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 AMERICAN BEVERAGE ASSOCIATION'S MOTION TO DISMISS PURSUANT TO D.C. SUPERIOR COURT RULE 12(B)

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INTRODUCTION

As with the motion of defendant The Coca-Cola Company ("Coke"), the motion to dismiss of defendant American Beverage Association ("ABA") teems with misplaced hyperbole about the First Amendment and, purportedly, the right of non-profit associations to engage in public "debate"—ignoring long-standing prohibitions on misleading commercial speech as well as precedent on trade associations. It is also rife with misrepresentations, easily demonstrated, as to the official positions of various health authorities and experts, including the Centers for Disease Control ("CDC") and the Food and Drug Administration ("FDA"). Quite contrary to ABA's argument, FDA and CDC positions do not align with its statements, let alone insulate it as a matter of law from liability for misleading representations. So too, like Coke, ABA mischaracterizes Plaintiffs' claims about the science of sugar-sweetened beverages ("sugar drinks") in an attempt to discredit them. Plaintiffs nowhere condition their legal claims on the proposition that sugar drinks have uniquely caused the current public health crises of obesity, type 2 diabetes, and cardiovascular disease. Proving deception in advertising cigarettes never required proof that smoking was the sole cause of cancer.

Notwithstanding Defendants' legal obfuscations, the main question before this Court is rather simple: that is, whether or not Plaintiffs have sufficiently pled a cause of action under the District of Columbia Consumer Protection and Procedures Act ("CPPA" or the "Act"), construing all averments in their favor, so as to entitle them to proceed with their claims against ABA in a court of law. The answer is yes: Plaintiffs have more than sufficiently pled that numerous statements of ABA on the health and nutritional effects of sugar drinks are misleading and deceptive by way of, *inter alia*, omissions, half-truths, innuendos, and/or falsities, in violation of the Act. Included in their allegations, among many others, are ABA statements that deceptively

associate sugar drinks with good health and a healthy lifestyle (*e.g.,* "Just finished an afternoon of Frisbee? Maybe you've earned a little more [soda]."), and falsely and misleadingly disassociate sugar drinks from negative health effects (*e.g.*, "Recently we've seen some food activists allege that [sugar drinks] cause obesity, diabetes and a host of other adverse health conditions. Obviously they are hoping you never look at the science behind their claims. Because it doesn't exist."). These misrepresentations, moreover, are made for the commercial objective of promoting and/or protecting sales of Coke and other member products, thereby removing them from the realm of protected speech.

Given the body of science linking sugar drinks to harmful health and nutritional effects in the form of devastating chronic diseases—now of epidemic proportions, including in the District of Columbia where a whopping 47 percent of adults are estimated to have to diabetes or pre-diabetes and at least 40 percent of the residents in wards seven and eight are obese, Compl. ¶¶ 61, 63—such deceptive marketing gimmicks are not only properly before this Court, they well merit the judicial scrutiny that Pastors Lamar and Coates and the Praxis Project, who routinely confront this harsh reality, seek on behalf of consumers.

STANDARD OF REVIEW

On Super. Ct. Civ. R. 12(b) motions to dismiss, District of Columbia courts apply "the pleading standard articulated by the Supreme Court in [*Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007) and *Ashcroft v. Iqbal*, 556 U.S. 662 (2009)]." *See Equal Rights Ctr. v. Properties Int'l*, 110 A.3d 599, 602 (D.C. 2015); *Heard v. Johnson*, 810 A.2d 871, 877 (D.C. 2002).

A motion to dismiss should be denied where the complaint contains "sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Iqbal*, 556 U.S. at 678 (quoting *Twombly*, 550 U.S. at 570). A claim is considered plausible on its face "when the

plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id*. Though mere "formulaic recitation of the elements of a cause of action will not do," "plausibility" is far from "probability." *Id.* Indeed, "a well-pleaded complaint may proceed even if it strikes a savvy judge that actual proof of those facts is improbable, and that a recovery is very remote and unlikely." *Twombly*, 550 U.S. at 556 (internal quotation marks omitted).

ARGUMENT

I. THE COMPLAINT READILY STATES A CLAIM THAT ABA'S STATEMENTS ARE DECEPTIVE AND MISLEADING IN VIOLATION OF THE CPPA

A. The Complaint Alleges Deceptive and Misleading Statements in Violation of the CPPA

ABA's argument that Plaintiffs cannot, as a matter of law, establish that ABA statements challenged in the Complaint are deceptive and misleading, *see* ABA Mem. Supp. Mot. to Dism. ("ABA MTD Mem.") at 20–24, misconceives the scope of the CPPA. The argument also overlooks the nature of ABA's misrepresentations, both collectively and individually, which statements, either through innuendo, omission, half-truths, or falsity, clash with reputable scientific findings—including those adopted by CDC, FDA, and myriad other respected health sources and authorities.

The CPPA is a "comprehensive statute designed to provide procedures and remedies for a broad spectrum of practices which injure consumers," *Atwater v. District of Columbia Dep't of Consumer & Regulatory Affairs*, 566 A.2d 462, 465 (D.C. 1989), and is to "be construed and applied liberally to promote its purpose," D.C. Code § 28-3901(c). *See also, e.g.*, *Nat'l Consumer's League v. Doctor's Associates, Inc.*, Case No. 2013 CA 006549 B, 2014 WL 4589989, at *5 (D.C. Super. Sept. 12, 2014) (noting liberal construction and application afforded the statute). This broad purpose encompasses "[u]se [of] innuendo or ambiguity as to a material fact, which has a tendency

to mislead," D.C. Code § 28-3904(f-1), and "provide[s] a cause of action when merchants bury the truth and leave false impressions without outright stating falsehoods," *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. 1.

The D.C. Council expanded the already broad scope of the CPPA when it amended that law in 2012 to add to prohibited acts the "[u]se [of] innuendo or ambiguity as to a material fact, which has a tendency to mislead." D.C. Code § 28-3904(f-1). The Council noted that in many instances, "while facts may exist in the public domain as to veracity of claims made, merchants nonetheless flood the market with countervailing representations to hide the truth." 2012 Committee Report at 7 (citing cigarette companies' efforts to "confus[e] the public about the link between cigarettes and cancer" as an example of such behavior (quoting *U.S. v. Philip Morris USA, Inc.*, 449 F. Supp. 2d 1, 208 (D.D.C. 2006), *aff'd in part and vacated in part on other grounds*, 566 F.3d 109 (D.C. Cir. 2009))). Other CPPA sections Plaintiffs claim Defendants violate similarly employ the broad "tend[] to mislead" formulation. *E.g.*, D.C. Code §§ 28- 3904(e), (f) (prohibiting failure to state a material fact if such failure tends to mislead).

Simply put, the CPPA is designed to address the kinds of misleading statements that were central to the *Philip Morris* case—that is, not only statements that are blatantly false but also those designed to obscure and "confus[e] the public about the link" between a product (or category of products) and certain negative health effects. This is precisely the claim here, where Plaintiffs have identified numerous specific statements by ABA that a jury could reasonably conclude are deceptive and misleading because, *inter alia*, they use "innuendo or ambiguity as to . . . material facts," and/or "fail to state material facts," and therefore "tend to mislead" through the "flood[ing] [of] the market with countervailing representations to hide the truth" about the health and

nutritional effects of sugar drinks. These include ABA statements like, "Recently we've seen some food activists allege that sugar-sweetened beverages 'cause' obesity, diabetes and a host of other adverse health conditions. Obviously they are hoping you never look at the *science behind their claims. Because it doesn't exist*."; "Like past false food scares, the anti-soda campaign misleads people *with unsound science*."; "You may have read articles recently suggesting that there is something unique about soda when it comes to diabetes. . . . But if you dig deep enough, *there's no 'there' there"*—"Get the Facts"; "The same holds true for headlines that say drinking soda can cause obesity, type 2 diabetes, or heart disease. *What's missing from those unfounded statements* is any evidence from randomized clinical trials . . . ."; "Drinking fluids is absolutely essential," "[a]dults and children can consume a wide variety of fluids each day, including . . . regular . . . soft drinks . . . to meet their hydration needs."; and "Just finished an afternoon of Frisbee? Maybe you've earned a little more [soda]." *See, e.g.*, Compl. ¶¶ 106, 107, 115, 135 & n.62 (emphasis added). These and other statements clash with "sound," "[well-] founded," "exist[ing]" science, including but not limited to clear statements of FDA and CDC—studiously ignored by Defendants—that sugar drinks link to obesity, type 2 diabetes, cardiovascular disease, as well as other negative health and nutritional effects. *See infra* Part I.B.

The fact that some of ABA's challenged statements may contain an element of truth or have some support in the public domain does not shield them from scrutiny for violating the CPPA. *See, e.g.*, *U.S. v. Philip Morris USA, Inc.*, 566 F.3d 1095, 1128 (D.C. Cir. 2009) ("[E]ven partially true statements can be actionable . . . if . . . misleading . . ."); *Borzillo v. Thompson*, 57 A.2d 195, 197–98 (D.C. 1948) ("It is settled law . . . that . . . a statement . . . which contains only those matters which are favorable and omits all reference to those which are unfavorable is as much a false representation as if all the facts stated were untrue."); *Nat'l Consumer's League*, 2014 WL

4589989, at *6 ("even truthful statements may be actionable" so long as "it would cause a reasonable consumer to be deceived or misled").

The Fourth Circuit's decision in *In re GNC*, on which ABA mistakenly relies for support, says nothing contrary. 789 F.3d 505 (4th Cir. 2015). Indeed, in *GNC*, the court expressly distinguished the claims before it, of literal falsity, from the type of false and misleading advertising claims at issue here:

> Crucially . . . . [b]ecause Plaintiffs elected to plead that the Companies' representations are false . . . we must determine whether the CAC states facts showing that the representations are literally false.
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> * * *
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> Our holding today should not be interpreted as insulating manufacturers of nutritional supplements from liability for consumer fraud. A manufacturer may not hold out the opinion of a minority of scientists as if it reflected broad scientific consensus.

Id. at 514–516.[1] Unlike in *GNC*, Plaintiffs here pled misleading and deceptive statements by ABA no fewer than 35 times. *See, e.g.*, Compl. ¶¶ 1, 3–5, 15–16, 18, 20, 22, 36, 66, 70, 72. Plaintiffs clearly state a claim under the CPPA.

ABA's reliance on *Ony, Inc. v. Cornerstone Therapeutics, Inc.*, 720 F.3d 490 (2d Cir. 2013) is also misplaced. That case concerned a single article published in a scientific journal that the plaintiff alleged to be false and misleading, as opposed to a campaign of deceptive advertising targeting consumers. Given the context, the court *never* addressed the extensive case law on what constitutes commercial speech, the lack of First Amendment protections for deceptive commercial speech, and/or the breadth and variety of actionable deception under D.C.'s CPPA. *Id.* at *passim*.

[1] *Tibau v. American Dental Ass'n* does not support ABA's position either, as the court found defendant's assertions were consistent with "the scientific and regulatory consensus." Case Nos. 322109–10, 2003 WL 25935971, at *11 (Cal. Super. Aug. 8, 2003). Clearly given the body of scientific evidence on sugar drinks, Plaintiffs have pled more than sufficient scientific evidence to preclude any such finding on a motion to dismiss here. *See infra* Part I.B.

Instead, in finding the article to be non-actionable, the court considered that "[s]cientific academic discourse poses several problems for the fact-opinion paradigm of First Amendment jurisprudence" and that it is "more closely akin to matters of opinion," with any limitations "well understood by the relevant scientific communities." *Id.* at 496–497. Those limitations were even expressed in the article itself, which specified that its conclusions were "not unqualified" and also "readily disclosed" methodological "shortcomings." *Id*. at 496, 498. The court then rejected out of hand any claim that the article was actionable under New York's General Business Law as "our decision rests entirely on our conclusion about the non-actionability of the article's contents." *Id.* at 498–99. Exactly none of this echoes the claims and facts alleged by Plaintiffs here. ABA's campaign directly and indirectly promoting sugar drinks constitutes commercial speech targeting consumers, *see infra* Part II, is neither in an academic journal nor conditioned on explicit scientific research, and deceptively associates sugar drinks with healthy diets and lifestyle as well as disassociates it from adverse health effects.[2]

Instead of *Ony*, more apposite would be the Fifth Circuit's decision in *Eastman Chemical Co. v. Plastipure, Inc.*, which distinguished *Ony* where the defendant used material from an academic journal *in aid of its commercial promotions*. As the Fifth Circuit aptly explained,

> [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.

[2] Defendants do cite in their memoranda various FDA and CDC statements as support, but these are not contained in the original statements that are challenged in this case, which statements were not "scientific" in character. As set forth below, Defendants distort the statements of FDA and CDC materially. *See, e.g.*, *infra* Part I.B. *See also Biolase, Inc. v. Fotona Proizvodnja Optoelektronskih Naprav D.D.*, Case No. 14 Civ. 0248 (ANx), 2014 WL 12577153, at *3 (C.D. Cal. Sept. 15, 2014) (distinguishing *Ony*; "Because the [advertising materials] are . . . [not] accurate reflections of scientific studies, the Court cannot dismiss the claims on that basis."); *Mimedx Grp., Inc. v. Osiris Therapeutics, Inc.*, Case No. 16 Civ. 3645 (KPF), 2017 WL 3129799, at *7 (S.D.N.Y. July 21, 2017) (same).

775 F.3d 230, 237–38 (5th Cir. 2014) (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.")). *See also, e.g.*, *In re Civil Investigative Demand*, 34 Mass. L. Rptr. 104, 108 & n.2 (Mass. Super. Ct. Jan. 11, 2017) ("concerns about Exxon's possible misrepresentations to Massachusetts consumers" about the risks posed by climate change are legitimate subjects of investigation consistent with the First Amendment).

In short, as in *Eastman Chemical* and other cases discussed above, as well as myriad other cases discussed within Plaintiffs' Opposition to Coke's Motion to Dismiss, ABA's statements are actionable under the CPPA. *See* Pls.' Mem. Opp. to Coke's Mot. to Dism. ("Opp. Mem. Coke MTD) at Part I.

B. FDA and CDC Statements Are Not Consistent with Positions of ABA

In an attempt to avoid this result, ABA mistakenly and misleadingly claims that its challenged representations "are consistent with the views of the FDA and CDC," ABA MTD Mem. at 3, and therefore, as a matter of law, not deceptive or misleading. ABA's attempt to align its challenged statements with the positions of FDA and CDC on sugar drinks, like that of Coke, rests on distortion and elision.

Plucking a clause from context, ABA says FDA has concluded that sugar drinks "are no more likely to cause weight gain in adults than any other source of energy." ABA MTD Mem. at 1 (quoting 79 Fed. Reg. 11,880, 11,904 (Mar. 3, 2014)). This citation, however, elides FDA's crucial qualifier that the cited lack of weight gain occurred only "under isocaloric controlled conditions." 79 Fed. Reg. at 11,904. People don't tend to compensate for liquid sugar intake by reducing other calories, however, *see* Compl. ¶¶ 45, 119, so consistent with Plaintiffs' allegations,

the central point of FDA's statement was recognition of the conclusion of the 2010 United States Dietary Guideline Advisory Committee ("DGAC") that, under normal conditions, "***strong evidence*** shows that children who consume more sugar-sweetened beverages have greater adiposity (body fat)," 79 Fed. Reg. at 11,903 (emphasis added). ABA also ignores FDA's embrace of the 2015 DGAC finding 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).[3]

ABA is equally misleading in attempting to align with CDC. ABA cites and attaches a CDC webpage that discusses caloric balance as mandating dismissal of Plaintiffs' claims as a matter of law, but ignores CDC's longstanding recognition of the association between sugar drinks and obesity and obesity-related chronic disease. Indeed, one would hardly know from Defendants' briefs that CDC has been clear about the negative health effects linked to sugar drinks. CDC warns that "[f]requently 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 January 11, 2018) (emphasis added), Ex. 2.[4] And

[3] ABA criticizes Plaintiffs' reliance on the 2015 DGAC report as merely "[a]dvisory." *See* ABA MTD Mem. at 7, n.7. It overlooks that FDA itself embraced findings of the 2010 and 2015 DGAC.

[4] 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

with respect to hydration, CDC has recognized that sugar drinks, notwithstanding that they are "a source of water," have "poor nutritional value" and are a "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), https://goo.gl/aAD5ba, Ex. 3. The statements of FDA and CDC not only clash with Defendants' challenged statements, they are compelling evidence of their deceptiveness.[5]

Beyond this, a plethora of scientific research and public pronouncements by health authorities align with Plaintiffs' claim that substantial science links sugar drinks with obesity, type 2 diabetes, and cardiovascular disease, further showing a triable issue of fact as against ABA. Health authorities that have publicly acknowledged the link and/or called for reduction in the consumption of sugar drinks as a means to control the epidemics of obesity and related chronic

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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.

[5] ABA distortions with respect to other FDA and health authority statements abound. For example, ABA discusses the science relating to added sugars at length, *see* ABA MTD Mem. at 7, when FDA rejects such "proxy" because the science on added sugars is nascent whereas "the evidence on sugar-sweetened beverages and body weight/adiposity is *strong and consistent*," *see* 81 Fed. Reg. at 33,803 (emphasis added). *Compare also* Coke MTD Mem. at 5, *and* ABA MTD Mem. at 7 (asserting scientific recognition that "[t]he role of [sugar drinks] in promoting obesity is controversial") (citing Ex. I ("Ebbeling RCT")), *with* Ebbeling RCT (articulating author's view that her RCT proffered clear and previously unavailable evidence of the link). *Cf.* Thomas R. Frieden, *Evidence for Health Decision Making—Beyond Randomized, Controlled Trials*, 377 NEW ENG. J. MED. 465 (2017) (former CDC head explaining that RCTs are not the only relevant form of scientific evidence here). Beyond Ebbeling's own RCT, there have been many RCTs since 2006 finding a link between sugar drinks and weight gain. *See* Compl. ¶ 50 & n.19 (citing several such RCTs).

disease include, but are not limited to, the: 2015 DGAC;[6] Institute of Medicine; [7] World Health Organization ("WHO"); [8] American Heart Association ("AHA"); [9] American Medical Association ("AMA");[10] American Public Health Association ("APHA");[11] American Diabetes Association

[6] Compl. ¶¶ 46, 52 (citing U.S. DEP'T OF AGRIC. & U.S. DEP'T OF HEALTH & HUMAN SERVS., SCIENTIFIC REPORT OF THE 2015 DIETARY GUIDELINES ADVISORY COMMITTEE, pt. D, ch. 6, p. 20 (2015), http://goo.gl/2rc9v3 ("*Strong and consistent evidence* shows that intake of added sugars from food and/or sugar sweetened beverages are associated with excess body weight in children and adults"; "*Strong evidence* shows that higher consumption of added sugars, especially sugar sweetened beverages, increases the risk of type 2 diabetes among adults and this relationship is not fully explained by body weight"; "Moderate evidence from prospective cohort studies indicates that higher intake of added sugars, *especially* in the form of sugar-sweetened beverages, is *consistently associated* with increased risk of hypertension, stroke, and CHD in adults." (emphasis added))).

[7] Compl. ¶ 57. *See also* INSTITUTE OF MEDICINE, ACCELERATION PROGRESS IN OBESITY PREVENTION: SOLVING THE WEIGHT OF THE NATION at Ch. 6, p.169 (2012), https://goo.gl/pZRas8 ("Researchers have found *strong associations* between intake of sugar-sweetened beverages and weight gain"; "*their link to obesity is stronger than that observed for any other food or beverage . . .*" (emphasis added)), Ex. 4.

[8] Compl. ¶ 112. *See also* WHO, *Reducing consumption of sugar-sweetened beverages to reduce the risk of unhealthy weight gain in adults*, https://goo.gl/Pn46gt (last visited Jan. 11, 2017) ("Current evidence suggests that increasing consumption of sugar-sweetened beverages is associated with weight gain. Therefore, reducing consumption of sugar-sweetened beverages would also reduce the risk of unhealthy weight gain in adults."), Ex. 5

[9] Compl. ¶¶ 42, 43, 46, 57. *See also* Linda Van Horn et al., *Recommended Dietary Pattern to Achieve Adherence to the American Heart Association/American College of Cardiology (AHA/ACC) Guidelines A Scientific Statement From the American Heart Association*, 134 CIRCULATION e1, e8 (2016), https://goo.gl/VbJXBm ("There is a *robust body of evidence* that SSB consumption is detrimental to health and has been associated with increased risk of CVD mortality, hypertension, liver lipogenesis, T2DM, obesity, and kidney disease." (emphasis added)), Ex. 6.

[10] Compl. ¶¶ 46, 47 (largest association of physicians and medical students backs resolution supporting "warning labels to educate consumers on the health harms of SSBs" (citing Sara Berg, *AMA Backs Comprehensive Approach Targeting Sugary Drinks,* AMA WIRE (June 14, 2017), https://goo.gl/tyAgGf)).

[11] APHA, *Taxes on Sugar-Sweetened Beverages* (Oct. 30, 2012), https://goo.gl/XGdrMZ ("Consumption of these drinks is a significant contributor to the obesity epidemic and increases the risk of type 2 diabetes, heart disease, and dental decay."), Ex. 7.

("ADA");[12] CDC;[13] and FDA.[14] The Complaint also cites an impressive body of peer-reviewed scientific research finding a link between sugar drinks and harmful health and nutritional effects.[15]

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[12] *See* Expert Report of Walter Willett ¶ 9, *Am. Beverage Ass'n v. City & Cty. of San Francisco*, Case No. 15 Civ. 03415 (EMC) (N.D. Cal. Filed Feb. 23, 2016), ECF No. 56-1, Ex. 8. *See also* ADA, *Diabetes Myths*, http://www.diabetes.org/diabetes-basics/myths/ (last visited Jan. 11, 2018) ("The American Diabetes Association recommends that people should avoid intake of sugar-sweetened beverages to help prevent diabetes."), Ex. 9.

[13] *See supra* Part I.B.

[14] *See supra* Part I.B.

[15] Compl. ¶¶ 49–58 (citing, *e.g.*, Ravi Dhingra et al., *Soft Drink Consumption and Risk of Developing Cardiometabolic Risk Factors and the Metabolic Syndrome in Middle-Aged Adults in the Community*, 116 CIRCULATION 480 (2007); Frank B. Hu & Vasanti S. Malik, *Sugar-Sweetened Beverages and Risk of Obesity and Type 2 Diabetes: Epidemiologic Evidence*, 100 PHYSIOLOGY & BEHAV. 47 (2010); Vasanti S. Malik et al., *Sugar Sweetened Beverages and Weight Gain in Children and* Adults*: A Systematic Review and Meta-Analysis*, 98 AM. J. CLINICAL NUTRITION 1084 (2013); Julie R. Palmer et al., *Sugar-Sweetened Beverages and Incidence of Type 2 Diabetes Mellitus in African American Women*, 168 ARCHIVES INTERNAL MED. 1487 (2008); Qibin Qi et al., *Sugar-Sweetened Beverages and Genetic Risk of Obesity*, 367 NEW ENG. J. MED. 1387 (2012); Matthias B. Schulze et al., *Sugar-Sweetened Beverages, Weight Gain, and Incidence of Type 2 Diabetes in Young and Middle-Aged Women*, 292 JAMA 927 (2004); Jiantao Ma, *Sugar-Sweetened Beverage but Not Diet Soda Consumption is Positively Associated with Progression of Insulin Resistance*, 146 J. OF NUTRITION 2544 (Nov. 9, 2016); Janne C. de Ruyter et al., *A Trial of Sugar-Free or Sugar-Sweetened Beverages and Body Weight in Children*, 367 NEW ENG. J. MED. 1397 (2012); Cara B. Ebbeling et al., *A Randomized Trial of Sugar-Sweetened Beverages and Adolescent Body Weight*, 367 NEW ENG. J. MED. 1407 (2012); Cara B. Ebbeling et al., *Effects of Decreasing Sugar-Sweetened Beverage Consumption on Body Weight in Adolescents: A Randomized Controlled Pilot Study*, 117 PEDIATRICS 673 (2006); Janet James et al., *Preventing Childhood Obesity by Reducing Consumption of Carbonated Drinks: Cluster Randomized Controlled Trial*, 328 BMJ 1237 (2004); Anne Raben et al., *Increased Postprandial Glycaemia, Insulinemia, and Lipidemia After 10 Weeks' Sucrose-Rich Diet Compared to an Artificially Sweetened Diet: A Randomized Controlled Trial*, 55 FOOD NUTRITION RES. 5961 (2011); Anne Raben et al., *Sucrose Compared with Artificial Sweeteners: Different Effects on Ad Libitum Food Intake and Body Weight After 10 Wk of Supplementation in Overweight Subjects*, 76 AM. J. CLINICAL NUTRITION 721 (2002); Michael G. Tordoff & Anne M. Alleva, *Effect of Drinking Soda Sweetened with Aspartame or High-Fructose Corn Syrup on Food Intake and Body Weight*, 51 AM. J. CLINICAL NUTRITION 963 (1990); Darren C. Greenwood et al., *Association Between Sugar-Sweetened and Artificially Sweetened Soft Drinks and Type 2 Diabetes: Systematic Review and Dose-Response Meta-Analysis of Prospective Studies*, 112 BRIT. J. NUTRITION 725 (2014); Fumiaki Imamura et al., *Consumption of Sugar Sweetened Beverages, Artificially Sweetened Beverages, and Fruit Juice and Incidence of Type 2 Diabetes: Systematic Review, Meta-Analysis, and Estimation of Population Attributable Fraction*, 351 BMJ h3576 (2015); Lawrence de Koning et al., *Sugar-Sweetened and Artificially Sweetened Beverage Consumption and Risk of Type 2 Diabetes in Men*, 93 AM. J. CLINICAL NUTRITION 1321 (2011); Vasanti S. Malik et al., *Sugar-*

In other words, an abundant body of credible scientific research supports Plaintiffs' claims of deception against dismissal because they find that, as a general matter, sugar drinks do not associate with good health and nutrition and, conversely, cannot properly be unconditionally disassociated from obesity and disease given the plentiful and "sound" research linking them.[16] The well-"founded" scientific research, as well as statements by FDA and CDC, also shows that sugar drinks are not a nutritionally or medically advisable form of hydration given this link, nor are consumers generally lacking hydration (with the possible exception of professional athletes); a calorie is not just a calorie in the context of health and nutrition because sugar drinks are devoid of nutrient value and link to chronic disease, shortfalls in needed nutrients, and excessive caloric intake overall—given the common failure to compensate for liquid intake by reducing food intake; and sugar drinks do not associate with health and healthy nutritional habits even when combined with token exercise like dog walking, laughing, or some frisbee.

Sweetened Beverages and Risk of Metabolic Syndrome and Type 2 Diabetes: A Meta-Analysis, 33 DIABETES CARE 2477 (2010); Andrew O. Odegaard et al., *Soft Drink and Juice Consumption and Risk of Physician-Diagnosed Incident Type 2 Diabetes*, 171 AM. J. EPIDEMIOLOGY 701 (2010); The InterAct Consortium, *Consumption of Sweet Beverages and Type 2 Diabetes Incidence in European Adults: Results from EPIC-InterAct*, 56 DIABETOLOGIA 1520 (2013); Adam M. Bernstein et al., *Soda Consumption and the Risk of Stroke in Men and Women*, 95 AM. J. CLINICAL NUTRITION 1190 (2012); Lawrence de Koning et al., *Sweetened Beverage Consumption, Incident Coronary Heart Disease, and Biomarkers of Risk in Men*, 125 CIRCULATION 1735 (2012); Teresa T. Fung et al., *Sweetened Beverage Consumption and Risk of Coronary Heart Disease in Women*, 89 AM. J. CLINICAL NUTRITION 1037 (2009); Te Morenga LA et al., *Dietary Sugars and Cardiometabolic Risk: Systematic Review and Meta-analyses of Randomized Controlled Trials of the Effects on Blood Pressure and Lipids*, AM. J. CLINICAL NUTRITION 65 (2014); Sonia Caprio, *Calories from Soft Drinks—Do They Matter?*, 367 NEW ENG. J. MED. 1462,1463 (2012); Vasanti S. Malik & Frank B. Hu, *Fructose and Cardiometabolic Health: What the Evidence from Sugar-Sweetened Beverages Tells Us*, 66 J. AM. C. CARDIOLOGY 1615 (2015)).

[16] *See also* Complaint ¶¶ 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)).

C. The Ninth Circuit's Decision in *ABA v. San Francisco* Does Not Support Dismissal

Finally, ABA takes false comfort in the recent Ninth Circuit decision in *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. *E.g.*, ABA MTD Mem. at 8–9. First, the Ninth Circuit will rehear the case *en banc*, so the decision reversing the trial court is uncertain. Even so, *ABA* involved standards for what the government can force a commercial actor to say through a compelled disclosure. The standard for what industry can say on its own is different. Just because the Ninth Circuit initially ruled that San Francisco cannot force ABA to warn of health risks of sugar drinks does not mean the opposite is true—namely, that sugar drinks are healthy, are not linked with obesity, type 2 diabetes, and cardiovascular disease. This is clearly not the case and ABA's deceptive statements to consumers that there are no health risks to sugar drinks are not immunized here.[17]

The question of whether a finder of fact would determine that ABA's statements have in fact violated the CPPA is not for the Court to answer now. Rather, the question presented is whether Plaintiffs' allegations suffice to state a cause of action. Given the statements Plaintiffs have identified, the existing science on the link between sugar drinks and adverse health effects, and the broad purpose and language of the CPPA, the unmistakable answer is yes.

[17] Notably, the Ninth Circuit never stated that requiring "ads for SSBs to disclose that they 'contribute[] to obesity [and] diabetes' was contrary to scientific evidence that *SSBs do not have these effects*." *See, e.g.*, Coke Mem. Supp. Mot. to Dism. ("Coke MTD Mem.") at 4 (emphasis in original). Those are Coke's words. The court discussed the science of added sugars. As FDA itself has explained, and as set forth in *this* record, sugar drinks and added sugars are not suitable scientific proxies for each other and it is not scientifically sound to extrapolate conclusions on sugar drinks from added sugar research (or the lack thereof). *See, e.g.*, *supra* at note 5.

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

Despite ABA's insistence otherwise, ABA MTD Mem. at 15–20, the First Amendment provides it no refuge. ABA's statements at issue here are commercial speech. As such, they are entitled to no First Amendment protection if found to be deceptive or misleading, as Plaintiffs allege them to be. *E.g.*, *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748, 772 (1976) (noting that the First Amendment does not "prohibit the State from insuring that the stream of commercial information flow cleanly as well as freely"); *Cent. Hudson Gas & Elec. Corp. v. Public Service Comm'n*, 447 U.S. 557, 566 (1980) (holding that in order to receive First Amendment protection, commercial speech "at least must . . . not be misleading"); *Philip Morris*, 566 F.3d at 1143. ABA's contention that its challenged speech is noncommercial and protected fares no better than that of Coke. *See* Opp. Mem. Coke MTD at Part II.

With respect to ABA's status, moreover, extensive case law from the U.S. Supreme Court and other federal and state appellate courts unequivocally establishes that trade associations can and do have commercial interests, and often engage in commercial speech on behalf of themselves and/or their members' products (such as sugar drinks). This is regardless of whether the speech relates to a category of member products or a specific product. *E.g.*, *Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60, 67 & n.13 (1983) ("That a product is referred to generically does not . . . remove it from the realm of commercial speech. . . . *[A] trade association may make statements about a product without specific brand names*." (emphasis added)); *Philip Morris*, 566 F.3d at 1144 ("The fact that some of [the tobacco advertisements challenged in that case] involve Defendants as a group joined in advertising their common product, *discussing cigarettes generically without specific brand names*, or link cigarettes to an issue of public debate, does not change the commercial nature of the speech." (emphasis added)); *Nat'l Comm'n on Egg Nutrition*

v. FTC, 570 F.2d 157, 163 (7th Cir. 1977) (enforcing Federal Trade Commission order against trade association for egg manufacturers and holding that "[t]he nature of [commercial speech] is not changed when a group of sellers joins in advertising *their common product*." (emphasis added)); *All One God Faith, Inc. v. Organic & Sustainable Industry Standards, Inc.*, 183 Cal. App. 4th 1186, 1210 (Cal. App. 2010) (finding that trade association engaged in commercial speech and quoting *Nat'l Comm'n on Egg Nutrition*); *Western Sugar Coop. v. Archer Daniels Midland*, Case No. 11 Civ. 3473 (CBM) (AJWx), 2015 WL 12683192, *7 (C.D. Cal. Sept. 21, 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)).

ABA's other contentions miss the mark as well. In characterizing its statements as part of a "public debate" and not commercial speech, ABA proceeds from the same misconception as Coke that commercial speech includes only speech that "does no more than propose a commercial transaction." *See* ABA MTD Mem. at 5, 17. For support, ABA relies on *Bolger*, yet *Bolger* is flatly to the contrary. Speech that "does no more than propose a commercial transaction" is within what the Court called the "core notion of commercial speech," but the Court defined other types of commercial speech as well. 463 U.S. at 66. Addressing various informational pamphlets on birth control, which included information of public health interest, promoted birth control generally and products only generically, the Court found that *all* were properly treated as commercial speech. *Id.* at 62 n.4, 66 n.13, 67–68. In so holding, the Court cited to *Metromedia, Inc. v. City of San Diego*, *see id.* at 68, evoking Justice Brennan's prescient words: "[T]hose who seek to convey commercial messages will engage in the *most imaginative of exercises* to place themselves within the *safe*

haven of noncommercial speech, while at the same time conveying their commercial message," *Metromedia*, 453 U.S. 490, 540 (1981) (Brennan, J., concurring) (emphasis added).

ABA's narrow view of commercial speech was also decisively rejected in *Philip Morris*. Analogous publicity campaigns by the tobacco industry, including notably its trade associations, discounting the harmful effects of smoking were held in all respects to be commercial in nature. The court explained that commercial speech extends to a broad range of representations outside the "core notion" of commercial speech, 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." *Philip Morris*, 566 F.3d at 1143 (relying, *inter alia*, on *Nat'l Comm'n on Egg Nutrition's* holding that the egg producers' trade association's publicity campaign amounted to commercial speech). It did not matter that 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*. *See also Western Sugar Coop.*, 2015 WL 12683192, at *7 (sugar trade association engaged in commercial speech when it acted with "a clear economic motive" in reposting articles on its website advancing its "mission to educate consumers and promote the consumption of sugar through sound scientific principles" (emphasis removed)); *CrossFit, Inc. v. Nat'l Strength & Conditioning Ass'n*, 2016 WL 5118530, at *5–8 (S.D. Cal. 2016) (non-profit fitness association "had an economic motive for publishing this data, specifically in preserving or expanding its market share in the fitness industry . . . .").[18]

[18] *Simpson v. Johnson & Johnson*, Case No. 2016 CA 1931 B (D.C. Super.) is aberrant and incorrect to the extent it suggests that a trade association's speech promoting members' products is non-commercial. *See* Pls.' Opp. to ABA Special Mot. to Dism. at Part I.B.i.

That ABA statements are not formal product advertisements, in other words, does not mean they do not convey a commercial message and can escape review here.[19]

ABA's statements and its own characterizations of the interests motivating its involvement in the sugar drinks "debate" make clear that its endorsements and defenses of sugar drinks generally, and more specifically, those made by Coke and other members, are commercial in nature. Compl. ¶ 96. For example, as part of its Mixify campaign, a joint effort with Coke (and PepsiCo and Dr. Pepper), ABA offered consumers assistance with "balancing your mix of food, drinks and physical activities," and noted how "our *products* can play a part in that equation." Coca Cola, *mixify-balance-well-being* (May 13, 2016), https://goo.gl/RWdjV6 (last visited Jan. 11, 2018) (emphasis added), Ex. 10. Like the messages in *Philip Morris*, *Nat'l Comm'n on Egg Nutrition*, and *All One God Faith*, *supra*, this message is "clearly designed to facilitate commerce in [ABA members'] products," *see All One God Faith*, 183 Cal. App. 4th at 1210, by seeking to persuade consumers that light exercise and use (and purchase) of "our products" achieves a healthy balance, Compl. ¶¶ 103, 115. The campaign, according to ABA's advertising consultant, succeeded in "reach[ing] more than 25 million teens and 22 million moms," *i.e.*, consumers, and generated wide interest on social media. *See* GMMB, *Corporate Social Impact: Inspiring Balance with the American Beverage Association,* https://goo.gl/WEa9HH (last visited Jan. 11, 2018), Ex. 11.

[19] *Bernardo v. Planned Parenthood Fed'n of Am.*, 115 Cal. App. 4th 322 (Cal. Ct. App. 2004), cited by ABA, *see* ABA MTD Mem. at 18, is not to the contrary. The Court ultimately held that the statements at issue were noncommercial in that they were "not 'promotional' of abortion" but "were educational and/or informative in nature, as opposed to advocating . . . ." *Bernardo*, 115 Cal. App. 4th at 350. *Bernardo* is far afield from the promotional activity by trade groups at issue in *Philip Morris*, *Nat'l Comm'n on Egg Nutrition, Western Sugar*, and here.

Other ABA statements are equally commercial in nature, encouraging consumers to associate sugar drinks with good health and promoting purchases, or continued purchases, to health-conscious consumers. *See, e.g.*, Compl. ¶ 115 ("Just finished an afternoon of Frisbee? Maybe you've earned a little more [soda].").[20] ABA campaigns, like "Let's Clear It Up," seek to preserve and promote sales by attempting to disassociate sugar drinks with negative health effects. *Id.* ¶ 106 ("Recently we've seen some food activists allege that [sugar drinks] cause obesity, diabetes and a host of other adverse health conditions. Obviously they are hoping you never look at the science behind their claims. Because it doesn't exist."). ABA self-described such efforts as commercial when *it* sued the City and County of San Francisco for their efforts to educate the public by way of mandatory warning notices on sugar drink ads, encompassing the Mixify campaign. Citing the risk of "unquantifiable economic and competitive losses," that is, commercial harm, ABA sought a preliminary injunction. *See* Pls.' Opp. to ABA Special Mot. to Dism. at I.B.ii. For its campaign work, ABA is paid *tens of millions* of dollars *annually* by Coke, as well as by PepsiCo and Dr. Pepper Snapple. *See, e.g.*, ABA, *2015 IRS Form 990*, https://goo.gl/82GRfo (denoting almost $76 million in annual revenue (page 1, line 9), $12 million in annual member dues (page 9, line 2b), and an additional $68 million from select members, including Coke, PepsiCo, and Dr. Pepper (page 9, line 2a)), Ex. 12.[21] Clearly, ABA's engagement on sugar drinks—including by way of outreach to current and potential consumers—is intended to protect and promote the sale of these products. It is also deceptive and unlawful under the CPPA, *see*

[20] While ABA argues otherwise, ABA MTD Mem. at 23 n.15, the inference that "more" refers to sugar drinks is clear because, aside from the clear context, it is accompanied by an image of a young girl drinking a soda, *see ABA-Mixify TV Spot,* VIMEO, https://vimeo.com/148111990.

[21] The precise breakdown of Coke's annual payments to ABA is not publicly available and is or will be a subject of discovery. *See* Pls.' Mot. for Targeted Discovery, Ex. A. It is public knowledge that Coke and Coke-affiliated personnel exert substantial sway at ABA, including positioning no fewer than seven key personnel on ABA's Board of Directors. Compl. ¶ 98.

supra Part I, and therefore not immunized by the First Amendment, *Cent. Hudson*, 447 U.S. at 566.[22]

Like Coke, ABA's pose as a victim of attempts by two highly respected pastors and a non-profit concerned with public health to suppress its free speech is palpably disingenuous. It warrants rejection out of hand no less than Exxon's recent attempts to claim that the Attorney Generals of New York and Massachusetts sought to stifle its free speech by seeking to investigate Exxon's public disclosures on climate change. *See* Opp. Mem. Coke MTD at 10–11, n.11 (citing, *e.g.*, *Exxon Mobil Corp. v. Schneiderman*, Case No. 17 Civ. 2301 (VEC) (SN) (S.D.N.Y)). Making short shrift of Exxon's First Amendment contention, the federal court declared that states "are entitled [to investigate]—in the same way they were entitled to investigate the tobacco companies or coal companies . . . whether, in fact, your public disclosures historically were accurate. And if they weren't then they should charge you with fraud." *Exxon*, Case No. 17 Civ. 2301 (VEC) (SN), ECF No. 245 at 56 (emphasis added), Ex. 13. *See also In re Civil Investigative Demand*, 34 Mass. L. Rptr. 104, 108 & n.2 (Mass. Super. Ct. Jan. 11, 2017) (rejecting Exxon's First Amendment argument and holding that "concerns about Exxon's possible misrepresentations to Massachusetts consumers" are legitimate subjects of investigation).

III. ABA'S CONDUCT IS ACTIONABLE UNDER THE CPPA

ABA argues that Plaintiffs' claims are not actionable because it is not a "merchant" subject to the provisions of the CPPA. *See* ABA MTD Mem. at 10–14. ABA is wrong.

[22] Because deceptive commercial speech is not entitled to protection by the First Amendment, *see id.*, ABA's audacious contention that the CPPA violates the First Amendment by prohibiting such speech is meritless, *see* ABA MTD Mem. at 24–25.

A. ABA Is a Merchant

As set forth at length above, *see supra* Part I, the CPPA's purpose "is to protect consumers from a broad spectrum of unscrupulous practices by merchants, therefore the statute should be read broadly to assure that the purposes are carried out," *see Modern Mgmt. Co. v. Wilson*, 997 A.2d 37, 62 (D.C. 2010). This encompasses construction of the term "merchant." "Broadly" construed, and contrary to ABA's contention, the term "merchant" is "not limited to the actual seller of the goods or services complained of." *See Howard v. Riggs Nat'l Bank*, 432 A.2d 701, 709 (D.C. 1981). Rather, "merchant" "includes those *connected with* the 'supply side' of a consumer transaction." *See Adam A. Weschler & Son, Inc. v. Klank*, 561 A.2d 1003, 1004 (D.C. 1989) (emphasis added) (quoting *Howard*, 432 A.2d at 709). Such is clearly the case here, where the express purpose of the statute was to encompass deceptive statements akin to those made by the various trade associations, and Philip Morris, concerning tobacco and its health effects so as to protect and encourages sales of cigarettes. *See supra* pp. 3–4.

The text of the Act itself is straightforward about this, defining "merchant" in two ways. First, a "merchant" includes "a person . . . who . . . does or would sell . . . , either directly or *indirectly*, consumer goods or services." D.C. Code § 28-3901(3) (emphasis added). Second, a "merchant" includes "a person who . . . does or would supply the goods or services which are or would be the subject matter of a trade practice," *id.*, including "any act which . . . provide[s] information about . . . a sale . . . of consumer goods and services," *id.* § 28-3901(6). Consistent with the Act's mandate, the D.C. Council has further clarified that "merchant" includes individuals who supply goods or services "normally considered *incidental* to the supply of goods and services to consumers." Council of the District of Columbia, Committee on Public Services and Consumer

Affairs, Report on Bill 1-253, at 14 (Mar. 24, 1976) ("1976 Committee Report") (emphasis added), Ex. 14.[23]

Acknowledging that the definition of "merchant" is to be broadly construed, District of Columbia courts have consistently held that interested third parties involved directly or indirectly in the supply side of a consumer transaction are merchants, so long as they are not merely disinterested conveyors. *See, e.g.*, *Howard,* 432 A.2d at 709–10 (one who "advertises [another's] consumer goods and services conceivably may be considered [a merchant]"); *Klank*, 561 A.2d at 1004 (auctioneer is a merchant even if he "was merely auctioning for a fee items owned by others . . . [g]iven the broad definition of 'merchant'"); *Calvetti v. Antcliff*, 346 F. Supp. 2d 92, 104 (D.D.C. 2004) (defendant is a merchant because he recommended a contractor and oversaw the contractor's work); *Williams v. Purdue Pharma Co*., 297 F. Supp. 2d 171, 174–75 (D.D.C. 2003) (manufacturers, but not distributors, of pharmaceutical products that "issued brochures and a videotape directed to consumer[s]" are merchants); *Hall v. S. River Restoration, Inc.*, Case No. 16 Civ. 2239 (CKK), 2017 WL 4011139 (D.D.C. Sept. 11, 2017) (insurance company is a merchant where it "considerably inserted itself into the 'supply side' of the transaction" between the homeowner and contractor); *Dist. of Columbia v. Student Aid Center, Inc.*, Case No. 2016 CA 003768 B, 2016 WL 4410867, *3 (D.C. Super. Aug. 17, 2016) (debt relief company that directed people to free government debt relief program is a merchant).

As Plaintiffs assert in the Complaint, "ABA exists to promote the sale and use of . . . sugar-sweetened beverages," and its statements "are directed at . . . District of Columbia consumers,"

[23] ABA's construction of "merchant" not only defies the plain language and purpose of the Act, it would impermissibly render other provisions superfluous. For example, the CPPA's "media exclusion" creates a narrow exception to its coverage of media outlets that advertise another merchant's goods. *See* D.C. Code § 28-3903(c)(2)(D). Were it not intended that such media outlets be covered by the Act in the first instance, there would be no need for an exemption.

even if not always exclusively. Compl. ¶¶ 96, 103. The manner in which ABA involves itself, including indirectly, in the sale of sugar drinks, and/or provides information about the sale of goods, is set forth in some detail above—both with respect to the law and the facts. *See supra* Part II. *See also, e.g.*, Compl. ¶¶ 96, 104, 105, 106, 107, 135. Its actions include the Mixify campaign, which ads have appeared on digital media, buses, bus stops, billboards, and vending machines in cities across the country.[24] For its work spearheading these "direct-to-consumer" ads, ABA paid GMMB approximately $30 million in a single year.[25] Even the wealthiest companies don't normally spend tens of millions of dollars on campaigns unrelated to their commercial interests. Notably too, ABA's insistence on the noncommercial character of its ads and statements is belied by Coke's SEC Form 10-K filings. Coke lists obesity concerns as its first corporate risk factor, stating "concern about obesity . . . may reduce demand for . . . our [products]" and, moreover, that Coke "cannot assure . . . continu[ed] 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. 17.

B. The Cases Cited by ABA Do Not Alter This Conclusion

With one exception, the cases cited by ABA merely stand for the proposition that *disinterested third parties* are not merchants. In *Howard*, for example, a home owner sued a bank employee who recommended a contractor that subsequently failed to complete the construction

[24] *See* Declaration of Kevin W. Keane, ABA Senior Vice President, dated January 11, 2016 ("Keane Decl."), ¶ 12, *Am. Beverage Ass'n v. City & Cty. of San Francisco*, Case No. 15 Civ. 03415 (EMC) (N.D. Cal. Filed Feb. 23, 2016), ECF No. 50-1, Ex. 15; Keane Decl., Ex. A, Ex. 15.
[25] ABA, *2014 Form 990* at 8, https://goo.gl/kCBF2o, Ex. 16. *See also* GMMB, *Corporate Social Impact: Inspiring Balance with the American Beverage Association*, https://goo.gl/WEa9HH (last visited Jan. 11, 2017), Ex. 11.

project. 432 A.2d at 703–04. The Court, finding that the employee was a "disinterested third part[y]" who merely "recommend[ed] the goods or services of a particular merchant," determined that the employee was not a merchant. *Id.* at 709–710. *See also Armstrong v. Accrediting Council for Continuing Educ. & Training, Inc.*, 832 F. Supp. 419, 421–25 (D.D.C. 1993), *vacated*, 84 F.3d 1452 (D.C. Cir. 1996) (accrediting agency was not a merchant because it is a "disinterested . . . party").[26]

The ABA also relies on *Dahlgren v. Audiovox Communications Corp.*, in which the court held that the Cellular Telecommunication & Internet Association ("CTIA") was not a merchant under the Act. *See* Case No. 2002 CA 007884 B, 2010 WL 2710128, at *1, *12–14 (D.C. Super. July 8, 2010). This action, however, is distinguishable.

First, the difference between CTIA's conduct and ABA's conduct is a difference of kind, not degree. The *Dahlgren* court concluded that it could only consider one press release discussing the health impacts of cell phone use because the others predated 2007 changes in the law. *Id*. Because plaintiff in *Dahlgren* primarily relied on pre-2007 statements, *Dahlgren*, 2010 WL 2710128, at *12–14, any connection between this release and the sale of cell phones was highly attenuated, rendering her allegations insufficient to state a claim. Plaintiffs, by contrast, rely on a campaign of deceptive commercial speech targeting consumers and have repeatedly asserted that ABA's conduct was for the objective of protecting and promoting the sale of sugar drinks, and specifically, Coke products. *E.g.*, Compl. ¶¶ 96, 103, 104, 105, 106, 107, 115, 135.

[26] To the extent ABA relies on *Adler v. Vision Lab Telecommunications, Inc.*, that decision is inapposite, as it discusses the definition of "consumer" and not "merchant." *See* 393 F. Supp. 2d 35, 39 (D.D.C. 2005).

Second, Dahlgren failed to cite—and the court did not address—the extensive body of controlling case law holding that trade associations can and do engage in commercial speech, even when they are speaking about product categories. *See Dahlgren*, Pl.'s Mem. in Opp. to Mot. to Dism. at 47–50, Ex. 18. *See also supra* Part II (citing, *e.g.*, *Bolger*, *Philip Morris*, *Nat'l Comm'n on Egg Nutrition*). Even so, however, the court found that CTIA's activities were "'connected with'—perhaps even tightly connected with—the supply chain." *Dahlgren*, 2010 WL 2710128, at *12–14. Under D.C. Court of Appeals precedent, such "*connect[ion] with* the supply side of a consumer transaction" conveys merchant status. *E.g., Klank*, 561 A.2d at 1004. Put simply, *Dahlgren*, even if decided correctly on the facts of that case, cannot support a conclusion that ABA's statements promoting the sales of sugar drinks generically, and Coke products specifically, fail to support its merchant status under the Act. To so hold would not only undermine the express purpose of the CPPA, it would flout considerable current authority.

C. Non-Profit Organizations Are Liable to the Same Extent as For-Profit Organizations

Finally, ABA asserts that as a non-profit organization, it has special status under the CPPA, exempting it from coverage. ABA MTD Mem. at 13–14. This contention is frivolous. The CPPA was amended in 2007 expressly to permit coextensive suits against non-profit organizations and for-profit corporations. As the Council of the District of Columbia noted, the purpose of the amendment was to "amend[] the definition of 'merchant' so that nonprofit organizations would be subject to the provisions of the [CPPA]." *See* Council of the District of Columbia, Committee on Public Safety and Judiciary, Report on Bill 17-53, at 2, 5 (Feb. 28, 2007) ("2007 Committee Report"), ABA MTD Mem., Ex. L.

In an effort to avoid this result, ABA seeks to distort and extend to itself an exception to the coverage for suits against non-profits. That limited exemption is for actions against nonprofits based on:

> membership in such organization, membership services, training or credentialing activities, sale of publications of the nonprofit organization, medical or legal malpractice, or any other transaction, interaction, or dispute not arising from the purchase or sale of consumer goods or services in the ordinary course of business.

D.C. Code § 28-3905(k)(5). As the D.C. Council made clear, this exception was intended to ensure that the CPPA could not be utilized to resolve non-profit membership disputes. *See* 2007 Council Report at 5 ("The [CCPA] would not have jurisdiction over nonprofit organizations in disputes regarding membership services . . . ."). The exception is plainly inapplicable to this dispute.[27]

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

For the reasons set forth in Plaintiffs' Opposition to Coke's Motion to Dismiss, Plaintiffs have standing to assert claims of false and deceptive promotion of sugar drinks. *See* Opp. Mem. Coke MTD at Part III.[28]

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[27] ABA's reliance on the *2006 testimony* to the Council of the District of Columbia to argue otherwise is unavailing. *See* ABA MTD Mem. at 14 (citing Oct. 19, 2006, Testimony of Bennett Rushkoff; May 4, 2006, Letter from Mayor Anthony Williams). The testimony predates the 2007 Amendment by a full year (and, significantly, the exception cited by the ABA). *Compare* Nonprofit Organization Oversight Improvement Act of 2006, Ex. L at 16, 19, *with* Nonprofit Organization Oversight Improvement Act of 2007, Draft 3, Ex. L at 50, 55. That testimony, moreover, is consistent with the clear import of the Amendment's language. *See, e.g.*, Testimony of Bennett Rushkoff at 7–8, Ex. L at 33 (noting the amendment would make it easier for the Attorney General to pursue claims against nonprofits, using example of a 1999 action against non-profit "credit counsel firm" that "was misleading consumers in its role as *marketing arm* of D.C.-based for-profit lender.").

[28] Further, for reasons set forth Plaintiffs' Opposition to Coke's Motion to Dismiss, *see* Opp. Mem. Coke MTD at Part IV.A, Plaintiffs claims are not barred by the statute of limitations.

CONCLUSION

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

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 AMERICAN BEVERAGE ASSOCIATION'S MOTION TO DISMISS PURSUANT TO D.C. SUPERIOR COURT RULE 12(B)

Before the Court is defendant American Beverage Association's Motion to Dismiss Pursuant to D.C. Superior Court Rule 12(B). 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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Respectfully submitted,

By: */s/ Maia Kats*