SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
Civil Division

THE PRAXIS PROJECT, et al., **Plaintiffs,** **v.** **THE COCA-COLA COMPANY, et al.,** **Defendants.**	**Case No. 2017 CA 004801 B** **Judge Elizabeth C. Wingo** **Civil Calendar 14**

ORDER

Pending before the Court are five motions and the related pleadings. The first motion is Coca-Cola's Motion to Dismiss Pursuant to Super. Ct. R. 12(B)(6) and 12(B)(1), filed by Defendant the Coca-Cola Company ("Defendant Coca-Cola") on October 23, 2017 ("Motion to Dismiss"). 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) ("Opposition"), was filed by Plaintiff The Praxis Project ("Plaintiff Praxis"), Plaintiff William H. Lamar, IV ("Plaintiff Lamar"), and Plaintiff Delman L. Coates ("Plaintiff Coates") (hereinafter known together as "Plaintiffs") on January 30, 2018, and the Reply Memorandum of Law in Further Support of Coca-Cola's Motion to Dismiss ("Reply"), was filed by Defendant Coca-Cola on February 28, 2018. Along with the Motion to Dismiss, on October 23, 2017, Defendant Coca-Cola also filed a Special Motion to Dismiss Pursuant to the District of Columbia Anti-Slapp Act, D.C. Code § 16-5501, *et seq.* ("Special Motion to Dismiss"). Plaintiff's Memorandum of Law Opposing Defendant Coca-Cola Company's Special Motion to Dismiss Pursuant to D.C. Code §§ 16-5501, *et seq.*, was filed on January 30, 2018, and a Reply Memorandum in Further Support of Coca-Cola's Special Motion to Dismiss Pursuant to District of Columbia Anti-SLAPP Act, D.C. Code § 16-5501, *et seq.*, was filed on February 28, 2018. Also pending before the Court are three additional motions: Defendant The Coca-

Cola Company's Consent Motion for Leave to File a Response to Plaintiffs' Praecipe for Supplemental Submission, filed February 1, 2019; Defendant the Coca-Cola Company's Motion for Leave to File Praecipe for Submission of Supplemental Authority, filed July 8, 2019; and Defendant the Coca-Cola Company's Motion for Leave to File Praecipe for Submission of Supplemental Authority, along with Plaintiffs' Opposition to Submission of Supplemental Authority, both filed on August 15, 2019.

For the reasons set forth below, the Court will grant the Motion to Dismiss in part and deny the Motion to Dismiss in part. Because the Court's ruling granting in part the Motion to Dismiss renders the Special Motion to Dismiss moot, the Special Motion to Dismiss will be denied as moot. Additionally, for the reasons stated below, the Consent Motion will also be denied as moot, and the Motions for Leave will be denied.

I. FACTUAL AND PROCEDURAL HISTORY

Plaintiffs Lamar and Coates are pastors who promote social justice, community outreach, and health. *See* Compl. ¶¶ 19, 21. Plaintiff Lamar is the Pastor of the historic Metropolitan African Methodist Episcopal Church, and is a graduate of Florida Agricultural and Mechanical School (B.S.) and Duke University Divinity School (M.Div.). *Id.* at ¶ 19. Plaintiff Coates is the Senior Pastor of Mt. Ennon Baptist Church, where he administers to nearly 9,000 members, and is a graduate of Morehouse College (B.A.), Harvard Divinity School (M.Div.), and Columbia University (Ph.D.). *Id.* at ¶ 21. Both pastors "provide[] guidance to [their] congregants and the community at large, especially children and others at risk of becoming diabetic, about the health hazards linked with sugar-sweetened beverages, recommending that they reduce their consumption." ¶¶ 149, 153. Plaintiff Praxis is a non-profit organization with a mission to build healthier communities, including through advocacy concerning sugar-sweetened beverages. ¶ 23.

Defendant Coca-Cola is a manufacturer of nonalcoholic beverage concentrates and syrups, including sugar-sweetened beverages, *id.* at ¶ 26, and previously-dismissed Defendant American Beverage Association ("Defendant ABA") is a trade association in the business of promoting beverages (hereinafter, known together as "Defendants"). *Id.* at ¶ 27.

Between June and July of 2017, Plaintiffs purchased several sugar-sweetened beverages sold by Defendant Coca-Cola to "evaluate and test their purported qualities and characteristics, including but not limited to their sugar content and potential effects on blood sugar levels and Defendants' representations that a calorie of Coke is equivalent nutritionally to a calorie of any other food." *Id.* at ¶ 20; *see also id.* at ¶¶ 22, 25. Plaintiffs initiated this action on July 13, 2017, by filing their Complaint against Defendants, alleging that Defendants' branding and advertising misled consumers about sugar-sweetened beverages and violated the District of Columbia Consumer Protection Procedures Act ("DCCPPA"), codified as D.C. Code §§ 28-3901 *et seq*. *Id.* at ¶ 18; *see also id.* at ¶¶ 168-186.[1]

On October 23, 2017, Defendants each filed a Motion to Dismiss, seeking to have all claims against them dismissed pursuant to Super. Ct. Civ. R. 12(b)(1) or 12(b)(6). Each

[1] Plaintiff's Complaint specifically outlines Defendants' alleged DCCPPA violations, and states as follows:

"176. The facts as alleged herein demonstrate that Defendants' acts, misrepresentations, omissions, innuendos, and practices, including republication of deceptive representations, constitutes unlawful trade practices in violation of the following provisions of D.C. Code § 28-3904:

a. Section 28-3904(a), which prohibits "represent[ations] that goods or services have a source, sponsorship, approval, certification, accessories, characteristics, ingredients, uses, benefits, or quantities that they do not have";
b. Section 28-3904(d), which prohibits "represent[ations] that goods or services are of particular standard, quality, grade, style, or model, if in fact they are of another";
c. Section 28-3904(e), which prohibits "mispresent[ations] as to a material fact which has a tendency to mislead";
d. Section 28-3904(f), (f-1), which prohibits "fail[ing] to state a material fact if such failure tends to mislead" and the "use of innuendo or ambiguity as to a material fact, which has a tendency to mislead"; and
e. Section 28-3904(h), which prohibits "advertis[ing] or offer[ing] goods or services… without the intent to sell them as advertised or offered."

Compl. at ¶ 176.

Defendant also filed a Special Motion to Dismiss pursuant to the District of Columbia Anti-SLAPP Act, codified as D.C. Code §§ 16-5501 *et seq*. On January 30, 2018, Plaintiffs filed oppositions to all four motions. On February 28, 2018, Defendants replied to Plaintiffs' oppositions.

The parties initially appeared before this Court for hearings on their motions on March 15, 2018, and September 17, 2018.[2] At the September 17, 2018 hearing, the Court noted its continued concerns as to the existence of standing, and permitted the parties to file supplemental briefing on that issue, noting that the Court anticipated short briefs identifying the four or so cases post-*Spokeo*[3] that most clearly supported each parties' position. Thereafter, on October 5, 2018, Plaintiffs filed a Supplemental Memorandum of Law (hereinafter "October 5, 2018 Supplement" or "10/5/18 Supplement"), which addressed Plaintiffs' standing to sue and also attached exhibits including sworn affidavits containing entirely new allegations related to the issue of standing. On October 15, 2018, Defendant Coca-Cola filed its Response to Plaintiffs' Supplement. Following those additional submissions, on December 12, 2018, the Court conducted a brief status hearing via conference call, at which Plaintiffs' counsel unexpectedly inquired as to the necessity of amending the Complaint to include the allegations contained in the Exhibits to the Supplemental Memorandum of Law. The Court therefore conducted another status hearing via conference call on December 27, 2018, and, having made a preliminary determination that the affidavits would not affect the Court's ruling on the issue of standing, improvidently indicated that it would consider the allegations contained within the affidavits without requiring the filing of an amended complaint.

[2] Between the March hearing and the September hearing, the parties filed praecipes to submit supplemental authorities or to respond to such authorities on March 26, 2018, April 13, 2018, April 30, 2018, May 4, 2018, June 22, 2018, July 16, 2018, July 25, 2018, and August 24, 2018. Many of these pleadings, although not all, were simply filed as praecipes, without leave of court.

[3] *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547-48 (2016).

Thereafter, on January 22, 2019, the Court granted Defendant ABA's Motion to Dismiss; the Court, after further analysis, concluded that at least one of the new affidavits could establish standing, but further concluding that Plaintiffs allegations were insufficient to render Defendant ABA a merchant within the meaning of the DCCPPA. The Court therefore granted Defendant ABA's Motion to Dismiss, dismissed the ABA as a defendant in this matter, and, as a result, denied Defendant ABA's Anti-SLAPP Motion as moot.

On January 29, 2019, again without leave of court, Plaintiffs filed Plaintiffs' Praecipe for Supplemental Submission. On February 1, 2019, Defendant The Coca-Cola Company's Consent Motion for Leave to File a Response to Plaintiffs' Praecipe for Supplemental Submission was filed, as well as Coca-Cola's own Praecipe for Submission of Supplemental Authority. On February 5, 2019, the Court conducted another motions hearing, at which it was prepared to rule on a number of issues, including the effect of the statute of limitations. At the hearing, however, Plaintiffs successfully sought the opportunity to file supplemental briefing on the issue of the application of the discovery rule in this case. The Court did, however, strike Plaintiffs' January 29, 2019 Praecipe for Supplemental submission, because "[t]his case has been replete with filings that are done without leave of Court," reminding the parties that anything other than filings such as motions, oppositions, and replies require that leave of court be granted, and no leave of court was granted as to that Praecipe. 2/5/19 Tr. at 7: 8-17.[4]

Plaintiffs' Supplemental Memorandum of Law in Opposition to Defendant The Coca-Cola Company's Motion to Dismiss was filed March 1, 2019. Defendant The Coca-Cola Company's Response to Plaintiffs' Supplemental Submission Regarding Statute of Limitations was filed March 22, 2019. On July 8, 2019, one day before the next scheduled hearing,

[4] The Court did not address the pending February 1, 2019 Consent Motion for Leave to Leave to File a Response to Plaintiffs' Praecipe for Supplemental Submission. Because the Praecipe to which it seeks to respond has been stricken, the Consent Motion will be **DENIED AS MOOT**.

Defendant the Coca-Cola Company's Motion for Leave to File Praecipe for Submission of Supplemental Authority was filed, along with the Praecipe.[5] On July 9, 2019, this Court held its final motions hearing on the pending motions. Following that hearing, on August 15, 2019, both Defendant the Coca-Cola Company's Motion for Leave to File Praecipe for Submission of Supplemental Authority, and Plaintiffs' Opposition to Submission of Supplemental Authority were filed.[6]

II. LEGAL STANDARD

A motion to dismiss under Rule 12 (b)(6) tests the legal sufficiency of a complaint. *Luna v. A.E. Eng'g Servs., LLC*, 938 A.2d 744, 748 (D.C. 2007). A complaint must satisfy the pleadings standards set forth in Super. Ct. Civ. R. 8 (a), which states that a complaint must contain a short and plain statement of Plaintiff's claim that "puts the defendant on notice of the claim against him." *Sarete, Inc. v. 1344 U St. Ltd. P'ship*, 871 A.2d 480, 497 (D.C. 2005) (quoting *Scott v. District of Columbia*, 493 A.2d 319, 323 (D.C. 1985)); *Leonard v. District of Columbia*, 794 A.2d 618, 630 (D.C. 2002) (noting that "even under our liberal rules of pleading," a party must adequately allege the elements of a cause of action to avoid dismissal).

In determining whether a complaint sufficiently sets forth a claim, the court must construe the complaint in the light most favorable to the plaintiff and must take the facts alleged in the complaint as true. *Casco Marina Dev., L.L.C. v. District of Columbia Redevelopment Land Agency*, 834 A.2d 77, 81 (D.C. 2003). However, "the tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions. Threadbare

[5] Although the Motion noted that consent was not obtained, no opposition was ever filed. Nonetheless, because the supplemental authority addresses an issue the Court has concluded is not appropriate to decide in the absence of the to-be-filed amended complaint, the Court will **DENY** the July 8, 2109 Motion for Leave and direct that the supplemental authority be included, if appropriate, in any briefing in response to any amended complaint filed.

[6] The proposed August 15, 2019 supplemental submission also addresses an issue the Court has declined to address in the absence of an actual amended complaint. Therefore, as with the July 8, 2019 Motion for Leave, the Court will **DENY** the August 15, 2019 Motion for Leave, and direct that the supplemental authority be included, if appropriate, in any briefing in response to any amended complaint filed.

recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice," and "unadorned, the-defendant-unlawfully-harmed-me accusation[s]" also are insufficient. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009); *see also Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007) ("a plaintiff's obligation to provide the 'grounds' of his 'entitlement to relief' requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do.").

Rather, "[t]o survive a motion to dismiss [under Rule 12 (b)(6)], a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face. A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged. The plausibility standard is not akin to a 'probability requirement,' but it asks for more than a sheer possibility that a defendant has acted unlawfully." *Potomac Dev. Corp. v. District of Columbia*, 28 A.3d 531, 544 (D.C. 2011) (quoting *Ashcroft*, 556 U.S. at 678); *see also Bell Atl. Corp.*, 550 U.S. at 555 ("Factual allegations must be enough to raise a right to relief above the speculative level."). Likewise, "[w]here a complaint pleads facts that are 'merely consistent with' a defendant's liability, it 'stops short of the line between possibility and plausibility of entitlement to relief.'" *Potomac Dev. Corp.*, 28 A.3d at 544. To survive a motion to dismiss under Rule 12 (b)(6), the District of Columbia Court of Appeals has made clear that a complaint must provide more than labels and conclusions, and that "a formulaic recitation of the elements of a cause of action will not do." *Grayson v. AT&T Corp.*, 980 A.2d 1137, 1144 (D.C. 2009) ("a complaint [will not] suffice if it tenders 'naked assertion[s]' devoid of further factual enhancement.") (citing *Bell Atl. Corp. v. Twombly*, 550 U.S. at 556).[7] Moreover, "[a] defendant

[7] The Court can review a motion pursuant to Rule 12 (b)(6) under the same standard as a motion for summary judgment pursuant to Super. Ct. Civ. R. 56 when "matters outside the pleadings are presented to and not excluded by

may raise affirmative defenses, such as statutes of limitations … in a Rule 12(b)(6) motion. Because statute of limitations issues often depend on contested questions of fact, dismissal is appropriate only if the complaint on its face is conclusively time-barred." *Koker v. Aurora Loan Servicing*, 915 F. Supp. 2d 51, 58 (D.D.C. 2013) (internal quotation marks and citations omitted).

Moreover, a motion to dismiss for lack of standing is appropriately treated as a motion to dismiss for lack of subject matter jurisdiction under Super Ct. Civ. R. 12(b)(1). *See Farm-To-Consumer Legal Def. Fund v. Vilsack*, 636 F. Supp. 2d 116, 122 (D.D.C. 2009) (citing *Haase v. Sessions*, 835 F.2d 902, 906 (D.C. Cir. 1987) ("the defect of standing is a defect in subject matter jurisdiction"); *Prosser v. Fed. Agric. Mortgage Corp.*, 593 F. Supp. 2d 150, 155 (D.D.C. 2009) ("Without standing, there is no subject matter jurisdiction."). "Standing analysis is different 'at the successive stages of litigation.' Thus, the examination of standing in a case that comes to us on a motion to dismiss is not the same as in a case involving a summary judgment motion; the burden of proof is less demanding when the standing question is raised in a motion to dismiss." *Grayson v. AT&T Corp*., 15 A.3d 219, 232 (D.C. 2011). Further,

> [f]or purposes of ruling on a motion to dismiss for want of standing, both the trial and reviewing courts must accept as true all material allegations of the complaint, and must construe the complaint in favor of the complaining party. At the same time, it is within the trial court's power to allow or to require the plaintiff to supply, by amendment to the complaint or by affidavits, further particularized allegations of fact deemed supportive of plaintiff's standing.

Id. (internal quotation marks and citation omitted).

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the court." Super. Ct. Civ. R. 12(d); *Equal Rights Ctr. v. Props. Int'l,* 110 A.3d 599, 602 n.1 (D.C. 2015). Where documents attached to the pleadings are central to the complaint, however, the need for an additional opportunity to refute or authenticate the document is absent because the parties are obviously on notice of the contents of the document. *See Redmon v. United States Capitol Police*, 80 F. Supp. 3d 79, 83-84 (D.D.C. 2015); *Pension Benefit Guar. Corp. v. White Consol. Indus., Inc.,* 998 F.2d 1192, 1196-97 (3d Cir. 1993). A court may also take judicial notice of matters in the general public record without converting a motion to one for summary judgment. *Drake v. McNair*, 993 A.2d 607, 616 (D.C. 2010); *see also Smith v. Public Defender Service*, 686 A.2d 210, 212 (D.C. 1996) (holding that "opinions and orders, as well as a brief and transcript" attached to a motion to dismiss "do not constitute 'matters outside the pleading'" that would require converting the motion to dismiss to one for summary judgment).

III. ANALYSIS

Plaintiffs allege that Defendants have made false, deceptive, and misleading representations about the character of sugar-sweetened beverages in violation of the DCCPPA. *See generally* Pl.'s Compl. Specifically, Plaintiffs allege Defendant Coca-Cola has directed "numerous deceptive representations" (about the characteristics of sugar-sweetened beverages and high fructose corn syrup) to the public, including omitting material information, which Defendant Coca-Cola knew or should have known would mislead consumers. *See id.* at ¶¶ 36, 102-107. In the Motion to Dismiss, Defendant Coca-Cola argues that: (1) Coca-Cola's statements are protected by the First Amendment; (2) Plaintiffs lack standing to sue; and (3) Plaintiffs have not stated a claim under the DCCPPA. With respect to the last argument, Plaintiffs assert, among other things, that the disputed conduct occurred outside the DCCPPA's statute of limitations or beyond the DCCPPA's geographic reach, the statements are not objectively misleading or otherwise actionable, and the DCCPPA does not make Coca-Cola liable for the conduct of others.

A. **Standing**

Standing is a threshold issue that must be addressed before proceeding to resolve other issues. *See Deutsche Bank Nat'l Trust Co. v. FDIC*, 717 F.3d 189, 194 n.4 (D.C. Cir. 2013) (noting that plaintiffs' standing to sue is discussed first, "since that is a threshold, jurisdictional concept") (internal citation omitted); *see also Grayson v. AT&T Corp*., 15 A.3d 219, 229 (D.C. 2011) ("Standing is a threshold jurisdictional question which must be addressed prior to and independent of the merits of a party's claims.") (internal quotation marks and citation omitted).

The District of Columbia generally follows the standing requirements of Article III of the United States Constitution. *Grayson*, 15 A.3d at 224 ("[E]ven though Congress created the

District of Columbia court system under Article I of the Constitution, rather than Article III, this court has followed consistently the constitutional standing requirement embodied in Article III."). To meet the requirements of constitutional standing, a party must show that it has suffered "(1) an actual or imminent threat of injury (2) that is attributable to the defendant, and (3) that the injury is redressable through adjudication." *Riverside Hosp. v. District of Columbia Dept. of Health*, 944 A.2d 1098, 1104 (D.C. 2008) (internal citations omitted). Beyond this "irreducible constitutional minimum of standing," *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992), courts have also developed "prudential principles that function as self-imposed restrictions on jurisdiction," among them the principle that "the plaintiff generally must assert his own legal rights and interests." *Riverside Hosp.*, 944 A.2d at 1104 (internal citations and quotation marks omitted). In other words, "the question is whether the person whose standing is challenged is a proper party to request an adjudication of a particular issue." *Grayson*, 15 A.3d at 229 (internal quotation marks and citation omitted). In part, this is because "'an adversary system can best adjudicate real, not abstract, conflicts.'" *Id.* at 233 (quoting *District of Columbia v. Walters*, 319 A.2d 332, 337 n.13 (D.C. 1974) in discussing the evolution of the District's standing doctrine).

Moreover, when interpreting statutes, such as the DCCPPA, codified as D.C. Code §§ 28-3901, *et seq*., which confers legal standing upon qualified plaintiffs, the D.C. Court of Appeals has stated:

> "[J]udicial tribunals seek to discern the intent of the legislature and, as necessary, whether that intent is consistent with fundamental principles of law: In construing a statute the primary rule is to ascertain and give effect to legislative intent and to give legislative words their natural meaning; [s]hould effort be made to broaden the meaning of statutory language by mere inference or surmise or speculation, we might well defeat true [legislative] intent. The words of a statute are a primary index but not the sole index to legislative intent; the words cannot prevail over strong contrary indications in the legislative history. And, [words] are inexact

> tools at best and for that reason there is wisely no rule of law forbidding resort to explanatory legislative history no matter how clear the words may appear on superficial examination. In that regard, we presume[] [that the legislature] acted rationally and reasonably, and we eschew interpretations that lead to unreasonable results. Statutory interpretation is a holistic endeavor, and, at a minimum, must account for a statute's full text, language as well as punctuation, structure, and subject matter. A basic principle [of statutory interpretation] is that each provision of the statute should be construed so as to give effect to all of the statute's provisions, not rendering any provision superfluous."

Grayson, 15 A.3d at 237-38 (internal quotation marks and citations omitted).

Plaintiffs' Complaint targets specific concerns about Defendant's practices and explains how they believe such practices violate the DCCPPA. Plaintiffs indicate that they have purchased Defendant Coca-Cola's products in order to "evaluate and test the purported qualities and characteristics," and are bringing this case on behalf of themselves and the general public. Compl. ¶¶ 18-25. They describe Defendants as making "numerous false and deceptive representations, including by way of omissions, about the consequences of drinking sugar-sweetened beverages routinely, the character of the calories in sugar-sweetened beverages, and sugar-sweetened beverages purported value as healthful sources of hydration for most consumers." *Id.* at ¶ 36. Moreover, Plaintiffs allege that Defendants' representations were "directed at the general public, including District of Columbia consumers, with the purpose of persuading consumers to purchase Coca-Cola's sugar-sweetened beverages and to discourage them from considering, or drowning out, the contrary advice of medical experts and scientists," *id.* at ¶ 37, and that "Defendants' knew or should have known that consumers would consider their representations material to their decisions whether to purchase Coca-Cola's sugar-sweetened beverages, decisions which the general consumer public,… otherwise would have modified had Defendants been truthful in their representations." *Id.* at ¶ 38. Consequently, Plaintiffs claim they, and the general public, have been exposed to Defendants' false and

deceptive advertising, depriving them of their statutory right under the DCCPPA to truthful information and to be free from improper trade practices, in violation of D.C. Code § 28-3904(a), (d), (e), (f) and (f-1), and (h). *See id.* at ¶¶ 168-186.

In their Motion to Dismiss, Defendants argue that: (1) the allegations of mere exposure to unlawful conduct does not establish injury-in-fact; (2) Plaintiffs' voluntary use of resources to disseminate their views does not constitute injury-in-fact; and (3) Plaintiffs cannot establish "tester" standing. Mot. at 17-26; Reply at 6-8. In response, Plaintiffs argue that (1) "[e]ach of the Plaintiffs is a consumer of Defendants' products and has been exposed to Defendants' deceptive statements," (2) Plaintiffs have standing based on their purchases of Coca-Cola's products for the purposes of testing and evaluation, and (3) Plaintiffs have standing based on their diversion of resources to rebut Coca-Cola's false and misleading marketing claims. *See* Opposition at 19-25.

The DCCPPA, in D.C. Code § 28-3905(k)(1), provides four separate bases for standing:

> **(A)** A consumer may bring an action seeking relief from the use of a trade practice in violation of a law of the District.
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> **(B)** An individual may, on behalf of that individual, or on behalf of both the individual and the general public, bring an action seeking relief from the use of a trade practice in violation of a law of the District when that trade practice involves consumer goods or services that the individual purchased or received in order to test or evaluate qualities pertaining to use for personal, household, or family purposes.
>
> **(C)** A nonprofit organization may, on behalf of itself or any of its members, or on any such behalf and on behalf of the general public, bring an action seeking relief from the use of a trade practice in violation of a law of the District, including a violation involving consumer goods or services that the organization purchased or received in order to test or evaluate qualities pertaining to use for personal, household, or family purposes.
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> **(D)**
>
> **(i)** Subject to sub-subparagraph (ii) of this subparagraph, a public interest organization may, on behalf of the interests of a consumer or a class of consumers, bring an action

> seeking relief from the use by any person of a trade practice in violation of a law of the District if the consumer or class could bring an action under subparagraph (A) of this paragraph for relief from such use by such person of such trade practice.
>
> **(ii)** An action brought under sub-subparagraph (i) of this subparagraph shall be dismissed if the court determines that the public interest organization does not have sufficient nexus to the interests involved of the consumer or class to adequately represent those interests.

Thus, in this case, Plaintiffs assert that the individual pastors have standing under provisions (A) and (B), and that the organization, Praxis, has standing under provisions (A), (C) and (D).

a. Tester Standing

The Court turns first to the assertion that all three Plaintiffs have tester standing pursuant to D.C. Code § 28-3905(k)(1)(B-C). Under those sections of the DCCPPA:

> **(B)** An individual may, on behalf of that individual, or on behalf of both the individual and the general public, bring an action seeking relief from the use of a trade practice in violation of a law of the District when that trade practice involves consumer goods or services that the individual purchased or received in order to test or evaluate qualities pertaining to use for personal, household, or family purposes[;]… [and]
> **(C)** A nonprofit organization may, on behalf of itself or any of its members, or on any such behalf and on behalf of the general public, bring an action seeking relief from the use of a trade practice in violation of a law of the District, including a violation involving consumer goods or services that the organization purchased or received in order to test or evaluate qualities pertaining to use for personal, household, or family purposes.

Specifically, Plaintiffs allege that they purchased Defendants' products for the purpose of testing and evaluating them. Compl. ¶¶ 144, 151, 156, 167. Although the Complaint contains no specific allegations of any tests actually conducted, in affidavits attached to the Supplement, each Pastor[8] asserts that "I did, in fact, test and evaluate these products. I reviewed each product's nutritional information, including its calories, sugar levels, and absence of other nutrients. I also converted the sugar quantities from grams to teaspoons, and I compared those

[8] The supplemental affidavit from Xavier Morales, Executive Director of the Praxis Project, does not address any testing or evaluation conducted by Praxis. *See* Supp. Ex. H, generally.

sugar levels to the recommendations of the American Heart Association ("AHA")." Supp. Ex. F ¶ 5; Ex. G ¶ 5. Both further state that "[t]he evaluation confirmed that each beverage: (1) exceeded or approached the AHA recommended daily maximum of teaspoons of added sugar for children, women, and men; and (2) contained no healthful ingredients," and that "[b]ased on my evaluation of the products, I confirmed that Defendants' statements – including those suggesting that all calories are equal, that their drinks offer essential hydration, and that their drinks are associated with a healthy lifestyle – are materially misleading." *Id.* at Ex. F. ¶¶ 6-7; Ex. G. ¶¶ 6-7.

According to the 2012 DCCPPA Amendment Committee Report, "tester standing" was created to allow consumers who offer to purchase, or actually purchase, products or services with the intent of determining whether those products or services are what they claim to be, to file suits against untruthful merchants. *See* D.C. Council, Report on Bill 19-0581 at 4-5 (November 28, 2012). The report states that "consumers need not actually have been misled by a misrepresentation regarding a consumer good or service to have suffered an injury-in-fact giving rise to an actionable claim." *Id.* at 4. The report further states that "[l]ike the testers in *Havens* and *Molovinsky*, D.C. consumers must be allowed to offer to purchase, or actually purchase, products or services with the intent of determining whether those products or services are what they claim to be." *Id.* at 5.

Although Plaintiffs' seek standing based on testing Defendants' products, even considering the additional allegations contained in the affidavits (though not originally included in the Complaint), Plaintiffs' have failed to allege that they have "tested" the product in any way that relates to the allegations of misleading statements in advertising at issue here. As an initial matter, the Court is not persuaded that purchasing a product to obtain information printed on the

label, the truth of which is *assumed* for the purposes of the "evaluation," rather than *at issue* (and that is clearly visible to the public and thus readily available without purchase) – without any actual scientific or physical testing of the product – would qualify as "testing" under the statute; Plaintiffs have failed to provide any authority, either in case law or in the legislative history, that would support the extension of tester standing to that extent. Moreover, even assuming such "testing" would qualify, the alleged "testing" and "evaluation" that apparently occurred here is in no way related to the purpose alleged in the complaint, specifically, to "evaluate and 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. There was no scientific test to determine the actual sugar content, there was no test of its effects on blood sugar levels, and there was no evaluation of anything even remotely relevant to the question of whether "a calorie of Coke is nutritionally equivalent to a calorie of any other food." In this case, Plaintiffs do not allege that the label on the product is actually misleading; indeed, to the contrary, Plaintiffs rely on the information contained in the label in making their "evaluation." Thus, while Plaintiffs' "evaluation" has demonstrated that Defendants' products do not conform to the AHA's recommendations on daily sugar consumption, the evaluation provides no information regarding Defendants' alleged misrepresentations of the quality or character of their products in their advertising. And although the D.C. Council noted that the 2012 amendments were to help actual testers avoid running afoul of notions of "manufactured standing," *see* Comm. Rep. at 4, here, where no relevant testing or evaluation was actually done, the assertion of standing based on testing in this case fails as to all Plaintiffs.

b. Diversion of Resources

Plaintiffs also attempt to establish Praxis' organizational standing pursuant to D.C. Code § 28-3905(k)(1)(D). Under that subsection, in order to pursue a claim under the DCCPPA,

> **(D)(i)** Subject to sub-subparagraph (ii) of this subparagraph, a public interest organization may, on behalf of the interests of a consumer or a class of consumers, bring an action seeking relief from the use by any person of a trade practice in violation of a law of the District if the consumer or class could bring an action under subparagraph (A) of this paragraph for relief from such use by such person of such trade practice.
> **(ii)** An action brought under sub-subparagraph (i) of this subparagraph shall be dismissed if the court determines that the public interest organization does not have sufficient nexus to the interests involved of the consumer or class to adequately represent those interests.

D.C. Code § 28-3905(k)(1)(D).

For Article III standing, an organization must allege more than a frustration of its purpose because frustration of an organization's objectives "is the type of abstract concern that does not impart standing." *Nat'l Taxpayers Union, Inc. v. United States*, 68 F.3d 1428 (D.C. Cir. 1995). An "interest in a problem" is not sufficient by itself to render an organization "adversely affected" or "aggrieved for standing purposes, no matter how longstanding the interests and no matter how qualified the organization is in evaluating the problem." *Friends of Tilden Park, Inc. v. D.C.*, 806 A.2d 1201 (D.C. 2002) (citing *Sierra Club v. Morton*, 405 U.S. 727 (1972)). The injury-in-fact requirement may, however, be satisfied when defendant's alleged statutory violation has "perceptibly impaired" an organizational plaintiff's programs. *See Organic Consumers Ass'n v. Hain Celestial Grp. Inc.*, 285 F. Supp. 3d 100, 103 (D.D.C. 2018) (citing *Fair Employment Council of Greater Washington, Inc. v. BMC*, 28 F.3d 1268, 1276 (D.C. Cir. 1994) (The defendant's "discriminatory actions have interfered with[] efforts and programs and have also required [plaintiff] to expend resources to counteract [the] alleged discrimination"). Furthermore, an organization does not suffer an injury in fact where it "expend[s] resources to

educate its members and others" unless doing so subjects the organization to "operational costs beyond those normally expended." *Nat'l Taxpayers Union, Inc.*, 68 F.3d at 1434; *see also Nat'l Ass'n of Home Builders v. EPA*, 667 F.3d 6, 12, (D.C. Cir. 2011) (organization's expenditures must be for "operational costs beyond those normally expended' to carry out its advocacy mission" (quoting *Nat'l Taxpayers Union*, 68 F.3d at 1434)).

In this case, Plaintiff Praxis has stated that its mission is to build healthier communities through advocacy concerning sugar-sweetened beverages, Compl. at ¶ 23, and it has alleged generally that it has had to allocate resources to cover the cost of its advocacy against Defendants' alleged unlawful practices and divert its resources away from other important public health initiatives. *Id.* at ¶¶ 164-65. And there are additional, slightly more specific allegations with respect to Praxis' diversion of resources in one of the affidavits attached to the October 5, 2019 Supplement. *See* Supp. Ex. H.[9] Even with the additional affidavit, however, the allegations currently before the Court remain insufficiently detailed and specific for the Court to conclude that Plaintiff has met its burden of establishing standing on this basis, that is, that its expenditures to counteract Defendants' alleged violations are "beyond those normally expended to carry out their advocacy mission." *See Nat'l Ass'n of Home Builders*, 667 F.3d at 12. The Court need not decide, however, whether it would allow Praxis yet another opportunity to supplement its brief with materials supporting its position that it has diverted a significant amount of its operational costs and resources to advocate and educate against Defendants' misrepresentations regarding sugar-sweetened beverages. Given the Court's finding as to Pastor

[9] Specifically, Xavier Morales, Praxis's CEO, indicates that of the 50% of his time that he spends addressing healthier eating, approximately 10-20 % is spent on education and advocacy to counteract Defendant's misrepresentations. Supp. Ex. H, ¶ 5. He does not, however, provide any details to explain what this means generally, or in the overall context of Praxis's work.

Lamar, *see infra*, Section III.A.c., the Court concludes that, at least at this time, no further hearing on the issue of standing is necessary in order for the case to proceed.

c. Violation of Statutory Rights

Having found that, on the face of the Complaint (as supplemented by the exhibits attached to the Supplement), without more, neither tester standing nor diversion of resources standing is adequately alleged as to any of the Plaintiffs, the Court turns to the final basis, that is D.C. Code § 28-3905(k)(1)(A). Pursuant to that section:

> **(A)** A consumer may bring an action seeking relief from the use of a trade practice in violation of a law of the District.

D.C. Code § 28-3905(k)(1)(A). Moreover, under D.C. Code § 28-3901(a)(1), the definition of person includes both individuals and organizations, and under D.C. Code § 28-3901(a)(2), a consumer is defined as "a person who … does or would purchase … consumer goods or services." Thus, Plaintiffs assert that all three Plaintiffs have standing pursuant to this section.

The U.S. Supreme Court has held that "[i]njury in fact is a constitutional requirement, and '[i]t is settled that Congress cannot erase Article III's standing requirements by statutorily granting the right to sue to a plaintiff who would not otherwise have standing.'" *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547-48 (2016) (quoting *Raines v. Byrd*, 521 U.S. 811, 820 (1997)). Thus, to establish injury in fact, a plaintiff must show that he or she suffered "an invasion of a legally protected interest" that is "concrete *and* particularized" and "actual or imminent, not conjectural or hypothetical." *Id.* at 1548 (quoting *Lujan v. Defendants of Wildlife*, 504 U.S. at 560) (emphasis added). For an injury to be "particularized," it "must affect the plaintiff in a personal and individual way." *Id.* (internal citations omitted). Moreover, for an injury to be "concrete," it must actually exist. *See id.* ("When we have used the adjective "concrete," we have meant to convey the usual meaning of the term – "real," and not "abstract."). The Supreme

Court stated explicitly that "Article III standing requires a concrete injury even in the context of a statutory violation." *Id.* at 1549. Defendants argue that the Supreme Court's clarification in *Spokeo* of the requirements of Article III standing preclude finding such standing here.

In support of their argument for individual standing, Plaintiffs cite to *Hancock v. Urban Outfitters, Inc.,* Case No. 2016 CA 007061 B (D.C. Super. Ct. Mar. 10, 2017) (attached to Plaintiffs' Supplement as Exhibit B), and *Zuckman v. Monster Beverage Corp*., Case No. 2012 CA 008653, 2016 D.C. Super. LEXIS 10 (D.C. Super. Ct. Aug. 12, 2016) (attached to Plaintiffs' Supplement as Exhibit E).[10] In *Hancock*, which cited *Spokeo*, the Court concluded that a plaintiff who alleged that defendant department store engaged in unlawful trade practices by collecting ZIP codes in the midst of credit card transactions, which were later used to send unwanted marketing materials to plaintiffs, had standing to pursue their claim under the DCCPPA. *See generally* 10/15/18 Supp. Ex. B. Similarly, in *Zuckman*, also citing *Spokeo*, the Court discussed whether a plaintiff had suffered an "injury-in-fact" by purchasing and consuming defendants' energy drink based upon defendant's alleged misrepresentations/omissions. *See generally* 10/15/18 Supp. Ex. E. In that case, plaintiff alleged that he would not have purchased the drinks if he had known about the negative health risks with which they were associated. *See id.* at 2. The court found plaintiff had standing based on an economic injury, and an intangible injury—namely, the risk of harm associated with consuming the beverage. *Id.* In both cases, the courts found plaintiffs alleged a particularized and concrete injury.

In the Complaint, unlike the plaintiffs in *Hancock* and *Zuckman*, none of the Plaintiffs alleged with any specificity a concrete, that is, real harm, whether tangible or intangible,

[10] Plaintiffs also cite to other decisions that do not address *Spokeo*, and thus are not relevant to the arguments asserted here.

particularized to them, arising from the allegedly misleading advertising. As the Court noted at the September 17, 2019 hearing, based on the Complaint, it was difficult to discern "what distinguishes [the Plaintiffs] from anyone else in the world." 9/17/18 Hearing Tr. at 20. Following that hearing, however, Plaintiffs submitted their October 5, 2019 Supplement, which, as noted above, contained not just argument based on the allegations in the Complaint as anticipated, but also additional affidavits which provide more specific allegations as to the harms suffered by the individual Plaintiffs from their consumer purchases, as well as, as discussed above, to the harm to the organization from its diversion of resources.[11]

The Court notes that Defendant correctly asserts that such allegations are not contained in the Complaint. 10/5/19 Supp. at 1. The Court, in an ultimately misguided attempt to streamline an already lengthy motions practice in this case, expressly agreed to consider the supplemental allegations in resolving the standing issue, and to permit the filing of an amended complaint should standing be found. And it is clear that in order to resolve standing questions on a motion to dismiss, "it is within the trial court's power to allow or to require the plaintiff to supply, by amendment to the complaint or by affidavits, further particularized allegations of fact deemed supportive of plaintiff's standing." *Grayson*, 15 A.3d at 246 (internal quotation marks and citation omitted). Moreover, pursuant to Super. Ct. Civ. R. 15(a), "leave to amend shall be freely given whenever justice so requires." Thus, the Court concluded that it was appropriate to consider the additional allegations, as an amended complaint could be filed to incorporate such allegations if such allegations are determined to be necessary to any finding of standing. In part,

[11] The Court notes that in the original briefing, Plaintiffs appear to assert a diversion of resources argument as to the Pastors, not just as to Praxis, that is, that due to the false representations of Defendant, the pastors have had to invest larger amounts of time and money in counseling congregants and members of the public suffering from obesity. *See* Compl. ¶¶ 147-157. That argument was not asserted in the many hearings on the motions, and for the reasons stated in Defendant Coca-Cola's Motion to Dismiss, such allegations do not come close to establishing a basis for standing for the pastors. *See* Motion to Dismiss at 23-24.

the Court's conclusion was based on its preliminary review, which suggested that the additional allegations did not alter the Court's conclusion, based on the Complaint as filed, that standing had not been sufficiently alleged. Upon further review, however, the Court concludes that the allegations in the additional affidavits do establish a basis for standing at least as to Pastor Lamar.[12]

With respect to those allegations, both individual Plaintiffs assert exposure to Defendant's advertising; specifically, both pastors state that "I have been exposed to Defendants' false and deceptive advertising." Supp. Ex. F, ¶ 2; Ex. G, ¶ 2. The allegations of the two pastors, however, are not identical, and the differences impact the standing analysis. Pastor Coates alleges that "[a]s recently as the spring of 2017, I purchased drinks sold by Coca-Cola in the District of Columbia for my children." *Id.* at Ex. G, ¶ 8. He does not, however, allege that the drinks purchased were sugar-sweetened beverages, a significant omission. He also does not allege that he did so in reliance on the advertising, but instead based on his belief "that Coca-Cola would not market a product to children that could cause them a serious disease, and that any negative effects to my children from drinking Coca-Cola products could be eliminated by proper exercise." *Id.* at ¶ 8. Pastor Lamar, however, alleges that he purchased drinks sold by Coca-Cola, including Sprite, for personal consumption "as recently as the spring of 2017." *Id.* at Ex. F, ¶ 8. He then states that he was "unaware that science had definitively established a link between these drinks and obesity, type 2 diabetes, and cardiovascular disease," *id.* at ¶ 9, and that he would not have purchased the drinks if "Defendants [had] disclosed [the] link" "between these drinks and obesity, type 2 diabetes, and cardiovascular disease", "instead of flooding the market

[12] As discussed below, the decision not to require an amended complaint, although it may have expedited analysis of the standing issue, did not on balance expedite resolution of all of the issues raised by the Motion, because, on further analysis, the Court concludes that efficiency requires the Court to defer resolution of some of the other arguments in the pending Motion to Dismiss until an amended complaint is filed.

with misleading representations and material omissions." *Id.* at ¶ 10. Such allegations are essentially identical to the allegations found sufficient in *Zuckman* to provide a particularized, concrete injury. *See Zuckman v. Monster Beverage Corp*., Case No. 2012 CA 008653, 2016 D.C. Super. LEXIS 10 (D.C. Super. Ct. Aug. 12, 2016) (holding that a plaintiff suffered an injury-in-fact after purchasing and consuming defendants' energy drinks upon defendants' alleged misrepresentations and omissions). Like the Court in *Zuckman*, this Court also finds such allegations sufficient post-*Spokeo* to meet the requirements of standing.

Thus, based on Plaintiffs' Supplemental Memorandum of Law and the attachments filed therewith, the Court is persuaded that at least Plaintiff Lamar has standing, given his allegation that he would not have purchased Defendant Coca-Cola's products, specifically Sprite, had Defendant disclosed the link between the sugar-sweetened products and obesity, type 2 diabetes, and cardiovascular disease. *See* Pl.'s Supp., Ex. F, ¶¶ 9-11. Moreover, because Plaintiff Lamar has standing, the Court need not consider the standing of the other plaintiffs. *See Watt v. Energy Action Educ. Found.*, 454 U.S. 151, 160 (1981) ("Because we find California had standing, we do not consider the standing of the other plaintiffs."); *Mountain States Legal Found. v. Glickman*, 92 F.3d 1228, 1232 (D.C. Cir. 1996). Given this conclusion, the Court will turn to Defendant Coca-Cola's other arguments in its Motion to Dismiss pursuant to Super. Ct. Civ. R. 12(b)(6) that are resolvable without an amended complaint. The Court notes, however, that because the allegations the Court relies upon for standing are not yet incorporated into an actual Complaint, Plaintiffs must amend the Complaint to reflect the allegations asserted in the Declaration attached to Plaintiff's Supplement as Exhibit F within 45 days in order to proceed with this case; failure to so amend will result in the matter being dismissed for lack of standing.[13]

[13] As the Court stated at the July 9, 2019 hearing, if Plaintiffs amend only to add the allegations regarding standing included in the affidavits attached to the Supplemental Motion and to remove aspects of the claim the Court rules are

B. DCCPPA-related Arguments

As noted above, Plaintiffs' claim in this matter is brought pursuant to the DCCPPA. The DCCPPA is a "comprehensive statute designed to provide procedures and remedies for a broad range of practices which injure consumers." *Sundberg v. TTR Realty, LLC*, 109 A.3d 1123, 1129 (D.C. 2015) (interal citations omitted). In its Motion to Dismiss, Defendant Coca-Cola asserts a number of bases for dismissal specific to the DCCPPA. In the last two hearings held on the motions, the Court indicated that it had reached conclusions with respect to two issues under the DCCPPA, that is, Coca-Cola's responsibility for the conduct of others and the applicability of the statute of limitations.[14] The Court now sets forth those rulings, and the basis for those conclusions.

a. The Conduct of Others

In its Motion to Dismiss, Coca-Cola asserts that the actions of the ABA, the Global Energy Balance Network (GEBN) or the European Hydration Institute (EHI) "cannot be imputed to Coca-Cola" and that the DCCPPA "imposes liability only for trade practices in which a defendant directly participates." Mot. at 28-29. In opposition, Plaintiffs rely on *McMullen v. Synchrony Bank*, 164 F. Supp. 3d 77 (D.D.C. 2016). Opp. at 30. The allegations in the Complaint in this case, however, are simply not sufficient to render *McMullen* analogous. In that case, "[a]ccording to Plaintiff, the Bank Defendants and One World Defendants each 'had an equal right to control the manner in which the joint venture operated.'" *McMullen*, 164 F. Supp.

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barred, *see infra* Sect. III.B.a and III.B.c., Plaintiffs need not file for leave to amend, as this Court has already authorized such a filing. Should they seek to amend in any other way, they must file a motion seeking leave to amend that addresses the standard factors for obtaining leave to amend a complaint.

[14] The Court also notes that it considered, but did not find persuasive, Coca-Cola's argument with respect to the geographic reach of the DCCPPA. Relying on *Dahlgren v. Audiovox Communications Corp.*, 2002 CA 007884 (July 8, 2010), Coca-Cola argues that many of the statements upon which Plaintiffs seek to rely were made in other jurisdictions, and therefore must be dismissed. Although this Court finds *Dahlgren* to be a well-reasoned opinion, the Court's conclusion in that matter with respect to the geographic reach of the statute appears to relate more to a question of standing than to a specific conclusion that the DCCPPA is limited to statements made in the District of Columbia. Defendant Coca-Cola cites to no other authority for that proposition, and the Court is aware of none.

3d at 92. In this case, however, while the Complaint does conclusorily allege that Coca-Cola extensively finances and influences the ABA, *see* Compl. ¶ 97, and more specifically that the President of Coca-Cola North America and six other Coca-Cola executives or affiliate executives sit on the board of directors of the ABA, *id.*at ¶ 98,[15] that Coca-Cola "funded" groups such as GEBN and EHI, *id.* at ¶ 78, and that Coca-Cola "co-founded" EHI, whose Director is a paid consultant for Coke, *id.* at ¶ 82, such allegations are well short of the suggestion that Coca-Cola "had an equal right to control the manner in which the [entity] operated." Nor are the cases cited regarding corporate officers, such as *DC v. Student Aid Ctr., Inc.,* Case No. 2016 CA 003768 B (D.C. Super. Ct. Aug. 17, 2016) and *Vuitch v. Furr*, 482 A.2d 811 (D.C. 1984) relevant here, as there is no allegation that Coca-Cola was the president, director or other corporate officer of any of these entities; instead, the Complaint merely alleges that some of its officers sat on the board of directors for the organization, or that Defendant provided the initial funding for the entities. Therefore, to the extent that the DCCPPA claim is based on statements made by other entities which Plaintiffs seek to impute to Defendant Coca-Cola, Defendant Coca-Cola's Motion to Dismiss will be granted.

b. The Statute of Limitations

Relying on *Murray v. Wells Fargo Home Mortgage* , 953 A. 2d 308, 323 (D.C. 2008), Defendant Coca-Cola asserts that Plaintiffs claim is "subject to the residual three-year statute of limitations" and therefore that Plaintiffs "cannot challenge any statements made prior to July 2014," i.e., three years before they filed their Complaint. Mot. to Dismiss at 26. Specifically,

[15] The Court notes that Defendant ABA's Memorandum of Law In Opposition to Plaintiffs' Opposed Motion for Targeted Discovery in Connection with Defendants' Special Motions to Dismiss Pursuant to the District of Columbia Anti-SLAPP Act, D.C. Code § 16-5502(C) ("Memorandum") asserts, from information contained on the ABA website, which is repeatedly referred to in Complaint, that there are 30 people on the ABA's board. Memo. at 9. Thus even with the asserted 7 members, Coca-Cola does not comprise even a third of the membership of the Board, much less a majority.

they rely on D.C. Code § 12-301(8), which applies a three-year statute of limitations to any cause of action for which "a limitation is not otherwise specified." In their Opposition, Plaintiffs responded with two arguments, neither of which are persuasive.

First, they asserted that because the relief sought is "entirely equitable, the controlling doctrine is laches." Opp. at 25. None of the cases cited by Plaintiffs, however, support such a proposition. Indeed, there is case law suggesting that laches not only does not control, it is not applicable when the relief sought is prospective injunctive relief. *See Gaudreau v. Am. Promotional Events, Inc.* 511 F. Supp. 152, 159 (D.D.C. 1997) ("it is well established that laches generally does not apply to bar claims for prospective injunctive relief"). As Defendant correctly notes in its Reply, *see* Reply at 8, laches controls with respect to equitable claims, not legal claims seeking an equitable remedy, such as an injunction. Indeed, the Court of Appeals recently reaffirmed in *Naccache v. Taylor* that "laches is 'peculiarly a creature of equity,' applicable only to cases that are 'purely equitable in character,' and concluded that "the line between legal and equitable claims vis-à-vis laches is still sound." 72 A.3d 149, 155 (D.C. 2013) (quoting *Saffron v. Dep't of the Navy,* 561 F.2d 938, 941 (D.C. Cir. 1977)). Unsurprisingly, therefore, the three-year statute of limitations has repeatedly been applied to claims asserted under the DCCPPA. *See Dist. Cablevision Ltd. P'shp v. Bassin*, 828 A.2d 714, 729 (D.C. 2003) (agreeing with the trial court that D.C. Code § 12-301(8) applies to claims asserted under the DCCPPA); *Murray v. Wells Fargo Home Mortg.*, 953 A.2d 308, 323 (D.C. 2008) ("No statute of limitations is specified for actions brought under the D.C. Consumer Protection Act, D.C. Code §§ 28-3801-3819, and so the residual three-year statute of limitations applies."); *see also Beyond Pesticides v. Monsanto Co.*, 311 F. Supp. 3d 82 (D.D.C. 2018) ("The DCCPPA is subject to a three-year statute of limitations.") (internal quotation marks and citation omitted); *Hakki v. Zima Co.*, 2006

D.C. Super. LEXIS 10, at *6-7 n.1 (D.C. Super. Ct. Mar. 28, 2006) ("For that matter, it is not clear why Plaintiffs attempt to reach back is not also barred by the three-year statute of limitations applicable to CPPA claims.").

Second, Plaintiffs asserted, equally unpersuasively, that the doctrine of continuing violations "has been applied repeatedly in the District of Columbia…," and therefore, as a result of that doctrine, that no aspect of their claim is barred. Opp. at 26. Every case cited in support of that proposition, however, stems from the federal courts, not the Superior Court or District of Columbia Court of Appeals. *See id.* And as Defendant correctly points out, *see* Reply at 9, the District of Columbia Court of Appeals has rejected the continuing violation doctrine in this context. *See, e.g., Hendel v. World Plan Exec. Council*, 705 A.2d 656, 658, 667 (D.C. 1997) (noting that "we [previously] held in substance that once the plaintiff has been placed on notice of an injury and the role of the defendants' wrongful conduct in causing it, the policy disfavoring stale claims makes application of the 'continuous tort' doctrine inappropriate" in upholding the grant of summary judgment as time barred as to claims including "unfair trade practices").

Although not raised in their pleading initially, on June 22, 2018, Plaintiffs filed – without leave – a praecipe citing a case with respect to the discovery rule doctrine, *Beyond Pesticides v. Monsanto Co.* , 311 F. Supp. 3d 82 (D.D.C. 2018). As that filing occurred before the Court moved to curb the extensive unauthorized filings in this case, that praecipe was not stricken. As a result, after discussing the issue at the February 5, 2019 hearing, because the theory had technically been raised though not actually briefed, and given the extent to which it appeared that the ordinary application of the statute of limitations would limit the claim as asserted, the Court permitted actual briefing on the issue.

Subsequently, in their March 1, 2019 Supplement, "Plaintiffs ask the Court to apply the discovery rule, since Plaintiffs' injuries were not readily apparent due to Coke's fraudulent conduct." 3/1/19 Supp. at 1. "Under the 'discovery rule,' the running of a limitations period may in some circumstances be tolled until the plaintiff knows or reasonably should have known of the injury." *Wright v. Howard Univ.*, 60 A.3d 749, 751 n.1 (D.C. 2013). Having reviewed the case law cited, however, the Court is persuaded that the discovery rule does not bar application of the statute of limitations in this case. Citing *Ray v. Queen*, Plaintiffs note that "[t]he critical question in assessing the existence *vel non* of inquiry notice is whether the plaintiff exercised reasonable diligence under the circumstances in acting or failing to act on whatever information was available to him. In all cases to which the discovery rule applies, the inquiry is highly fact-bound and requires an evaluation of all of the plaintiff's circumstances." 747 A.2d 1137, 1141-1142 (D.C. 2000) (internal quotation marks and citation omitted). Furthermore, it is clear that "[t]he statute of limitations may be raised by pre-answer motion under Rule 12(b), but only if the facts that give rise to the defense are clear from the face of the complaint. Dismissal is improper, however, as along as a plaintiff's potential rejoinder to the affirmative defense is not foreclosed by the allegations in the complaint." *Beyond Pesticides*, 311 F. Supp. 3d at 87 (internal quotation marks and citations omitted).

Here, however, the Complaint does in fact foreclose Plaintiff's potential rejoinder, that is, that they were not on inquiry notice of the link between sugar-sweetened beverages and obesity, type 2 diabetes, and cardiovascular disease prior to 2014. Unhelpfully to their argument, in the Complaint, Plaintiffs identify 2012 as the year that Coca-Cola "ramped up their campaign of misrepresentation and deception" because they were "faced with a growing body of scientific research establishing the link between its products and obesity, type 2 diabetes and

cardiovascular disease." Compl. ¶ 67. At that time, according to the Complaint, "[v]arious scientists, regulators, and health professionals were drawing attention to the science linking the epidemics of obesity, diabetes, and cardiovascular disease to sugar-sweetened beverages." *Id.* ¶ 67. The campaign allegedly sought to "reverse the growing public perception that sugar-sweetened beverages are linked to obesity, type 2 diabetes, or cardiovascular disease." *Id.* at ¶ 69.

Given these allegations, unsurprisingly, Plaintiffs do not even attempt to make an argument that Plaintiff Praxis, described in the Complaint as a non-profit organization whose "mission is to build healthier communities, including through advocacy of its Executive Director, Xavier Morales, concerning sugar-sweetened beverages," *see* Compl. at ¶ 23, did not have actual or inquiry notice as of 2014. Instead, they assert, relying on *Hillbroom v. PricewaterhouseCoopers LLP*, 17 A.3d 566 (D.C. 2011), that the Court of Appeals "expressly contemplated that the statute of limitations might ultimately bar the claims of one subset of plaintiffs but not the claims of another subset." 3/1/19 Supp. at 4. They therefore focus on the two Pastor Plaintiffs, and argue that the Complaint, and particularly paragraph 66 of the Complaint, does not "show that prior to July 2014 the Pastors had, or should have had, a sophisticated knowledge of the state of scientific research regarding sugar drinks and obesity, type 2 diabetes, and cardiovascular disease." *Id.* at 5. According to Complaint, however, both individual plaintiffs are highly educated, with Plaintiff Lamar having obtained a master's degree from Duke University Divinity School, Compl. at ¶ 19, and Plaintiff Coates a Ph.D. from Columbia University, *id.* at ¶ 21, and both are pastors of significant and historic churches. *Id.* Significantly, the Complaint also alleges that as part of their ministry, they "provide[] guidance to [their] congregants and the community at large, especially children and others at risk of

becoming diabetic, about the health hazards linked with sugar-sweetened beverages, recommending that they reduce their consumption." *Id.* at ¶¶ 149, 153.

Plaintiffs' Complaint is replete with citations to studies and newspaper articles that make clear that the health risks of sugar sweetened beverages was a topic that any educated individual, but in particular individuals who, as part of their profession, counsel people about health risks, were on inquiry notice well before 2014. As an initial matter, Plaintiffs cite to numerous scientific studies from before 2014,[16] such as the 2009 study from the American Heart Association recommending limitations on the intake of sugar, *id.* at ¶ 43 n. 14, a 2013 Credit Suisse article discussing the differing impact of consumption of sugars in beverage form as compared to solid form, *id.* at ¶ 45 n. 15; and, to support its point that "studies tracking thousands of adults for years show that those who consume sugar-sweetened beverages have higher rates of obesity and obesity-related chronic diseases," cite studies from 2004, 2007, 2008, 2010, 2012, and 2013. *Id.* at ¶ 49 n. 18. To support their assertion that one 8-ounce sugar-sweetened drink a day has adverse consequences, they cite to seven (7) studies, all of which were published in 2012 or earlier, *id.* at ¶ 50 n. 19, and, to support the proposition that consumption of sugar-sweetened beverages is linked to an increase in type 2 diabetes even after researchers account for the impact of sugar sweetened beverages on weight, four (4) additional studies from 2013 or earlier, along with some more recent studies. *Id*. at ¶ 52 n.20. They further quote a 2012 New England Journal of Medicine article as stating that "'the recommendations from the Institute of Medicine, the American Heart Association, the Obesity Society and many other organizations [are] to reduce the consumption of sugar-sweetened beverages in both children and adults.'" ¶ 57 & n.25. In addition to the numerous scientific studies cited, however, the

[16] In reviewing the Complaint, because citations to publications generally only list the year, for efficiency, the Court excluded all studies from 2014 as well, not just the ones from after July 13, 2014.

Complaint also cites a publication from a significant United States health agency, the Centers for Disease Control, which makes clear that the governmental agency had issued a pronouncement on the link as early as 2010. Specifically, the first footnote of the Complaint, found on page two, cites to a 2010 publication from the Centers for Disease Control & Prevention, The CDC Guide to Strategies for Reducing the Consumption of Sugar-Sweetened Beverages (2010), https://goo.gl/1rj6eZ.[17] As of 2010, the CDC explicitly stated that "[h]igh consumption of SSBs has been associated with obesity," and that "[s]everal other health conditions have been associated with the consumption of SSBs. These include diabetes, elevated triglycerides, cardiovascular disease, non-alcoholic fatty liver disease, elevated uric acid levels, gout, and dental caries. *Id*. at 5.[18] Perhaps most importantly in evaluating the inquiry notice issue, the Complaint makes clear that in addition to having been addressed by scientists and governmental agencies, the question of the link between sugar-sweetened beverages and obesity was discussed in various forms of mainstream media, such as USA Today in 2012, and CNN in 2013. Compl. ¶¶ 75-77 and nn.38 & 40. Moreover, the USA Today article cited makes clear that the concerns regarding the health risks of sugar-sweetened beverages were sufficiently prevalent by 2012 that the mayor of a major American city, Mayor Michael Bloomberg of New York City, had, in 2012, proposed limiting the size of sugary drinks that could be sold in the city because, as his spokesperson stated, "'sugary drinks are a key driver of the obesity crisis that is killing 5,800

[17] The Court notes that as of the date of this Order, that publication did not appear to be available at the website cited by Plaintiffs. The Court did, however, locate it at https://stacks.cdc.gov/view/cdc/51532.

[18] Indeed, at the September 17, 2018 hearing, in arguing that Katie Bayne's 2012 statement that there was no scientific evidence to connect sugar-sweetened beverages was "flatly false" in 2012, counsel appears to cite to this study, among others, stating that "in 2011, the CDC came out with this statement. It's a leading health authority. 2011, Your Honor. The CDC said, frequently drinking sugar-sweetened beverages is associated with weight gain, obesity, type-2 diabetes, heart disease, kidney disease, non-alcoholic liver disease, tooth decay and cavities, gout, and a type of arthritis. Limiting SSB intake can help individuals maintain a healthy weight. You have statements from the CDC. You have statements from the FDA. You have statements from the World Health Organization, the dietary guidelines advisory committee, the American Medical Association, the Institute of Medicine, the American Heart Association, the American Public Health Association." 9/17/19 Tr. at 83. In short, counsel's arguments on this issue appears to undermine its own claim as to the state of knowledge putting the Pastors on inquiry notice.

New Yorkers … annually.'" Bruce Horovitz, *Coke Says Obesity Grew as Sugar Drink Consumption Fell*, USA Today (June 7, 2012), http://goo.gl/w0jFU2.[19] Thus, although the Court is required, in evaluating a motion to dismiss, to take as true Plaintiffs' assertions (interpreted by agreement of the Court as part of the Complaint) that they did not have actual notice of the link between sugar sweetened beverages and obesity, type 2 diabetes, and cardiovascular disease, *see* Oct. 5, 2018 Supp., Ex. G ¶ 9 and Ex. F ¶ 9, the allegations in the Complaint foreclose any argument that the Pastors, highly educated individuals who also counseled people on this very subject as part of their ministry, were not on inquiry notice prior to 2014. As the Complaint in this matter was filed on July 13, 2017, therefore, those portions of Plaintiffs claim that are based on statements made before July 13, 2014 are barred by the three-year statute of limitations, and Defendant Coca-Cola's Motion to Dismiss will be granted to the extent that the claim is based on such statements.

C. Coca-Cola's Special Motion to Dismiss Pursuant to the District of Columbia Anti-Slapp Act, D.C. Code § 16-5501, *et. seq.*

In its Special Motion to Dismiss, Defendant Coca-Cola expressly limits that motion to the asserted "statements [that] reflect[] Coca-Cola's contributions to a public policy debate," which it identifies as five statements made from 1998 through 2013. *See* Special Mot. to Dismiss, at 5-6 & n.6. Given the Court's ruling that the statute of limitations bars the claim as to any statements made prior to July 13, 2014, inclusion of any of these statements as part its claim is

[19] All of the above citations are to publications contained within Plaintiffs' Complaint, and are therefore clearly appropriate to consider in evaluation the inquiry notice issue. *See supra,* note 8. In its March 22, 2019 Response, Defendant also cites to numerous articles in District of Columbia mainstream publications, such as articles in the Washington Post from 2001, 2004, and 2005, the Washington Times from 2009, and the Washington Informer from 2009. *See* 3/22/19 Response, at 4-5 and n.2. Although not essential to the Court's conclusion, the Court does conclude that it is appropriate to consider such articles in evaluating whether the Pastor Plaintiffs were on inquiry notice, and concludes that such articles lend further support to its conclusion that the assertion that the Plaintiffs were not on inquiry notice fails. *See DeBenedictis v. Merrill Lynch & Co.*, 492 F.3d 209, 214-15, 217 (3d Cir. 2007) (affirming District Court's reliance on news articles not cited in the complaint to find that plaintiff was on inquiry notice, where they relate directly to the misrepresentations and omissions alleged).

barred by the statute of limitations. Therefore, Defendant Coca-Cola's Special Motion to Dismiss will be denied as moot.

IV. CONCLUSION

In addressing the issues related to the conduct of others and the statute of limitations, the Court noted the difficulty and potential inefficiency of analyzing the remaining issues raised by the Motion to Dismiss, such as whether the Complaint sufficiently alleges a claim under the DCCPPA generally, without the ability to refer to actual allegations in an actual, not theoretical, amended complaint. The Court concluded that its agreement to consider the allegations raised in the attachment, rather than requiring the filing of an amended complaint, though well-intentioned, actually undermined, rather than increased, its ability to resolve efficiently all of the remaining issues in the pending Motion. At the final hearing on pending motions, therefore, the Court indicated its intent to deny the Motion to Dismiss on all other grounds pending the filing of an amended complaint, without prejudice to Defendant re-asserting any such arguments if such arguments are appropriately raised by the allegations in any amended complaint.

Accordingly, it is this 1st day of October, 2019, hereby

ORDERED that Coca-Cola's Motion to Dismiss Pursuant to Super. Ct. R. 12(B)(6) and 12(B)(1), is **GRANTED IN PART AND DENIED IN PART**. Specifically, it is **GRANTED** to the extent that Plaintiffs in their claim seek to hold Defendant Coca-Cola responsible for the statements or conduct of other entities, including the ABA, GEBN and EHI, and to the extent that Plaintiffs seek to base their claim on statements made prior to July 13, 2014, which are barred by the statute of limitations. It is **DENIED** in all other respects, without prejudice to re-assertion of any appropriate arguments upon the filing of any amended complaint. It is further

ORDERED that Defendant Coca-Cola's Special Motion to Dismiss Pursuant to the District of Columbia Anti-Slapp Act, D.C. Code §16-5501, *et seq.* is **DENIED AS MOOT**. It is further

ORDERED that Defendant The Coca-Cola Company's Consent Motion for Leave to File a Response to Plaintiffs' Praecipe for Supplemental Submission, filed February 1, 2019, is**DENIED AS MOOT**. It is further

ORDERED that Defendant the Coca-Cola Company's Motion for Leave to File Praecipe for Submission of Supplemental Authority, filed July 8, 2019, is **DENIED**. It is further

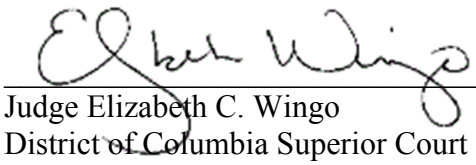
ORDERED that Defendant the Coca-Cola Company's Motion for Leave to File Praecipe for Submission of Supplemental Authority, filed August 15, 2019, is **DENIED.** It is further

ORDERED that any future praecipes relating to substantive motions pending before the Court filed without leave of Court shall be **STRICKEN.** It is further

ORDERED that Plaintiffs shall file an amended complaint to incorporate the additional jurisdictional allegations contained in the October 5, 2018 Supplemental Memorandum of Law within 45 days of the date of this Order. Failure to file an amended complaint within 45 days shall result in the dismissal of the current Complaint for lack of standing. It is further

ORDERED that should an amended complaint be filed, the parties shall appear for a status hearing in this matter on January 17, 2020, at 10:30 a.m. in Courtroom 212 of the District of Columbia Superior Court.

SO ORDERED.



Judge Elizabeth C. Wingo
District of Columbia Superior Court

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