease. They are half-truths, at best.

Statements that sugar drinks "offer . . . hydration" are similarly misleading. They are contrary, for example, to CDC's recognition that sugar drinks, notwithstanding that they are "a source of water," have "poor nutritional value" and that "the increased caloric intake resulting

from these beverages is one factor contributing to the prevalence of obesity among adolescents in the United States." *See* CDC, *Beverage Consumption Among High School Students—United States, 2010* (June 17, 2011) (emphasis added), Ex. 3. They are also contrary to abundant, peer-reviewed scientific research linking sugar drinks, as opposed to water and non-sugar drinks, to obesity, type 2 diabetes, and cardio-vascular disease. Compl. ¶¶ 49–58. The implication that sugar drinks are nutritionally acceptable sources of healthful hydration, notwithstanding their empty calories, is materially misleading.

In sum, Coke unlawfully misleads reasonable consumers—contrary to the recognition by these authorities, and myriad leading scientific and health experts, of scientific evidence linking sugar drinks to obesity and related chronic disease—through representations that no established science shows such a linkage and through suggestions that all calories have an equal effect on the body, that consuming sugar drinks is beneficial by way of essential hydration, that the key to battling the obesity crisis is moderate exercise and not elimination or reduction of routine consumption of sugar drinks,[11] and that the scientific research showing otherwise is unsound.

II. COKE'S DECEPTIVE STATEMENTS ARE COMMERCIAL SPEECH AND ARE UNPROTECTED BY THE FIRST AMENDMENT

A. This Suit Seeks Redress for Commercial Speech That Plaintiffs Claim to Be Deceptive and Misleading and Therefore Unprotected

According to Coke, this "entire lawsuit is a constitutionally-impermissible attempt to suppress protected speech." Coke MTD Mem. at 16. Coke's reading of the Complaint is far-

[11] *See* Compl. ¶¶ 110–12 ("The federal government itself has acknowledged that 'the contribution that physical activity makes to weight loss and weight stability is relatively small'"; "Even intensive exercise programs often fail to improve weight" (quoting U.S. Department of Health and Human Services and citing myriad scientific studies)).

fetched at best.[12] Plaintiffs accuse Coke of "false, deceptive, and misleading advertising and promotion" of sugar drinks through "an aggressive campaign to protect profits" from their sale "by flooding the market with . . . representations that obscure" the "link between the beverages and disease." Compl. ¶¶ 1–2. The challenged statements consist entirely of commercial speech designed to protect the brand image of Coke's existing sugar drink products.

Coke's attempts to cast its marketing as pure speech are belied by its characterizations elsewhere, most notably its 10-K filings with the SEC. *See supra* p. 4. Further, it is foreclosed by decisions rejecting the same contentions by the tobacco industry regarding its publicity campaigns denying and/or obfuscating the harm associated with smoking.

The Supreme Court first recognized limited protection for commercial speech in *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976), holding that the First Amendment protects *truthful* advertising of prescription drug prices. The Court made plain then that the First Amendment accords *no* protection to speech that is "*false* . . . , *deceptive or misleading*" and that its decision would "not prohibit the State from insuring that the stream of

[12] Coke's pose as a victim of attempted suppression of free speech echoes the assertions of Exxon Mobil Corporation that investigations by the New York and Massachusetts Attorneys General into whether it has *misrepresented* the risks posed by climate change similarly seek to silence its views about climate change. *See Exxon Mobil Corp. v. Schneiderman*, Case No. 17 Civ. 2301 (VEC) (SN) (S.D.N.Y); *In re Civil Investigative Demand*, Case No. 2016-EPD-36 (Mass. Super. Ct.). The Massachusetts court rejected Exxon's argument, holding that "concerns about Exxon's possible misrepresentations to Massachusetts consumers" are legitimate subjects of investigation consistent with the First Amendment. *In re Civil Investigative Demand*, 34 Mass. L. Rptr. 104, 108 & n.2 (Mass. Super. Ct. Jan. 11, 2017). At a recent hearing on Exxon's federal suit, the court made short shrift of Exxon's contention that the states' document requests attempt to stifle its free speech. Conceding Exxon's right to express itself on matters of public concern, the court stated that the attorneys general are entitled to investigate "*whether, in fact, your public disclosures historically were accurate. And if they weren't then they should charge you with fraud*." *Exxon Mobil Corp*., Case No. 17 Civ. 2301 (VEC) (SN), ECF No. 245 at 56 (emphasis added), Ex. 7. Plaintiffs are equally entitled to challenge misrepresentations by Defendants in their promotion of sugar drinks.

commercial information flow *cleanly as well as freely*." *Id.* at 771–72 (emphasis added).[13] To be protected at all, commercial speech must "at least . . . *not be misleading*." *Cent. Hudson Gas & Elec. Corp. v. Public Service Comm'n*, 447 U.S. 557, 566 (1980) (emphasis added). Allowing a commercial enterprise to head off consumer-deception claims in the name of its own free speech would, contrary to *Virginia State Board*, thwart efforts by consumers and law enforcement agencies to assure that information flows *cleanly*, as well as defy the broad purposes of the CPPA.

Coke's attempt to cast its promotions of sugar drinks as "pure speech" brings to mind the prediction that commercial enterprises would engage in "imaginative . . . exercises" to claim "the *safe haven of noncommercial speech*" while "at the same time *conveying their commercial message*." *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 540 (1981) (Brennan, J., concurring) (emphasis added).[14] Coke follows the footsteps of big tobacco in claiming the "safe haven of noncommercial speech" for its deceptive promotion of sugar drinks.

Coke misconceives the scope of commercial speech as limited to the "core notion of commercial speech," *i.e.*, speech that "does no more than propose a commercial transaction." *Bolger v. Youngs Drug Prod. Corp.*, 463 U.S. 60, 65 (1983) (quoting *Virginia State Bd.*, 425 U.S. at 763). *Bolger*, which Coke mischaracterizes as limiting commercial speech to the "core notion," is a prime example to the contrary. The Court found informational pamphlets promoting birth control and family planning to be commercial even though they included discussion of "important

[13] The Court notably upheld the standing of consumers to assert the right to receive truthful advertising. *Id.* at 757. To recognize standing for consumers seeking to assure that information flows *freely* but not to those like Plaintiffs who seek to assure that it flows *cleanly* would make a mockery of the Court's declared purpose. Yet that is what Defendants urge. *See supra* Part III.

[14] Coke and ABA—much like Exxon in its attempt to slam the door on state investigations—do the prediction one better. They not only claim the "safe haven of noncommercial speech" but attempt to nip Plaintiffs' suit in the bud through their Anti-SLAPP motions. It is they rather than Plaintiffs who attempt to squelch free advocacy.

public issues" and referred to the company's products only "generically." *Id*. at 62 n.4, 66 n.13, 67–68. Declining to treat the pamphlets as pure speech, the Court drew attention to *Metromedia*, evoking Justice Brennan's prediction of manufacturers engaging in "imaginative . . . exercises" to seek the "safe haven" of pure speech. *Id*. at 68 (citing *Metromedia*, 453 U.S. at 540 (Brennan, J., concurring)).

Coke's effort in this regard is similar to big tobacco's claim to a "safe haven" for its campaigns of deception denying the health consequences of smoking. *U.S. v. Philip Morris USA, Inc.*, 566 F.3d 1095 (D.C. Cir. 2009), *cert. denied*, 130 S.Ct. 3501 (2010). Coke's claim to heightened protection is foreclosed by *Philip Morris's* holding that the tobacco industry publicity campaigns constituted commercial speech. *Id*. at 1143. The court declared that commercial speech extends to a broad range of representations beyond the "core notion," including "material representations about the efficacy, safety, and quality of the advertiser's product, and other information asserted for the purpose of persuading the public to purchase the product." *Id*. It drew support from *Nat'l Comm'n on Egg Nutrition v. FTC*, 570 F.2d 157 (7th Cir. 1977) ("NCEN"), which held that a trade association's publicity campaign discounting the relationship between eggs and heart disease was commercial speech. *See Philip Morris*, 566 F.3d at 1143–44 (citing *NCEN*, 570 F.2d at 163). In NCEN, the Seventh Circuit rejected the egg association's contention that its statements were "expressions of opinion on an important and controversial public issue" entitled to heightened protection. 570 F.2d at 160.[15]

The D.C. Circuit held that the various denials by the tobacco companies and their trade associations of the "adverse effects of cigarettes and nicotine in relation to health and addiction"

[15] In *Bolger,* the Supreme Court similarly relied on *NCEN's* expansive view of commercial speech. 463 U.S. 67 n.13 (citing *NCEN*, 570 F.2d at 157).

"*constitute commercial speech*" notwithstanding that they appeared in diverse settings and formats. *Id.* at 1144 (emphasis added). It deemed all to be commercial speech including those "in formats that . . . do not explicitly propose a particular commercial transaction." *Id*. And, it declared that the commercial nature of the defendants' speech was not altered by the facts that some involved the defendants as a group "joined in advertising their common product"; "discuss cigarettes generically without specific brand names"; or "link cigarettes to an issue of public debate . . . ." *Id*.

The tobacco campaign held to be commercial speech ranged far beyond communications in conventional advertising format. As detailed by the trial court's findings, its campaign relied heavily on communications other than product advertising, including press releases, statements of company officers, dissemination of studies, books, articles, *etc*. *U.S. v. Philip Morris USA, Inc.*, 449 F. Supp. 2d 1, at 168 *et seq.* (D.D.C. 2006).[16] What Coke wants to bring within "the safe haven of noncommercial speech" is no different in form or purpose from what was treated as commercial speech and held unlawful in *Philip Morris*.[17] *See also Western Sugar Coop. v. Archer-Daniels-*

[16] Elements of the tobacco campaigns treated as commercial speech included public statements by tobacco companies and trade associations, *id.* at 168–69; public speeches by company executives, *id.* at 169; dissemination of the scientific publication, "A Scientific Perspective on the Cigarette Controversy," *id*.; press releases, *id*.; remarks to the press media denying the existence of scientific evidence of link between smoking and cancer, *id*.; health newsletters asserting existence of "differing opinions . . . regarding tobacco use and health," *id.* at 170; public statements by officers of tobacco industry's research arm, *id*.; statements disputing article by Surgeon General on hazards of tobacco smoking, *id.* at 171; statements in radio interviews, *id.* at 172; targeted mailings to medical professions, scientists, media, and public contesting 1964 Surgeon General's Report, *id.* at 189; commissioned article by sportswriter for magazine publication and mass mailing, *id.* at 190; television spots calling for "impartial research on the vital question of tobacco and health," *id.* at 192; release of "backgrounder" to editorial writers, *id.* at 194; etc. No element of the campaigns contested by Plaintiffs here is without an analog in the tobacco industry's campaign of adjudicated deception, all elements of which were held to be commercial speech.

[17] The D.C. Circuit also rejected the tobacco defendants' attempt to invoke *Noerr-Pennington* "because the doctrine *does not protect deliberately false or misleading statements*." *Philip Morris*, 566 F.3d at 1123–24. The misstatements there included—like those claimed here—not only

Midland, Case No. 11 Civ. 3473 (CBM) (AJWx), 2015 WL 12683192, at *7 (C.D. Cal. 2015) (sugar trade association engaged in commercial speech in posting information on its website and distributing to consumers and the media information advancing its "mission to educate consumers and promote the consumption of sugar through sound scientific principles" (emphasis removed)); *Theodosokis v. Clegg*, Case No. 14 Civ. 2445 (TUC) (JAS), 2017 WL 1294529, *19 (D. Az. 2017) (republication of medical journal article treated as commercial speech based on republishers' financial interest in "touting" the study's results).

Coke's attempt to cast "advertising and marketing" practices geared to maintaining "brand image" and "consumer preferences," *see* Coke, 2017 SEC Form 10-K at 17, Ex. 4, as noncommercial is part of a pattern that has emerged as predicted in *Metromedia*. In language that describes the publicity campaigns by the tobacco industry and those challenged here, one legal article observed that FDA-regulated firms "speak in ways that disrupt our *conventional understanding of what constitutes advertising or promotion*," have "pioneered the creative use of press releases, web sites, social media, and other formats," and speak also "through intermediaries and third parties—particularly scientific and medical experts—using speakers bureaus, continuing medical education (CME) seminars, industry and academic conferences, and reprints of scientific studies and academic articles." *See* N. Cortez*, Can Speech by FDA-Regulated Firms Ever be Noncommercial*, 37 Am. J.L. & Med. 388, 389 (2011), Ex. 8. The author observes that courts view claims for heightened protection of such speech with "a healthy dose of skepticism," concluding that courts have "yet to encounter an FDA-related case" in which speech of this nature was held

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statements found to be "literally false" but also "partially true statements" that were "intentionally misleading as to facts," and "misleading omission[s] . . . intended to induce a false belief and resulting action . . . ." *Id.* at 1128. Tellingly Coke cites no decision applying *Noerr-Pennington* to bar a consumer suit based on allegations remotely similarly to those against the tobacco industry or those lodged here.

to be noncommercial. *Id.* at 390, 399. Coke's attempt to make this case the first is foreclosed by *Philip Morris* and like authorities. *See also* Opp. Mem. ABA MTD at Part II.

B. Coke's Commercial Speech Is Not "Inextricably Intertwined" with Pure Speech

This is not a case where commercial speech is "inextricably intertwined" with noncommercial speech, Coke MTD Mem. at 14, so as to qualify for full protection. It is far afield from *Riley v. Nat'l Federation of Blind of N.C., Inc.*, 487 U.S. 781, 796 (1988). The Court disapproved a law requiring charitable fund-raisers to disclose their financial motivation—*i.e.*, the percentage of receipts retained personally—with any charitable appeal. This mandated disclosure was "inextricably intertwined" with pure speech, as the Court later explained, "because the state law *required* it to be included." *Bd. of Trustees v. Fox*, 492 U.S. 469, 475 (1989). *See also Jordan v. Jewel Food Stores, Inc.*, 743 F.3d 509, 521 (7th Cir. 2014) ("Properly understood, then, the inextricably intertwined doctrine applies only when it is *legally or practically impossible* for the speaker to separate out the commercial and noncommercial elements of his speech." (emphasis added)). The statements challenged here are no more "inextricably intertwined" with pure speech than the tobacco industry's deceptions and half-truths, which were held unprotected in *Philip Morris.*

C. Commercial Speech Has Been Held to Extend to Publications in Academic Journals and Statements to the Press When Used for a Commercial Purpose

Contrary to Coke's contention, the rubric of commercial speech extends to publications in academic journals when turned to a commercial purpose. *Washington Legal Found. v. Friedman*, 13 F. Supp. 2d 51 (D.D.C. 1998), is an example. The court considered First Amendment challenges to FDA guidance documents that constrained use by manufacturers of article reprints, medical textbooks, and CME seminars in promoting off-label applications of pharmaceutical products to prescribing physicians. *Friedman*, 13 F. Supp. 2d at 62. It acknowledged that such materials were

not "typical" commercial speech in that they were the work product of scientists, physicians, and other academics, but pointed out that their dissemination was economically motivated for commercial purposes and hence appropriately treated as commercial speech. *Id.* at 64. *See also Eastman Chemical Co. v. Plastipure, Inc.*, 775 F.3d 230, 237–38 (5th Cir. 2014) ("[I]t is of no moment that the commercial speech in this case concerned a topic of scientific debate. . . . The First Amendment ensures a robust discourse in the pages of academic journals, but it does not immunize false or misleading commercial claims."); *id.* (quoting Recent Case, 127 Harv. L. Rev. 1815, 1819 (2014) ("Dissemination of a scientific article as part of a company's marketing campaign is for promotional purposes and therefore qualifies as commercial speech.")); *Semco, Inc. v. Amcast, Inc.*, 52 F.3d 108, 114 (6th Cir. 1995) (holding that "alleged misrepresentations in a [trade journal] article represent commercial speech and are actionable under the Lanham Act"); *CrossFit, Inc. v. Nat'l Strength & Conditioning Ass'n*, Case No. 14 Civ. 1191 (JLS) (KSC), 2016 WL 5118530, at *5–8 (S.D. Cal. 2016) (denying protection to article claimed to be false and misleading; commercial speech elements and noncommercial speech not inextricably intertwined).[18]

Coke's claim that its assertions in media format enjoy "near-unfettered First Amendment protection," Coke MTD Mem. at 13, is at odds with *Philip Morris*, which treated the tobacco industry's communications to the media as commercial speech along with the rest of its publicity campaigns, *see supra* Part II.A. *See also SKEDKO, Inc. v. ARC Prod., LLC*, Case No. 13 Civ. 00696 (HA), 2014 WL 2465577, at *6 (D. Or. June 2, 2014) (corporate executive interview with magazine is commercial speech).

[18] Coke's reliance on *Ony* is misplaced. *See* Opp. Mem. ABA MTD at Part I.A.

Coke's argument principally relies on two cases: *Boule v. Hutton*, 328 F.3d 84 (2d Cir. 2003); and *Delux Cab, LLC v. Uber Techs., Inc.*, Case No. 16 Civ. 3057 (CAB) (JMA), 2017 WL 1354791 (S.D. Cal. Apr. 13, 2017). *See* Coke MTD Mem. at 14–15.[19] Neither case supports Coke. First, *Boule* involved disposition on a fully developed factual record, not dismissal of the complaint for failure to state a claim. Second, the language quoted by Coke did not govern disposition of the state law claims under the GBL—New York's version of the CPPA—the dismissal of which the Second Circuit reversed and remanded with instruction "to determine whether these false statements constitute a violation of [the GBL]." 328 F.3d at 93. And third, the trial court's holding on remand dismissing the GBL claim is expressly limited to the context of Lanham Act *competitors*, as opposed to consumers. *E.g.*, *Boule v. Hutton*, 320 F. Supp. 2d 132, 137–38 (S.D.N.Y. 2004) ("*competitors* state a claim under [the GBL] only when they allege some harm to the public health or safety" and "[p]laintiffs failed to offer evidence at trial that showed that consumers . . . were interested in purchasing art by Khidekel"). With respect to disparagement as an unfair trade practice, moreover, the court ruled in *plaintiffs'* favor. *Id*. at 139–40.

Importantly too, while the Second Circuit in *Boule* upheld the finding that a statement in *ArtNews* media was not commercial for purposes of evaluating the Lanham Act claim, the facts of that article are far away from those presented here. More precisely, without any risk of transgressing the extensive case law on non-core commercial speech, it affirmed that "Section 43(a) [of the Lanham Act] 'does not cover a response to an unsolicited inquiry by a magazine reporter seeking comment on a topic of public concern.'" 328 F.3d at 91. Even disregarding the disparate legal context, clearly the allegations here do not concern an unsolicited, one-off comment

[19] Coke also relies on *Farah v. Esquire Magazine*, 863 F. Supp. 2d 29 (D.D.C. 2012), *aff'd*, 736 F.3d 528 (D.C. Cir. 2013). *See id.* That case is inapposite for the reasons stated in Plaintiffs' Opposition to Coke's Special Motion to Dismiss at 11.

included in the article of an independent journalist, they concern an affirmative campaign by Coke to deceive consumers where Coke expertly used (and outreached to) media for its own deceptive purposes. *See also Delux Cab*, 2017 WL 1354791, at *7 (evaluating claim in the Lanham Act/competitor context, never discussing *Bolger* and its extensive progeny on the parameters of commercial speech, and noting that "Plaintiff does not oppose Defendants' argument regarding the media statements").

In short, Coke's statements are not "inextricably intertwined" with protected, independent media coverage. Instead, Coke used the media as a microphone for its commercial objectives. *See, e.g.*, Coke MTD Mem., Ex. 11 (USA Today article featuring interview of Coke executive exclusively with no editorial commentary); Compl. ¶ 88 & n.51 (Email from then-Coke CEO directing its Chief Scientific Officer to "persuade" CBS to invite Coke-funded scientist onto "CBS This Morning"). Accordingly, there is no "safe haven" for Coke's commercial statements here either.

III. PLAINTIFFS HAVE STANDING TO ASSERT CLAIMS OF FALSE AND DECEPTIVE PROMOTION OF SUGAR DRINKS

Plaintiffs—two pastors who provide care and guidance to others, including congregants who are suffering from obesity and obesity-related diseases, and a non-profit organization whose mission is to build healthier communities—plainly have standing to bring this case under the CPPA. For one thing, the CPPA establishes a broad right of consumers to truthful information, and Plaintiffs, as consumers of Defendants' products, have standing to vindicate that right. Second, Plaintiffs have standing as testers under D.C. Code §§ 28-3905(k)(1)(B–D). Third, Plaintiffs have standing because they have diverted resources to rebut Defendants' false, deceptive, and misleading claims.

A. Plaintiffs Have Standing to Enforce Their Rights to Truthful Information Under the CPPA

Each of the Plaintiffs is a consumer of Defendants' products and has been exposed to Defendants' deceptive statements. Compl. ¶¶ 20, 22, 25, 146. As such, each has standing to complain about Defendants' misleading statements under the CPPA. D.C. Code § 28-3904 establishes the right of consumers to truthful information, whose infringement triggers the requisite injury to confer standing on a consumer who purchases goods or services subject to the CPPA. The District of Columbia Court of Appeals so held in *Grayson v. AT & T Corp.*, 15 A.3d 219 (D.C. 2011) and again in *Floyd v. Bank of America*, 70 A.3d 246 (D.C. 2013).[20]

Coke's challenge to Plaintiffs' standing misreads *Grayson.* Coke seizes on the Court's holding that a second plaintiff, Paul Breakman, lacked standing. Coke MTD Mem. at 18, n.10. Unlike Grayson, whose claim of standing was upheld, and Plaintiffs here, Breakman made no claim to have purchased the subject product. He sought to challenge trade practices of AOL but did not claim to be "an AOL member" or to have "any relationship to AOL." *Grayson*, 215 A.3d at 227. The Court held that Breakman lacked standing because he sought to sue to in a "wholly representative capacity." *Id.* at 247. Grayson, in contrast, did make purchases in the District. *Id.* at

[20] *Grayson* upheld the standing of plaintiff Alan Grayson based on decisions that recognized the standing of plaintiffs claiming infringement of statutory rights to information. 15 A.3d at 249 & n.97 (citing *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 373 (1982) (standing based on claimed "deprivation of" "enforceable right to truthful information concerning . . . availability of housing" under 804(d) of Fair Housing Act); *FEC v. Akins*, 524 U.S. 11, 21 (1984) (voters claiming denial of truthful election information had standing to sue under Federal Election Campaign Act); *Public Citizen v. Dep't of Justice*, 491 U.S. 440, 449 (1989) (upholding standing of advocacy organizations denied information subject to disclosure under the Federal Advisory Committee Act); *Shays v. FEC*, 528 F.3d 914, 923 (D.C. Cir. 2008) (standing to enforce right to information claimed under Bipartisan Campaign Reform Act of 2002)). *See Virginia State Bd. of Pharmacy*, 425 U.S. at 757 (upholding standing of consumers to assert right to receive truthful advertising).

225. The Court upheld his claim of standing for products he purchased. *Id.* at 249–50 & n.98. Plaintiffs' standing rests on the same footing as that of Grayson.

In order to avoid this result, Coke argues that Grayson had standing because he made purchases "under false pretenses." *See* Coke MTD Mem. at 18, n.10. However, reliance is not an element of a CPPA claim. The Act is violated "whether or not any consumer is in fact misled, deceived or damaged thereby," D.C. Code § 28-3904, and nothing in *Grayson* suggests otherwise. Indeed, Grayson's standing derived from his "personally obtain[ing] calling cards in consumer transactions in which . . . information was not disclosed." *Grayson*, 15 A.3d at 249, n.97.[21]

Coke also overlooks *Floyd v. Bank of America.* In *Floyd,* the Court emphasized the "broad reach" of its holding in *Grayson* that a plaintiff shows an injury in fact simply "by alleging that she is a *consumer of the defendant's service(s)* and that the defendant *has misrepresented material facts about the service or has failed to inform the plaintiff of material information* . . . ." 70 A.3d at 251 (emphasis added). *See also id*. (Grayson's standing was based on "invasion of . . . legal right [under] the CPPA,' . . . to truthful and non-misleading information . . . ."). Numerous District of Columbia decisions,[22] as well as *Grayson*, *Floyd*, and the plain language of the CPPA,

[21] Coke's reliance on the 2012 amendments to the CPPA is unavailing. While the amendments provided additional ways to establish Article III standing for CPPA claims, including, *e.g.*, express recognition of standing for testers, it made plain that violating the right to truthful information suffices. The 2012 Committee Report described the amendments to the CPPA as designed "to clarify that the CPPA establishes an enforceable right to truthful information" and "codifies language" in *Grayson* that upheld standing based on infringement of that right. *See* 2012 Committee Report at 3.

[22] *See Nat'l Consumer League v. Bimbo Bakeries USA*, Case No. 2013 CA 006548 B, 2015 WL 1504745, at *4 (D.C. Super. Apr. 2, 2015) (consistent with *Grayson*, organization had standing based on its purchase of subject product); *Nat'l Consumers League v. Gerber Products Co*., Case No. 2014 CA 008202 B, 2015 WL 4664213, at *5 (D.C. Super. Aug. 5, 2015) (organization's standing upheld based on purchase of "two canisters of Good Start"); *Mostofi v. Mohtaram, Inc*., Case No. 2011 CA 163 B, 2013 WL 8372154, at *3 (D.C. Super. Nov. 12, 2013) ("dispositive consideration is that Plaintiff is a consumer who engaged in a consumer transaction"; "purchase[] of one bottle of Pompeian" sufficed "regardless of Plaintiff's . . . motivation" or

unambiguously support Plaintiffs' standing based on a purchase wherein they were denied non-misleading information in violation of the CPPA.[23]

Spokeo, Inc. v. Robins, 136 S.Ct. 1540 (2016) does not mandate a different result. To the contrary, in *Spokeo*, the Supreme Court took it as a given that certain intangible injuries "can . . . be concrete" so as to confer standing. 136 S.Ct. at 1549. It listed as an example infringement of the rights to information recognized in *Akins* and *Public Citizen*, *see id.*—two decisions relied on in *Grayson*, 15 A.3d at 249 & n.97. *Spokeo* is in harmony with *Grayson* and *Floyd* and with Plaintiffs' standing based on claimed infringement of their statutory right to truthful information.[24]

"desire to test"); *Dahlgren v. Audiovox Communications*, Case No. 2002 CA 007884 B, 2012 WL 2131937, at *4 (D.C. Super. Mar. 15, 2012) (CPPA now "provides standing to any consumer seeking to bring an action for a violation the law, so long as, as held in *Grayson*, that person . . . has been deprived of a right under that law"); *Organic Consumers Ass'n v. General Mills, Inc.*, Case No. 2016 CA 6309 B, 2017 WL 2901210, at *4 (D.C. Super. July 6, 2017) (recognizing injury in fact based on purchase of product and claim of misrepresentation); *cf. Zuckman v. Monster Beverage Corp*., Case No. 2012 CA 008653 B, 2016 WL 4272477, at *3 (D.C. Super. Aug. 12, 2016) (refers to plaintiff's allegation that he would not have purchased "had he known of the health risk" but does not hold such an allegation necessary to state requisite injury).

[23] As against all of these precedents, Coke gains little support from *Hemby v. Biotab Neutraceuitcals, Inc.*, Case No. 2014 CA 001290 B. *See* Coke MTD Mem. at 19–20 & Ex. 18–19. *Hemby* is distinguishable because the plaintiff in that case, unlike the Plaintiffs here, did not allege that he was even aware of the alleged misrepresentations before purchasing the product in question. *Compare id.*, Ex. 19 at 4, *with* Compl. ¶ 145 (alleging that Plaintiffs were "exposed to Defendants' false and deceptive advertising"). Nor is Coke's argument supported by *Hancock v. Urban Outfitters, Inc.*, 830 F.3d 511 (D.C. Cir. 2016). *Hancock* was a claim that the defendant unlawfully collected consumers' zip codes, not a violation of the right to truthful information. 830 F.3d at 514. It has no bearing on standing here.

[24] *Spokeo* held that "a bare procedural violation" of the Fair Credit Reporting Act would not suffice to claim a concrete injury. 136 S.Ct. at 1550. It *did not*—contrary to Coke's characterization—hold that it was "not enough . . . to allege that a search engine company had listed inaccurate information about [the plaintiff's] education . . . ." *See* Coke MTD Mem. at 18. The Court remanded to determine whether that "particular procedural violation" met the concreteness requirement. *Spokeo*, 136 S.Ct. at 1550. The Ninth Circuit then proceeded to hold that it *did*. *Robins v. Spokeo, Inc.*, 867 F.3d 1108, 1117 (9th Cir. 2017).

B. Plaintiffs Have Standing Based on Their Purchases of Coke's Products for the Purpose of Testing and Evaluation

As noted above, in 2012, the D.C. Council amended the CPPA to allow standing by testers. 2012 Committee Report at 4–5. In addition to standing based on the infringement of their right to truthful information, Plaintiffs also have standing based on allegations that each purchased Coke sugar drinks to test their purported qualities and characteristics including but not limited to "their sugar content and potential effects on blood sugar levels" and Defendants' "representation that a calorie of Coke is equivalent nutritionally to a calorie of any other food." Compl. ¶¶ 20, 22, 25.[25]

Coke argues that tester standing under the CPPA requires more than testing and assessment of a product, such as laboratory testing that establishes falsity. However, D.C. Code § 28-3905(k) imposes no such further requirement. It requires no more than, as alleged in the Complaint, that plaintiffs in fact tested and evaluated the subject products. Compl. ¶¶ 20, 22, 25, 144, 151, 156, 167. [26]

Coke gains no support from *Fair Employment Council v. BMC Mktg. Corp.*, 28 F.3d 1268 (D.C. Cir. 1994), a decision decided well before the 2012 amendments to the CPPA. The court in that case rejected the "suggestion that the mere expense of testing . . . constitutes 'injury in fact' fairly traceable to [the defendant's] conduct." 28 F.3d at 1276. Plaintiffs premise their standing as

[25] Coke disparages Plaintiffs' references to their intended testing as "vagu[e]" and mocks "pastoral injury," Coke MTD Mem. at 24–25, ignoring these specific references to testing the products. Compl. ¶¶ 20, 22, 25.

[26] Coke misstates the CPPA's legislative history as reflecting a supposed intention to narrowly construe standing by limiting it to plaintiffs who "'purchase[] products . . . with the intent of determining whether those products . . . are what they claim to be,' *and who then uncover a misrepresentation.*" Coke MTD Mem. at 2 (emphasis added). The supposed additional condition—"and who then uncover a misrepresentation"— is Coke's invention, notably absent from the 2012 Committee Report, and patently inconsistent with the broad purposes of the Act. *See* 2012 Committee Report at 5.

testers on allegations that they purchased the subject products and tested and evaluated them—which is all the provision requires—not on the expense of testing. Compl. ¶¶ 144, 151, 156, 167.[27]

C. Plaintiffs Have Standing Based on Diversion of Their Resources to Rebut Coke's False, Deceptive, and Misleading Marketing Claims

Plaintiffs also have standing based on diversion of their resources to rebut Coke's false, deceptive, and misleading marketing claims. Here, as in in *Animal Legal Def. Fund v. Hormel Foods Corp.*, Case No. 2016 CA 004744 B, at *6 (D.C. Super. Sept. 22, 2017) ("*ALDF*"), Ex. 9, the Complaint includes detailed allegations regarding the diversion of resources incurred by the Plaintiffs. Compl. ¶¶ 146–47, 149–50, 154–55, 160–66. These include the diversion of time and money from other advocacy that plaintiff Praxis can devote to the fight against obesity and chronic disease, and the diversion of resources of Pastors Lamar and Coates from help they can give to their parishioners and others. The court in *ALDF* soundly relied on *Equal Rights Ctr. v. Properties Int'l*, 110 A.3d 599, 603 (D.C. 2015) and *D.C. Appleseed Ctr. for Law & Justice, Inc. v. D.C. Dep't of Ins.*, 54 A.3d 1188 (D.C. 2012) for its holding that an organization suffers a sufficiently concrete injury to bestow standing when there is a "'direct conflict between the defendant's conduct and the organization's mission'" and the organization is "forced to divert resources to counteract the effects of another's unlawful acts." *ALDF*, Case No. 2016 CA 004744 B, at *6 (quoting *Equal Rights Ctr.*, 110 A.3d at 604).[28]

The allegations here state the requisite conflict and detail the injury suffered by each of the Plaintiffs. Plaintiffs' alternate claim of standing based on injury suffered via diversion of their

[27] Coke's attempted analogy to *Havens* is unsupported. Respondent R. Kent Willis, the tester plaintiff who was *white*, was provided with *truthful* information that housing was in fact available to him as a white individual. He was held to lack standing because he "alleged no injury to his statutory right to accurate information . . . ." 455 U.S. at 375.

[28] Coke relies mistakenly on *Food & Water Watch, Inc. v. Vilsack*, where the standing claim was the harm the organization would occur in *the future*. 808 F.3d 905, 920 (D.C. Cir. 2015).

resources is supported by the recent *ALDF* decision and the decisions of the D.C. Court of Appeals on which the decision relies.

IV. PLAINTIFFS HAVE OTHERWISE STATED A CLAIM UNDER THE CPPA

A. Plaintiffs' Claims Are Not Barred by the Statute of Limitations

In the final pages, page 26, of its 30-page brief, Coke makes a half-hearted argument that some of Plaintiffs' CPPA claims are barred by the three-year statute of limitations set forth in D.C. Code § 12.301(8)—an argument echoed in a footnote by ABA. *See* Coke MTD Mem. at 26. Coke points to allegations regarding certain advertisements it ran and certain statements by its executives in 2012 and 2013 as falling outside the period of limitations. *Id.* (citing Compl. ¶¶ 75–77, 109, 114, 109, 116, 130–31). However, Coke fails to acknowledge two important points. First, because the relief sought in this case is entirely equitable, *see* Compl. at 39–40, the controlling doctrine is laches and the statute of limitations does not control. Second, because the challenged advertisements and statements are part of a continuing course of conduct that runs afoul of the CPPA, even under the statute of limitations, the action is timely where the last challenged acts fall within the period of limitations.

First, where the relief sought is entirely equitable, the controlling doctrine is laches. *See Federal Marketing Co. v. Virginia Impression Products, Inc.*, 823 A.2d 513, 527–28 (D.C. 2003) (allowing certain equitable claims to be asserted five years after the actionable conduct, even though applicable statute of limitations was three years); *King v. Kitchen Magic, Inc.*, 391 A.2d 1184, 1187 (D.C. 1978) (allowing equitable claims to be asserted nine years after actionable conduct, even though applicable statute of limitations was three years). "No rigid rule, such as a specific statute of limitations, controls in a case where fraud is an issue." *In re Estate of Reilly*, 933 A.2d 830, 838 (D.C. 2007) (equitable claims not barred by a "fixed period."). To prevail on a laches defense, Defendants would need to show an unreasonable delay that has caused specific

prejudice in their ability to defend. *Powell v. Zuckert*, 366 F.2d 634, 636 (D.C. Cir. 1966). This is an inherently fact specific inquiry that cannot be resolved on a motion to dismiss. *Naccache v. Taylor*, 72 A.3d 149, 153 (D.C. 2013) (laches requires "a fact-intensive, case-by-case prejudice analysis that focused on the circumstances and actions of the particular parties").

Second, to the extent the statute of limitations applies, it should be measured against the Defendants' entire course of conduct, not by individual statements or advertisements. The principle of a continuing statutory violation was articulated in *Havens*, 455 U.S. at 380–81. The plaintiffs claimed that Havens Realty had turned down a series of rental applications from African Americans in violation of the Fair Housing Act, and Havens sought to bar the plaintiffs' claims with respect to the first four housing applications on the grounds that those denials fell outside the period of limitations. The Court concluded that where a plaintiff "challenges . . . not just one incident of conduct violative of the Act, but an unlawful practice that continues into the limitations period, the complaint is timely when it is filed within [the period of limitations] of the last asserted occurrence of that practice." *Id.* (footnote omitted).

The "continuing violation" principle has been applied repeatedly in the District of Columbia, including in the context of consumer violations. *See Earle v. District of Columbia*, 707 F.3d 299 (D.C. Cir. 2012) (discussing, *inter alia*, *Singletary v. District of Columbia*, 351 F.3d 519, 526 (D.C. Cir. 2003) (series of discriminatory employment practices); *Postow v. OBA Federal Savings & Loan Ass'n*, 627 F.2d 1370, 1379 (D.C. Cir. 1980) (consumer claim under the federal Truth in Lending Act)). *See also Page v. U.S.*, 729 F.2d 818, 821 (D.C. Cir. 1984) ("When a tort involves continuing injury, the cause of action accrues, and limitation period begins to run, at the time the tortious conduct ceases."); *Hargroves v. Capital City Mortgage Co.*, 140 F. Supp. 2d 7, 18 (D.D.C. 2000) (applying continuing violation principle to a series of predatory loans).

Two types of circumstances, both present here, have been held to warrant application of the continuing violation principle. One is a violation "that could not reasonably have been expected to be made the subject of a lawsuit when it first occurred because its character as a violation did not become clear until it was repeated during the limitations period." *Taylor v. FDIC*, 132 F.3d 753, 765 (D.C. Cir. 1997) (quoting *Dasgupta v. Univ. of Wisconsin Bd. of Regents*, 121 F.3d 1138, 1139 (7th Cir. 1997)); *Hargroves*, 140 F. Supp. 2d at 18. In *Hargroves*, the defendant made successive loans that, taken in isolation, might not have been viewed as actionable, but when viewed in the context of a full pattern of later loans, was deemed predatory. *Hargroves*, 140 F. Supp. 2d at 18. When Coke's Vice President stated in 2012 that "[t]here is no scientific evidence that connects sugary beverages to obesity," Compl. ¶ 75, or when in 2013 Coke launched its "Coming Together" advertising campaign that proclaimed "All Calories Count," *id*. ¶ 116, those acts alone might not have warranted a suit under the CPPA. Taken together with Coke's ensuing public statements and advertising campaigns and its covert funding and republication of science slanted in its favor, which came to light in 2015, *id*. ¶ 81, n.42, the character and extent of Coke's violations has only become clear within the limitations period.

The second such circumstance is where the policy underlying the applicable statute supports a continuing obligation to act or refrain from acting. *See AKM LLC dba Volks Constructors v. Sec'y of Labor*, 675 F.3d 752, 763 (D.C. Cir. 2012) (Garland, J., concurring) ("[W]here a . . . statute [ ] imposes a continuing obligation to act, a party can continue to violate it until that obligation is satisfied, and the statute of limitations will not begin to run until it does."); *Postow*, 627 F.2d at 1379–80 (lender had a continuing obligation to provide a disclosure required by the Truth in Lending Act because of the "the announced goals of the Act"). So too here given D.C. Code § 28-3901(c)'s express direction that the CPPA "be construed and applied liberally to

promote its purpose" of assuring that consumers are provided with truthful information. The CPPA's broad remedial purpose supports application of the continuing violation principle to Defendants' entire pattern of deceptive conduct, including their failure to disclose what they have long known about the health risks of sugar drinks. *See, e.g.*, Compl. ¶ 171.

B. Coke's Conduct Falls Within the "Geographic Reach" of the CPPA

Coke is incorrect that Plaintiffs complain about conduct beyond the "geographic reach" of the CPPA. Coke MTD Mem. at 26–27. Neither case cited by Coke supports its argument. *Williams v. Purdue Pharma Co.*, 297 F. Supp. 2d 171 (D.D.C. 2003) says nothing about the "geographic reach" of the CPPA. It holds to the contrary that the CPPA *does* apply to manufacturers based outside the District (like Coke) who sell their products to wholesalers and retailers within the District. *See* Complaint, *Williams*, Case No. 02 Civ. 00556 (RMC), ECF No. 1-1 at 1 (stating that defendants are located in New Jersey and Connecticut), Ex. 10. *Dahlgren v. Audiovox Communications Corp.*, Case No. 2002 CA 007884 B, 2012 WL 2131937 (D.C. Super. Mar. 15, 2012), contrary to Coke's assertion, points out that the CPPA *does* apply to trade practices occurring outside the District. *See Dahlgren*, 2012 WL 2131937 ("The [CPPA] does not limit 'person' to a resident of a District of Columbia. . . . Nor does it provide that a 'trade practice' must occur in the District of Columbia."). *See also Williams v. First Mortg. & Investors Corp.*, 176 F.3d 497, 499 (D.C. Cir. 1999); *Wiggins v. AVCO Financial Services*, 62 F. Supp. 2d 90, 98 (D.D.C. 1999) (both applying the CPPA to claims brought by District residents challenging trade practices occurring outside the District).

C. Coke's Conduct is Actionable Under the CPPA

Coke argues that certain of its activities—namely, its statements on the health effects of *its products* and its sponsorship of events in which it pushes this same message *to consumers*—are

not covered by the CPPA. In a clear attempt to repackage its First Amendment argument, and without citation to authority, Coke asserts that these activities do not "implicate[] 'consumer transactions'" and, therefore, are not actionable under the CPPA. *See* Coke MTD Mem. at 28.

Even if Coke correctly stated the legal standard, which it has not,[29] Coke's argument is meritless. Plaintiffs allege that all of Coke's activities are done with the "purpose of persuading consumers to purchase [sugar drinks]." Compl. ¶¶ 74, 94. But this Court need not take Plaintiffs' word for it. Coke's insistence on the noncommercial character of its conduct is belied by Coke's SEC Form 10-K filing, which list obesity concerns as its first corporate risk factor. *See supra* p. 4. The CPPA, of course, was designed to address this exact behavior. *See* 2012 Committee Report at 7 (quoting *U.S. v. Philip Morris USA, Inc.*, 449 F. Supp. 2d 1, 208 (D.D.C. 2006) ("[C]ompanies similarly spent years confusing the public about the link between cigarettes and cancer.")), Ex. 5. *See also* Opp. Mem. ABA MTD at Part II (discussing the commercial purpose of ABA's conduct).

Coke also asserts in summary fashion that actions of ABA, the Global Energy Balance Network ("GEBN"), and the European Hydration Institute ("EHI") cannot be imputed to it because it did not "directly participate[]" in these activities. *See* Coke MTD Mem. at 28–29 (citing cases on derivative liability).

Our allegations are not based on Coke's derivative liability for the actions of others. Contrary to Coke's assertion, it "t[ook] part in" each of the actions alleged in the Complaint. *See* D.C. Code § 28-3901(3) ("'[R]espondent' means *one or more* merchants [who] have *taken part in* . . . a trade practice." (emphasis added)). For many of the references to GEBN, EHI, and ABA, it

[29] The question is not whether Coke's activities "implicate[] consumer transactions," it is whether Coke's activities constitute a "trade practice," which broadly covers "*any act* which does or would . . . *provide information about*, or, directly or *indirectly*, solicit . . . a sale . . . of consumer goods or services." *See* D.C. Code § 28-3901(7) (emphasis added). *See also id.* § 28-3901(3) ("'[R]espondent' means . . . merchants [who] have taken part in . . . a trade practice.").

is *only* Coke's actions that form the basis of the allegations.[30] For other allegations, Coke took part in a joint venture.[31] Finally, even where Plaintiffs' allegations are based on GEBN's, EHI's, and ABA's activities, Plaintiffs allege Coke was involved in and/or controlled their conduct.[32] These allegations are sufficient to establish liability under the CPPA. *See McMullen v. Synchrony Bank*, 164 F. Supp. 3d 77, 92 (D.D.C. 2016) (defendants liable under CPPA for "joint venture"); *Dist. of Columbia v. Student Aid Ctr., Inc.*, Case No. 2016 CA 003768 B, 2016 WL 4410867 (D.C. Super. Aug. 17, 2016) ("Corporate officers are personally liable when they participate in, inspire, or fail to prevent deceptive trade practices under the CPPA."). *See also Vuitch v. Furr*, 482 A.2d 811, 820 n.29, 823 (D.C. 1984) ("[O]fficer or director personally liable for conversion by corporation . . . where knowingly acquiesced therein.").[33]

CONCLUSION

For the foregoing reasons, and for all the reasons stated in Plaintiffs' Opposition to ABA's Motion to Dismiss, the Court should reject Coke's motion to dismiss the Complaint for failure to state a claim as a matter of law.

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[30] *See, e.g.*, Compl. ¶¶ 78–79 (Coke "secretly funded" scientific research "to suppress and obfuscate the facts about [sugar drinks]" and "relied on, and republished, such studies to support its misleading claims about [sugar drinks]").

[31] *See id.* ¶ 115 (the Mixify campaign was "sponsored by both Coca-Cola and the ABA"); *id.* ¶ 81 & n.42 (Coke created GEBN's website on which misleading statements appear).

[32] *See, e.g.*, *id.* ¶¶ 96, 97, 98 (Coke "extensively finances and influences ABA," "sits on [ABA's] board of directors," and otherwise controls the content of ABA's statements on sugar drinks); *id.* ¶ 81, n.42 (Coke funded and "helped pick [GEBN's] leaders, create its mission statement and design its website . . . ."); *id.* ¶ 82 (Coke funded and co-founded EHI). Indeed, given Coke's control over GEBN and EHI, Plaintiffs' allegations establish that Coke was the alter ego of those entities. *See Gonzalez v. Internacional De Elevadores, S.A.*, 891 A.2d 227, 237 (D.C. 2006) (to establish alter ego status there must be "unity of ownership and interest").

[33] Because Plaintiffs' allege Coke is directly liable for the conduct in the Complaint, this analysis is unaltered by Coke's argument that GEBN, EHI, and ABA are not merchants. Even in the derivative context, however, "[a]n aider or abettor . . . may generally be [liable] where the principal has a defense personal to himself . . . ." *See, e.g.*, *State v. Stocksdale*, 138 N.J. Super. 312, 320 (1975). Anyway, ABA is a merchant under the CPPA. *See* Opp. Mem. ABA MTD at Part III.

Date: January 30, 2018

Respectfully submitted,

By: */s/ Maia Kats*

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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: Motion Hearing March 15, 2018, at 11:00 a.m.

(PROPOSED) ORDER DENYING DEFENDANT COCA-COLA COMPANY'S MOTION TO DISMISS PURSUANT TO SUPER. CT. CIV. R. 12(B)(6) AND 12(B)(1)

Before the Court is defendant Coca-Cola Company's Motion to Dismiss Pursuant to D.C. Superior Court Civil Rule 12(B)(6) and 12(B)(1). Upon consideration of the parties' filings, it is hereby ORDERED that Defendant's Motion to Dismiss is denied.

By the Court,

Date: _____

_____
Honorable Elizabeth Wingo
District of Columbia Superior Court

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CERTIFICATE OF SERVICE

I hereby certify that on January 30, 2018, I caused a copy of the foregoing memorandum to be electronically served via the CaseFileXpress system on the following:

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