SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
Civil Division

PASTOR WILLIAM H. LAMAR, IV, et al.,	)	Case No. 2017 CA 004801 B
Plaintiffs,	)	
	)	Honorable Judge Jose M. Lopez
v.	)	
THE COCA-COLA COMPANY,	)	Next Event: Status Hearing March 27, 2020 at 9:30 a.m.
Defendant.	)	

MEMORANDUM OF LAW IN SUPPORT OF COCA-COLA'S MOTION TO DISMISS AND MOTION TO STRIKE PURSUANT TO SUPER. CT. R. 12(B)(6) AND 12(F)

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PRELIMINARY STATEMENT

Plaintiffs' Amended Complaint consists predominantly of claims that have already been dismissed.[1] Plaintiffs Delman Coates, William Lamar and The Praxis Project first asserted their claims in July 2017, and Coca-Cola moved to dismiss them under Rule 12(b)(1), Rule 12(b)(6), and the D.C. Anti-SLAPP Act. The Honorable Elizabeth Carroll Wingo heard four sessions of oral argument, and considered two rounds of supplemental briefing, on these motions over a period that spanned nearly two years. In October 2019, Judge Wingo issued a thorough 32-page opinion that held that (1) Plaintiffs Coates and Praxis lacked standing to bring their claims; and (2) the vast majority of the conduct alleged in Plaintiffs' Complaint was beyond the three-year statute of limitations or not attributable to Coca-Cola, and thus not actionable under the District of Columbia Consumer Protection Procedures Act, D.C. Code § 28-3901 *et seq.* ("CPPA"). Judge Wingo reserved decision as to the remainder of Plaintiffs' pleading, and authorized Coca-Cola to reassert its arguments that those claims, too, were defective. Shortly thereafter, the case was reassigned to this Court.

Plaintiffs now seek to parlay this administrative handoff into an opportunity to resurrect their defunct claims. Their Amended Complaint, like their July 2017 pleading, alleges that Coca-Cola violated the CPPA by publicly disputing Plaintiffs' viewpoint that sugar-sweetened beverages ("SSBs") are uniquely to blame for the societal rise of obesity and related conditions. Once again, Plaintiffs focus largely on four cherry-picked remarks that Coca-Cola executives

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[1] On December 3, 2019, Coca-Cola submitted a motion seeking permission to file a 30-page consolidated brief in support of its motions to dismiss and to strike, rather than submit two separate 15-page briefs in support of each motion. Coca-Cola also sought permission to file a single 15-page reply brief. Plaintiffs opposed that application, and the Court has not yet ruled on it. Coca-Cola has thus consolidated the motions into a single brief pending further guidance from the Court. In the event that the December 3 application is denied, Coca-Cola will seek leave to refile its motions in conformity with the Court's instructions.

made to journalists or academics between 1998 and 2013—though Judge Wingo dismissed all such claims as barred by the CPPA's three-year statute of limitations. Once again, they claim that Coca-Cola is liable under the CPPA for miscellaneous statements of third parties—though Judge Wingo rejected that contention, too. And once again, Plaintiffs Coates and Praxis assert claims for relief—though Judge Wingo held that these parties had failed, after two opportunities, to establish standing. This Court should reject Plaintiffs' effort to re-litigate issues Judge Wingo already decided. Plaintiffs' Amended Complaint should be stricken to the extent it is based on pre-2014 conduct or third-party statements, and the claims of Coates and Praxis should be dismissed.

That does not leave Plaintiffs with much. Plaintiffs attempt to cobble together a timely CPPA claim by contending that Coca-Cola engaged in a post-2014 "campaign of deception" by running two television commercials of its own, and by lending its name to an American Beverage Association ("ABA") TV spot. But these allegations cannot rescue Plaintiffs' CPPA claim, for several reasons. *First*, as Plaintiffs acknowledge, the two Coca-Cola commercials aired in 2013, so claims as to them are untimely. Plaintiffs' allegation that the ads remained accessible on the company's YouTube archive is insufficient to bring them within the statute of limitations. Moreover, the allegations regarding Coca-Cola's YouTube archive—which did not appear in Plaintiffs' original Complaint—should be stricken, since Judge Wingo directed Plaintiffs to seek leave of Court to make any amendment not expressly authorized in her Order. Plaintiffs have simply disregarded that mandate.

Second, Plaintiffs do not allege that either the Coca-Cola commercials or the ABA TV spot contained objectively misleading statements under the CPPA. Although Plaintiffs accuse Coca-Cola of undertaking a campaign to deny the purported link between SSBs and obesity, the

videos they challenge caution the public about the risk of weight gain associated with excessive SSB consumption. One of them reminds consumers that the calories in SSBs "count" and warns that "if you eat and drink more calories than you burn off, you'll gain weight." Another announces that a 12-ounce can of Coke contains 140 calories, and catalogues the series of physical activities necessary to burn them off. Plaintiffs do not, and cannot, plausibly allege that these ads would mislead a reasonable consumer into believing that SSBs pose no risk of weight gain or associated conditions.

Third, the ads are protected by the First Amendment. Commercial speech enjoys constitutional protection so long it is not "inherently misleading." Plaintiffs do not allege that the statements in the challenged videos fall into that narrow category, and the Court of Appeals for the Ninth Circuit has rejected the argument that they do. The First Amendment protects Coca-Cola's right to disseminate accurate information.

Plaintiffs' claims lacked merit the first time they were asserted (and dismissed). Now, they border on the frivolous. The Court should strike the large majority of Plaintiffs' Amended Complaint in accordance with Judge Wingo's prior ruling. The few remaining allegations are insufficient to state a claim, and the Amended Complaint should be dismissed with prejudice.

BACKGROUND

A. The Initial Complaint

Plaintiffs Praxis, Coates and Lamar filed this action in July 2017 against Coca-Cola and the ABA, a trade association, asserting a single claim for violation of the CPPA. Compl. ¶¶ 168-86.[2] The crux of their claim was that Coca-Cola had, through its contributions to public discourse, engaged in a "campaign of deception" by "denying outright established science" and

[2] The ABA was dismissed from the case by Order dated January 22, 2019 on the ground that it is not a "merchant" subject to liability under the CPPA. Because the ABA is a D.C. resident, however, the case was not removable to federal court when originally brought.

refusing to acknowledge the purported "scientific consensus linking sugar-sweetened beverages to obesity, type 2 diabetes, and cardiovascular disease." *Id.* ¶¶ 4, 36, 72. Plaintiffs sought to enjoin Coca-Cola's speech on this subject, and to compel Coca-Cola to fund a public education campaign endorsing Plaintiffs' contrary viewpoint. Compl. Prayer for Relief ¶¶ B, D.

Despite Plaintiffs' heated rhetoric, the Complaint was short on facts. It focused on a handful of statements by Coca-Cola executives that supposedly "obfuscated" the alleged link between SSBs and obesity, and the three TV spots described above, which caution consumers about the risk of weight gain. In an attempt to give their threadbare Complaint a modicum of heft, Plaintiffs also included a number of statements that, by their own allegations, Coca-Cola did not make.

In the first category, Plaintiffs identified a total of four supposedly misleading statements by Coca-Cola executives, dating back to the 1990s, concerning the longstanding public controversy over the alleged health effects of SSBs:

- In 1998, then-CEO Douglas Ivester allegedly told a Brazilian newspaper that "Coca-Cola is an excellent complement to the habits of a healthy life." Compl. ¶ 76.

- In 2012, Coca-Cola executive Katie Bayne gave an interview to USA Today to provide Coca-Cola's perspective on a proposed restriction on SSB sales in New York City. Ms. Bayne was asked, among other things, what she "would say to [New York City] Mayor Bloomberg if he were sitting across from [her]." Ex. 11. In that interview, Ms. Bayne allegedly asserted that "[t]here is no scientific evidence that connects sugary beverages to obesity," and cited epidemiological evidence that obesity had risen even as SSB consumption had declined. Compl. ¶ 75 & n.38; Ex. 11.

- In 2013, at a scientific symposium discussing the causes and prevention of obesity, Dr. Rhona Applebaum, then the Chief Science and Health Officer at Coca-Cola, asserted that Coke was "safe, it hydrates, it's enjoyable." Compl. ¶ 131.

- Also in 2013, Coca-Cola's current CEO James Quincey responded to a CNN reporter's questioning about Coca-Cola's efforts to "take the front foot in the world's fight against obesity" by noting that, with respect to weight gain, "a

calorie is a calorie." Compl. ¶ 77 & n.40.

To a lesser extent, Plaintiffs also based their claim on two of Coca-Cola's television ads—"Be OK" and "Coming Together"—both of which ran in January 2013. Those ads informed consumers that "all calories count"; that "if you eat and drink more calories than you burn off, you'll gain weight," Exs. 1-2 ("Coming Together"); and that "EXTRA physical activity" was a good way to offset calorie intake from SSBs. Exs. 3-4 ("Be OK") (emphasis in original). *See* Compl. ¶¶ 113, ill. 1, 121, ill. 4. Plaintiffs also took issue with "Mixify," a TV spot by the ABA and its members, which ran in September 2014 and encouraged consumers to "Balance what you eat and drink with what you do," Exs. 5-6 ("Mixify"). Plaintiffs did not assert that any of these ads misrepresented Coca-Cola's products or made other factually inaccurate statements. Rather, they claimed that the ads were part of Coca-Cola's "campaign of deception" because they "switch[ed] the focus" from and "drown[ed] out" Plaintiffs' views. Compl. ¶¶ 4, 37.

Plaintiffs also sought to hold Coca-Cola liable for a number of other statements made by third parties, including the ABA, the Global Energy Balance Network ("GEBN") and the European Hydration Institute ("EHI"). Plaintiffs cited, for example, a press release by the ABA pointing out that it was "National Ice Cream Month" and "remind[ing readers] to grab a beverage to go with your ice cream." Compl. ¶ 106. Plaintiffs even tried to hold Coca-Cola accountable for a post by a nutrition blogger who, according to Plaintiffs, had represented that soda was "a healthy snack, 'like . . . packs of almonds.'" *See id.* ¶ 92. In reality, the blogger encouraged readers to "[s]elect portion-controlled versions of your favorites, like Coca-Cola mini cans, packs of almonds or pre-portioned desserts for a meal." Exs. 7, 12.

Although the initial Complaint asserted that these statements had misled "consumers"

into purchasing and consuming SSBs, none of the Plaintiffs claimed to have been so deceived. Plaintiffs Lamar and Coates, both of whom are pastors of congregations in the D.C. area, alleged that Coca-Cola's purported misstatements had "inhibit[ed]" their provision of "pastoral care." Compl. ¶¶ 147, 153, 158. They claimed to have "frequently provide[d] guidance" to parishioners about "the health hazards linked with sugar-sweetened beverages," to counteract Coca-Cola's alleged misstatements and at the expense of other pastoral activities. *Id.* ¶¶ 146-54. Similarly, Praxis, a nonprofit organization whose stated mission is to "build healthier communities" through "advocacy work," claimed that it had been compelled to "divert[] resources from other advocacy work in order to advocate on [SSBs]." *Id.* ¶ 23. In short, Plaintiffs alleged that Coca-Cola's purported misstatements had forced them to expend more time and effort to promote their points of view than they otherwise would have spent.

B. Coca-Cola's Motions to Dismiss

Coca-Cola moved to dismiss the Complaint pursuant to Rule 12(b)(1), arguing that Plaintiffs' purported injuries did not establish standing. Coca-Cola also moved under Rule 12(b)(6), arguing, among other things, that the disputed statements (1) pre-dated July 2014 and thus were too stale to challenge under the CPPA; (2) were made by others and could not form the basis of a claim against Coca-Cola; (3) were otherwise not actionable under the CPPA; and/or (4) were protected by the First Amendment.[3]

In addition, Coca-Cola filed a motion to dismiss under D.C.'s Anti-SLAPP Act, D.C. Code § 16-5501 *et seq.*, which permits the filing of a "special motion to dismiss" any lawsuit that "aris[es] from an act in furtherance of the right of advocacy on issues of public interest." D.C. Code § 16-5502(a)-(b). The Anti-SLAPP statute provides defendants with a means to

[3] Coca-Cola's Motion to Dismiss Pursuant to Super. Ct. R. 12(B)(6) and 12(B)(1) (Oct. 13, 2017).

"expeditiously and economically dispense of" suits arising from such statements by, among other things, (1) imposing an automatic stay of discovery upon the filing of a special motion; (2) requiring plaintiffs to make a prompt evidentiary showing of "likely . . . succe[ss] on the merits"; and (3) awarding attorneys' fees to successful Anti-SLAPP movants. D.C. Code §§ 16-5504; 16-5502(b)-(c); D.C. Council Comm. on Pub. Safety and the Judiciary, *Report on Bill 18-983, Anti-SLAPP Act of 2010*, at 4 (Nov. 18, 2010). Coca-Cola argued that its statements to the media and at scientific conferences—*i.e.*, the statements of Mr. Ivester, Ms. Bayne, Mr. Quincey and Dr. Applebaum—fell within the statute because they occurred in the context of the vigorous public debate over the role of SSB consumption in the prevalence of obesity and related conditions.[4]

Judge Wingo gave these arguments an extraordinary amount of attention over a period of nearly two years, holding lengthy oral argument sessions in March 2018, September 2018, February 2019, and July 2019. At Plaintiffs' instigation, Judge Wingo also permitted two rounds of supplemental briefing. Moreover, Plaintiffs submitted dozens of pages of additional briefing in the form of purported "supplemental authority" submissions—most of which did not in fact reference new developments in the law, but merely advanced arguments that Plaintiffs had failed to include in their opposition briefs. *See* Plaintiffs' Apr. 13, 2018 Praecipe; Plaintiffs' June 22, 2018 Praecipe; Plaintiffs' second June 22, 2018 Praecipe; Plaintiffs' July 16, 2018 Praecipe; and Plaintiffs' Jan. 29, 2019 Praecipe. One such submission, for example, contained extensive argument relating to a 1999 Supreme Court case. *See* Plaintiffs' Apr. 13, 2018 Praecipe at 2-3.

C. Plaintiffs' Shifting Theories

[4] Coca-Cola's Special Motion to Dismiss Pursuant to District of Columbia Anti-SLAPP Act, D.C. Code § 16-5501 *et seq.*, at 9-11 (quoting D.C. Code § 16-5502(a), and *E.R.R. Pres. Conference v. Noerr Motor Freight*, 365 U.S. 127, 136 (1961) (establishing *Noerr-Pennington* doctrine)).

Throughout the extensive briefing and argument on Coca-Cola's motions, Plaintiffs repeatedly revamped their claims in response to shortcomings that Judge Wingo identified. At the second argument session in September 2018, Judge Wingo expressed skepticism about Plaintiffs' standing, and gave Plaintiffs the opportunity to file a supplemental submission marshaling authority for their argument that mere exposure to misleading advertising, without more, allows a party to bring a claim under the CPPA. Sept. 17, 2018 Tr. at 28-29. But Plaintiffs disregarded Judge Wingo's instructions on the content of their submission, choosing instead to remake their standing allegations from scratch. Their supplemental brief, filed in October 2018, was accompanied by a sworn factual affidavit from each Plaintiff, reciting what Judge Wingo described as "entirely new allegations related to the issue of standing." Oct. 1, 2019 Order at 4; *see also* Exs. 8-10 (the "Supplemental Affidavits").

In the Supplemental Affidavits, Plaintiffs Coates and Lamar abandoned their allegations that Coca-Cola's statements had caused them "pastoral injury" by forcing them to "provide counsel" to congregants regarding the purported health risks of SSBs. Instead, they claimed for the first time that *they themselves* were ignorant of these risks until a few months before they filed their Complaint. Plaintiff Lamar alleged that, in spring 2017, he had "purchased drinks sold by Coca-Cola, including Sprite [an SSB] . . . for [his] personal consumption . . . *unaware* that science had definitively established a link between these drinks and obesity, type 2 diabetes, and cardiovascular disease," and that he would not have purchased those products if not for Coca-Cola's alleged misstatements. Ex. 8 ¶ 8 (emphasis added). Pastor Lamar did not identify what Coca-Cola statements, if any, he had heard or read. Plaintiff Coates similarly backtracked on his original "pastoral injury" theory, though his new allegations were even vaguer than Lamar's. Plaintiff Coates averred that he had purchased unspecified "drinks" under the misapprehension

that Coca-Cola "would not market a product to children that could cause them serious disease." Ex. 9 ¶¶ 8-9. Like Pastor Lamar, Coates did not claim to have seen, much less relied upon, any Coca-Cola statement challenged in the Complaint. Meanwhile, Plaintiff Praxis claimed in its Supplemental Affidavit to have devoted 10-20% of its time to counteracting misstatements by Coca-Cola, but did not identify the alleged misstatements or the activities it undertook in response to them. Ex. 10 ¶ 5.

Although the Supplemental Affidavits were not formally part of the pleadings, Judge Wingo acceded to Plaintiffs' request to consider them. On January 22, 2019, in an opinion granting the ABA's Rule 12(b)(6) motion to dismiss, Judge Wingo held the allegations in Plaintiff Lamar's Supplemental Affidavit sufficient to establish his standing. Because one plaintiff with standing was enough to confer jurisdiction over the ABA's motion, Judge Wingo found it unnecessary to consider the standing of the other two plaintiffs at that time. The January 2019 Order granted the ABA's motion to dismiss on the basis that it was not a "merchant" under the CPPA, but did not address Plaintiffs' claims against Coca-Cola. Jan. 22, 2019 Order at 9-10.

The third oral argument session, on February 5, 2019, saw Plaintiffs once again reshape their claims, this time by mounting new arguments regarding the claims' timeliness. Judge Wingo expressed a preliminary view that Plaintiffs' claims were time-barred, since they arose almost entirely from conduct that pre-dated July 2014. Plaintiffs responded with a brand new argument that their protracted delay should be excused under the so-called "discovery rule," because Coca-Cola's purported "scheme" of deception had prevented them from timely discovering their injuries. *See* Feb. 5, 2019 Tr. at 52. Although Judge Wingo noted that this argument "should have been in the opposition" and chastised Plaintiffs for "trying to take multiple bites of the apple," she agreed to supplemental briefing on the issue. *Id.* at 41-42.

At the fourth and final session on July 9, 2019, Judge Wingo heard extensive argument on the applicability of the discovery rule, among other issues. Perhaps sensing that their discovery-rule argument was unlikely to carry the day, Plaintiffs argued that their claims relating to the 2013 TV commercials were timely because those ads had remained accessible on the Coca-Cola YouTube channel. Feb. 5, 2019 Tr. at 6; July 9, 2019 Tr. at 11, 20-23, 51-62. Coca-Cola responded that under the "republication" doctrine, such de minimis availability of the ads did not bring them within the statute of limitations, and cited supportive authority. July 9, 2019 Tr. at 53-55. Judge Wingo expressed concern that this issue had not been briefed and was not ripe for decision, but noted that Coca-Cola would have an opportunity to raise it in a renewed motion to dismiss. *Id.* at 56-57.

D. The Court's Decision

On October 1, 2019, Judge Wingo granted Coca-Cola's motion to dismiss in large part and reserved decision on the remainder of the motion. Judge Wingo's thoroughly reasoned 32-page opinion rested on four determinations relevant here.

First, Coca-Cola is not liable for "statements made by other entities" because the CPPA imposes liability only "for trade practices in which a defendant directly participates," and Plaintiffs failed to adequately allege that Coca-Cola "control[led]" the ABA, GEBN, or EHI. Judge Wingo thus dismissed Plaintiffs' claims to the extent they were based on statements by these entities, or by anyone other than Coca-Cola. Oct. 1, 2019 Order at 23-24.[5]

Second, Coca-Cola is not liable for statements made prior to July 2014 because they are beyond the CPPA's three-year statute of limitations. Oct. 1, 2019 Order at 31. The Court

[5] The Court did not specifically address the alleged paid nutrition blogger. *See* Oct. 1, 2019 Order at 23-24. However, the Order applies with equal force to her, and in any event her statements are objectively not misleading as a matter of law. *See infra* Argument, Part II.

rejected Plaintiffs' argument that the "discovery rule" applied because their "injuries were not readily apparent due to Coke's fraudulent conduct." *Id.* at 26-27 (citation omitted). The Complaint itself, the Court reasoned, "foreclose[d]" Plaintiffs' contention 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," as Plaintiffs had alleged a "*growing public perception*" of that link by 2012. *Id.* at 27-28 (citing Compl. ¶¶ 67, 69) (internal quotation marks omitted) (emphasis added). Moreover, there were extensive media reports on the issue, including in the District of Columbia, and New York City had engaged in a well-known attempt in 2012 to limit the size of containers of SSBs. Oct. 1, 2019 Order at 27, 29-31 & n.19 (quoting *Wright v. Howard Univ.*, 60 A.3d 749, 751 n.1 (D.C. 2013)). Accordingly, Judge Wingo dismissed Plaintiffs' claims to the extent they took aim at any statements that pre-dated July 2014.

Third, even treating their belated affidavits as part of the Complaint, neither Plaintiff Coates nor Plaintiff Praxis had standing to pursue a CPPA claim. Judge Wingo rejected all three Plaintiffs' allegations that Coca-Cola's statements had injured them by prompting them to "divert resources," reasoning that theory of standing is not available to individual plaintiffs, and that Praxis had not alleged an expenditure of resources "beyond those normally expended to carry out [its] advocacy mission." Oct. 1, 2019 Order at 16-17 & n.9, 20 n.11. Plaintiffs Coates and Lamar had also failed to allege that they had suffered a cognizable injury on account of their mere "exposure to [Coca-Cola's] advertising," as it "was difficult to discern what distinguishe[d] [them] from anyone else in the world." *Id.* at 19-20 (citation omitted) (alteration adopted).

Although Judge Wingo reiterated her January 2019 holding that Lamar's allegations were sufficient to establish his standing as a consumer, she reached a contrary conclusion as to Coates. She noted that, unlike Lamar, Coates had not "allege[d] that the drinks purchased were sugar-

sweetened beverages, a significant omission," and had not alleged that his purchase was made "in reliance on the advertising." Oct. 1, 2019 Order at 21. Accordingly, neither he nor Praxis—which did not allege to have standing as a consumer—had alleged any viable theory of standing.

Finally, the Court declined to permit Plaintiffs carte blanche to revamp their claims yet again. Oct. 1, 2019 Order at 22. Rather, Judge Wingo permitted Plaintiffs to amend the Complaint "*only* to [(1)] add the allegations regarding standing included in the . . . Supplemental [Affidavits] and [(2)] to remove aspects of the claim the Court rule[d] are barred." *Id.* at 22-23 n.13. Thus, she authorized the addition of the allegations from the Supplemental Affidavits—even the ones she had found insufficient to confer standing—because, as she noted elsewhere in her opinion, they had never been incorporated into the pleadings. *Id.* at 20-21. She also invited Plaintiffs to "remove aspects of the claim" the Court had dismissed—*i.e.*, the aspects based on pre-2014 conduct and third-party statements. *Id.* And she directed that "[s]hould 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." *Id.* (emphases added).

Finally, although Judge Wingo did not list the specific allegations that she expected Plaintiffs to "remove" from their amended pleading based on her Order, she denied Coca-Cola's Anti-SLAPP motion as moot—reflecting that all of the statements addressed in that motion were out of the case. Oct. 1, 2019 Order at 31-32, 33. As noted above, this category included Mr. Ivester's 1998 statement; Ms. Bayne's 2012 statement; Dr. Applebaum's 2013 statement; and Mr. Quincey's 2013 statement. Judge Wingo also did not identify the "aspects of the claim" that remained, or rule on Coca-Cola's outstanding arguments. Instead, she reserved decision on all issues not addressed by her Order, and made clear that her ruling was "without prejudice to re-assertion [by Coca-Cola] of any appropriate arguments upon the filing of any amended

complaint." *Id.* at 32.

E. The Amended Complaint

On November 13, 2019, Plaintiffs filed their Amended Complaint. The Amended Complaint contravenes virtually every ruling in Judge Wingo's Order. Plaintiffs have included detailed allegations of Coca-Cola's purported pre-July 2014 conduct, including each of the statements at issue in Coca-Cola's Anti-SLAPP Motion, despite Judge Wingo's ruling that any claims premised on those allegations are time-barred. Am. Compl. ¶¶ 62-73. They have also included detailed allegations about the statements of EHI, GEBN and the ABA, *id.* ¶¶ 74-86, 103-111, though these claims have also been dismissed. In a desultory nod to Judge Wingo's ruling, they recast these time-worn statements as "background," Am. Compl. at p. 12 & n.35, and allege that some pre-2014 statements—such as the TV commercials—have remained available on the internet, *id.* ¶¶ 93, 95. Not only are these allegations insufficient to breathe new life into the already-dismissed claims, but these amendments were made without leave of Court, in clear violation of Judge Wingo's Order.

Plaintiffs have also flouted Judge Wingo's Order in their third attempt to allege standing. Their Amended Complaint trots out new allegations, made without leave of Court, pertaining to (1) Coates's 2017 purchases of Coca-Cola products, *compare* Am. Compl. ¶¶ 23-24, *with* Ex. 9 ¶¶ 8-10; and (2) Praxis's 2017 use of "resources" to counteract Coca-Cola's purported misrepresentations, *compare* Am. Compl. ¶ 30, *with* Ex. 10 ¶ 5. If Plaintiffs had sought leave to add these allegations—as Judge Wingo instructed them to do—Coca-Cola would have opposed their bid to raise claims that could have been included the July 2017 Complaint. Moreover, tellingly, Pastors Lamar and Coates deleted their prior, now-contradictory allegations that they "provide[d] pastoral care for and spiritual guidance to congregants and members of the public" regarding the purported risks of SSB consumption. *See* Compl. ¶¶ 148-49, 153-54; Am. Compl.

¶¶ 20-22.

ARGUMENT

Rule 12(f) empowers a court to "strike from a pleading an insufficient defense or any redundant, immaterial, impertinent, or scandalous matter." D.C. Super. Ct. Civ. R. 12(f).[6] A matter is immaterial if it "has no essential or important relationship to the claim for relief or the defenses being pleaded." 5C Charles Alan Wright et al., Fed. Prac. & Proc. § 1382 (3d ed. supp. 2018). "Impertinent material consists of statements that do not pertain to, and are not necessary to resolve, the disputed issues." *Id.* Although Rule 12(f), by its terms, does not require a showing of prejudice to the movant, courts do typically require such a showing in considering the movant's entitlement to relief. *See generally Ally Bank v. Hedgman*, 2019 D.C. Super. LEXIS 8, *4-5 (D.C. Super. Ct. July 3, 2019).

A motion to dismiss under Rule 12(b)(6) tests the legal sufficiency of the complaint. *Luna v. A.E. Eng'g Servs., LLC*, 938 A.2d 744, 748 (D.C. 2007). Courts in the District 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)." *Poola v. Howard Univ.*, 147 A.3d 267, 276 (D.C. 2016). To avoid dismissal, "a complaint must contain sufficient factual matter . . . to state a claim to relief that is plausible on its face." *Iqbal*, 556 U.S. at 678 (internal quotation marks omitted). In considering the sufficiency of the complaint, the court must credit all "well-pleaded facts" and ignore any "legal conclusion couched as a factual allegation." *Id.* at 678-79; *see also Poola*, 147 A.3d at 277-78 ("'bare assertions [that] . . . amount to nothing more than a

[6] Because D.C. Super. Ct. Civ. R. 12 "is identical to *Federal Rule of Civil Procedure 12*" in all material respects, D.C. Super. Ct. Civ. R. 12, Cmt. to 2017 Amts., cases interpreting Rule 12 of the Federal Rules may inform the Court's analysis. *See generally Hackman v. One Brands, LLC*, 2019 D.C. Super. LEXIS 12, *3-4 (D.C. Super. Ct. June 18, 2019) ("Although Defendant's Motion to Dismiss, which was originally filed in federal court, cites to federal rule 12(b)(6), Rule 12(b)(6) of the Superior Court Rules of Civil Procedure is identical.").

formulaic recitation of the elements of a . . . claim'" are "'not entitled to be assumed true'") (quoting *Iqbal*, 556 U.S. at 681). "Where 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.'" *Sundberg v. TTR Realty, LLC*, 109 A.3d 1123, 1129 (D.C. 2015) (quoting *Iqbal*, 556 U.S. at 678).

In addition to the well-pleaded factual allegations, the Court may consider documents external to the complaint if they are "referred to in the complaint and [are] central to the plaintiff's claim." *Drake v. McNair*, 993 A.2d 607, 616 (D.C. 2010) (internal quotation marks omitted). The Court may also consider prior pleadings. *See, e.g.*, *Golden Mgmt. & Training Corp.*, 319 F. Supp. 3d 358, 372 (D.D.C. 2018).

Applying these standards here, the Amended Complaint's irrelevant and improper allegations should be stricken, and what remains should be dismissed for failure to state a claim.

I. PLAINTIFFS' IRRELEVANT AND IMPROPER ALLEGATIONS SHOULD BE STRICKEN

A. Third-Party and Pre-2014 Statements

The Court should strike the allegations concerning pre-2014 and third-party statements, Am. Compl. ¶¶ 62-86, 103-111, because Judge Wingo has already dismissed Plaintiffs' claims attacking them. Indeed, Judge Wingo's Order instructed Plaintiffs to "remove [these] aspects of the claim" from any amended pleading. Oct. 1, 2019 Order at 22 n.13. That alone requires that they be stricken. *See, e.g.*, *Conservation Force v. Salazar*, 878 F. Supp. 2d 268, 270-271 (D.D.C. 2012) (dismissing with prejudice claims included in amended complaint despite prior dismissal); *DeFazio v. Hollister, Inc.*, 2008 U.S. Dist. LEXIS 99720, *11 (E.D. Cal. Apr. 7, 2008) ("Previously dismissed allegations that failed to state a claim upon which relief can be granted under any applicable legal theory should be stricken from an amended complaint.") (citation

omitted).

Moreover, permitting the allegations to remain will cause prejudice to Coca-Cola. Plaintiffs presumably included these allegations because they intend to premise arguments, and seek discovery, on statements that Judge Wingo has already deemed non-actionable under the CPPA *precisely because* they are (i) too old and/or (ii) not fairly attributable to Coca-Cola. Neither Coca-Cola nor this Court should be forced to devote time and resources to claims that Judge Wingo has already carefully considered and decided. *See, e.g.*, *Whittlestone, Inc. v. Handi-Craft Co.*, 618 F.3d 970, 973 (9th Cir. 2010) (noting that function of Rule 12(f) is "to avoid the expenditure of time and money that must arise from litigating spurious issues by dispensing with those issues prior to trial"); *Conservation Force v. Salazar*, 878 F. Supp. 2d at 270-71 (striking previously dismissed claims included in amended complaint, reasoning that the "failure to remove the already dismissed claims . . . has caused opposing counsel and the court to waste time disposing of this issue"); *Sikkelee v. Precision Airmotive Corp.*, 2011 U.S. Dist. LEXIS 38382, *24-25 (M.D. Pa. Apr. 8, 2011) (ordering plaintiff to remove previously dismissed allegations in order to streamline case and promote efficiency).

The risk of prejudice from improper inclusion of these allegations is particularly acute here, in light of Judge Wingo's denial of Coca-Cola's Anti-SLAPP motion as moot. The Anti-SLAPP statute entitles Coca-Cola to certain procedural protections—including the right of immediate appellate review—before it is required to defend against a lawsuit that seeks to suppress its right to public participation. D.C. Code §§ 16-5502(c)-(d); *see Competitive Enter. Inst. v. Mann*, 2016 D.C. App. LEXIS 528, *4-5 (Dec. 22, 2016). Here, Judge Wingo dismissed Plaintiffs' claims based on statements made in public debate as untimely, obviating Coca-Cola's Anti-SLAPP motion. Oct. 1, 2019 Order at 32-33. Yet Plaintiffs now seek to reinject that

protected conduct into the case, such that Coca-Cola will be forced to defend itself for statements made "in furtherance of the right of advocacy on issues of public interest," and deprived of its procedural protections under the statute. D.C. Code § 16-5502(a). Plaintiffs' attempt to circumvent both the Anti-SLAPP statute and Judge Wingo's Order should be disallowed.

B. Praxis and Pastor Coates

The Court should also (1) strike Praxis's and Coates's new allegations of injury, which were added without leave of Court in violation of Judge Wingo's Order; and (2) dismiss those Plaintiffs' claims in their entirety, in accordance with Judge Wingo's determination that they lack standing. Am. Compl. ¶¶ 22-30. As set forth above, that determination was based on exhaustive briefing and argument, and also took account of Supplemental Affidavits that Plaintiffs filed (without leave of Court) to bolster their initial deficient allegations. In more than ten pages of substantive analysis, Judge Wingo unequivocally concluded that Praxis and Coates lack standing under any theory. Oct. 1, 2019 Order at 14 ("[E]ven considering the additional allegations contained in the affidavits (though not originally includ[ing] in the Complaint), Plaintiffs[] have failed to allege" tester standing); *id.* at 17 ("Even with the additional affidavit," Praxis failed to allege standing on a diversion of resources theory); *id.* at 21 (Coates's "consumer" standing allegations inadequate even with affidavit).

That determination is the law of the case. *See, e.g.*, *In re Estate of Delaney*, 819 A.2d 968, 993-94 (D.C. 2003). Plaintiffs acknowledge that the Court "ruled" on Praxis's and Coates's standing, as alleged in the Supplemental Affidavits. Am. Compl. at 4 n.4. Indeed, the reason Plaintiffs have offered new and improper allegations of standing in the Amended Complaint is to try to remedy the deficiencies the Court deemed fatal. *See* Am. Compl. ¶¶ 8-10, 30. Coca-Cola (and the Court) should not be required to continue to address issues that have already been

considered at great length and resolved.[7]

Praxis's and Coates's new allegations as to standing—*i.e.*, those that appeared in neither their 2017 Complaint nor their 2018 Supplemental Affidavits—should also be stricken because they violate Judge Wingo's clear directive. As Judge Wingo observed, this case "has been replete with filings that are done without leave of Court." Oct. 1, 2019 Order at 5 (citation omitted). For that reason, Judge Wingo granted Plaintiffs leave to amend "*only* to add the allegations regarding standing included in the affidavits" and "to remove aspects of the claim the Court rule[d] are barred," and directed that any further attempts to amend "*in any other way*" would require a motion pursuant to Rule 15. *Id.* at 22 n.13 (emphases added). Plaintiffs have nonetheless forged ahead, without seeking leave under Rule 15, and added new allegations expressly forbidden by Judge Wingo's Order. These averments should be stricken on this basis alone. *See, e.g.*, *Terry v. City of Pasadena Cal.*, 2019 U.S. Dist. LEXIS 132630, *21-22 (C.D. Cal. Apr. 22, 2019) (courts regularly "exercise[] their discretion under Rule 12(f) to strike pleadings that exceed the scope of a permitted amendment or do not comply with the court's instructions pursuant to an order granting leave to amend") (collecting cases); *see also Clapper v. Am. Realty Investors, Inc.*, 2019 U.S. Dist. LEXIS 194305, *25-27 (N.D. Tex. Nov. 7, 2019) (striking allegations "raised in the [amended complaint] for the first time without consent of the opposing party or leave of court in violation of Rule 15(a)(2)").

Even if Plaintiffs had sought leave to amend, as they were directed to do, amendment would not be proper under Rule 15. In considering whether to permit amendment, courts "take note of five factors: (1) the number of requests to amend made by the movant; (2) the length of

[7] For the same reason, Coca-Cola is not seeking to re-litigate whether Pastor Lamar has standing based on the allegations in his Supplemental Affidavit, now that those allegations have been incorporated into the operative pleading and Judge Wingo has found them sufficient to confer standing.

time the case has been pending; (3) bad faith or dilatory tactics on the part of the movant; (4) the merit of the proffered pleading; and (5) prejudice to the nonmoving party." *Sherman v. Adoption Ctr. of Washington, Inc.*, 741 A.2d 1031, 1038 (D.C. 1999). Each of these factors weighs against amendment here.

First, Plaintiffs have already received one chance to amend, through the Supplemental Affidavits they previously submitted (without leave) following extensive briefing and argument.

Second, this case has now been pending for more than two years. The facts asserted in Plaintiffs' Amended Complaint, if true, were known to Plaintiffs the day they filed this case in July 2017. *See Sherman*, 741 A.2d at 1038 (amendment not allowed where plaintiff waited nearly two years after filing the complaint). Over the past 30 months, the parties have thoroughly briefed and argued the issue of standing. Having failed to assert these new allegations at any point in that process, Plaintiffs cannot justify doing so now. *See, e.g.*, *Molovinsky v. Monterey Coop.*, 689 A.2d 531, 534 (D.C. 1996) (affirming denial of amendment where plaintiff failed to offer adequate explanation for lengthy delay).

Third, Plaintiffs' failure to seek leave to amend despite the Court's order is part of a pattern of making submission after submission without adhering to the rules of the Court. Here, Plaintiffs ignored not only Rule 15, but also Judge Wingo's specific order that they seek leave before amending their Complaint "in any other way." Oct. 1, 2019 Order at 22 n.13.

Fourth, the proposed amendments are futile insofar as they would not save Praxis's claims. Praxis still does not allege the deployment of resources "beyond those normally expended to carry out [its] advocacy mission." Oct. 1, 2019 Order at 17 (citations omitted). Judge Wingo already rejected Praxis's "diversion of resources" theory based on Praxis's supplemental allegations that it spends a certain amount of time "on education and advocacy to

counteract" Coca-Cola's alleged "misrepresentations." *Id.* at 17 n.9 (citing Ex. 10 ¶ 5). The only new allegations Praxis proposes would quantify those expenditures and further explain how that time is spent. Am. Compl. ¶ 30. But all of these expenditures are, by admission, part of Praxis's *general advocacy efforts*. *Id.* ¶ 28 (noting that these expenditures and activities reflect "10-20%" of the "50% of the time" Praxis "spent on advocacy of healthier eating and drinking").

Moreover, the actions Praxis identifies involve nothing more than participation in discussions, development and distribution of messaging, and "advocacy work," all in order "to carry out its food advocacy mission." Am. Compl. ¶ 30. Under settled law, that sort of impact on Praxis's advocacy efforts is not enough to show perceptible impairment to its *programs*, because "[c]hallenging conduct like [Coca-Cola's] . . . is the *very purpose of consumer advocacy organizations*" such as Praxis. *Nat'l Consumers League v. General Mills, Inc.*, 680 F. Supp. 2d 132, 136 (D.D.C. Jan. 15, 2010) (emphasis added); *see also Food & Water Watch, Inc. v. Vilsack*, 808 F.3d 905, 920-21 (D.C. Cir. 2015) (no organizational standing where organization whose primary purpose was "to educate the public about . . . safe, wholesome food" was required to "increase the resources that it spen[t] on educat[ion]" in response to challenged conduct).

Lastly, the proposed amendment should be denied as prejudicial for the reasons noted above. Since July 2017, Coca-Cola has devoted extensive resources to defending itself against one set of allegations, then a second set, that sought to establish standing on the part of Praxis and Coates. Now, more than two years later, Plaintiffs are attempting to come forward with yet a third account of their injuries. Coca-Cola should not be forced to face an ever-moving target as Plaintiffs continually reshape their allegations in an effort to overcome the Court's rulings.

II. THE AMENDED COMPLAINT FAILS TO STATE A CPPA CLAIM

The Amended Complaint should also be dismissed in its entirety for the separate reason that Plaintiffs do not plausibly allege a violation of the CPPA. As a consequence of the Court's

Order, the sole remaining challenged statements by Coca-Cola consist of three TV ads: "Coming Together," Exs. 1-2; "Be OK," Exs. 2-3, and "Mixify," Exs. 5-6.[8] Two of these were broadcast outside the CPPA's statute of limitations period, and none of them contains any objectively misleading statement.

A. Plaintiffs' Attacks on "Coming Together" and "Be OK" Are Time-Barred

Two of the three remaining ads—Coca-Cola's "Coming Together" and "Be OK" commercials—were broadcast in 2013, prior to the July 2014 cut-off date for the CPPA's three-year statute of limitations. Am. Compl. ¶¶ 88 n.49 (citing January 16, 2013 broadcast date for "Be OK"); *id.* ¶ 93 n.54 (citing January 25, 2013 date for "Coming Together"). Plaintiffs' claims regarding these ads are therefore time-barred.

During the July 2019 hearing, Plaintiffs suggested that these claims might still be timely because the ads were accessible on Coca-Cola's YouTube channel, an online archive of Coca-Cola advertisements dating back more than ten years.[9] *See* July 9, 2019 Tr. at 60. Judge Wingo expressly declined to rule on whether the possibility that these ads were accessible on the internet after July 2014—a fact that was not alleged in the initial Complaint—could render Plaintiffs' attack on them timely. Rather, she anticipated that this issue would be briefed in a motion to dismiss the Amended Complaint. July 9, 2019 Tr. at 55-56 (noting that Coca-Cola would have the "opportunit[y]" to brief this issue in its renewed motion to dismiss).

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[8] Plaintiffs also apparently continue to rely on a statement by an alleged paid nutrition blogger who, they allege, "included the suggestion that a soda could be a healthy snack, 'like . . . packs of almonds.'" Am. Compl. ¶ 100. Even if that third-party statement could support claims against Coca-Cola, and it cannot (*see* Order at 23-24), Plaintiffs fail to allege that the blogger made any objectively misleading statement. In full, the statement read: "Select portion-controlled versions of your favorites, like Coca-Cola mini cans, packs of almonds, or pre-portioned desserts for a meal that won't break the calorie bank, helping you manage your weight for better heart health." Exs. 7, 12. It did not say Coke is a "healthy" snack. Moreover, representations as to "healthy" diets are non-actionable in any event. *See infra* at 24-28.

[9] *See, e.g.*, The Coca-Cola Co., *The Greatest Gift*, YOUTUBE (Aug. 24, 2009), https://www.youtube.com/watch?v=gdnWplvu29U.

In their Amended Complaint, Plaintiffs have added new allegations relating to these ads' continued accessibility on "Coca-Cola's YouTube channel." Am. Compl. ¶¶ 93, 95. Not only are these averments made without leave of Court, they do not cure Plaintiffs' statute-of-limitations problem.

It is axiomatic that an allegedly false or defamatory statement published outside the limitations period does not remain actionable for as long as it accessible in a library or on the internet. If that were so, the statute of limitations would essentially be meaningless in this context, because any published statement (*e.g.*, a book, a newspaper article, etc.) can be retrieved years, and even decades, after publication. For this reason, courts—including in the District of Columbia—have adopted the so-called "single publication rule." *See Rosen v. Am. Isr. Pub. Affairs Comm., Inc.*, 41 A.3d 1250, 1255 (D.C. 2012) (citing *Mullin v. Washington Free Weekly*, 785 A.2d 296, 298 & n.2 (D.C. 2001)). Under that rule, a party cannot assert a claim based on a statement that would otherwise be time-barred simply by pointing to its continued availability in a library or archive. Even alerting a new audience to the availability of a preexisting statement does not amount to a new publication. *See, e.g.*, *In re Philadelphia Newspapers, LLC*, 690 F.3d 161, 174-75 (3d Cir. 2012); *Rinaldi v. Viking Penguin*, 420 N.E.2d 377, 381 (N.Y. 1981). Only a new "republication"—such as a second edition of an earlier-published book—starts the statute of limitations running anew. *See In re Philadelphia Newspapers, LLC*, 690 F.3d at 174 (discussing body of case law holding that "linking to previously published material" on the internet is not considered "republication" for statute of limitations purposes "based on the determination that a link is akin to the release of an additional copy of the same edition of a publication because it does not alter the substance of the original publication"); *see, e.g., Sundance Image Tech., Inc. v. Cone Editions Press, Ltd.*, 2007 U.S. Dist. LEXIS 16356

(S.D. Cal. Mar. 7, 2007); *Churchill v. State of N.J.*, 876 A.2d 311 (N.J. Super. Ct. 2005).

Consistent with this principle, courts routinely hold that the mere fact that a statement remains available online does not extend the statute of limitations for a claim targeting that statement. Rather, such a claim accrues, and the limitations period begins to run, the day the statement is first published. *See, e.g.*, *Pippen v. NBCUniversal Media, LLC*, 734 F.3d 610, 616 (7th Cir. 2013) (defamation claim based on statements published on website were time-barred as "passive maintenance of a web site [is] not a republication"); *Churchill v. State*, 876 A.2d 311, 319 (N.J. App. 2005) (adopting single publication rule for internet communications and applying to defamation claim). Simply put, the truism that a statement published years ago can still be retrieved via a Google search does not make the statement indefinitely actionable.

The single publication rule dooms Plaintiffs' attempt to use Coca-Cola's YouTube channel archive to salvage their tardy attack on the "Coming Together" and "Be OK" ads. The statute of limitations for a CPPA claim predicated on those ads began to run when they were first broadcast and posted to Coca-Cola's YouTube channel in January 2013. Plaintiffs were required to bring suit on those statements no later than January 2016. They missed that deadline by a year and a half, so their claims are time-barred.

B. None of the Ads Contains An Objectively Misleading Statement

Plaintiffs' claims regarding the disputed television spots fail for the additional reason that none of them contains an objectively misleading statement. The CPPA proscribes statements and omissions that are false or have a "tendency to mislead." D.C. Code § 28-3904(e), (f)-(1).[10]

[10] The Amended Complaint also makes cursory reference to several other provisions of the CPPA, all of which are inapposite. Am. Compl. ¶¶ 129(a), (b), (e). Because Plaintiffs do not allege any misrepresentation about the content of Coca-Cola's products, they cannot show that Coca-Cola falsely represented its goods as having "characteristics, ingredients, uses, [or] benefits . . . that they do not have," D.C. Code § 28-3904(a); that Coca-Cola falsely represented that its goods were "of particular standard,

Whether something has a "tendency to mislead" turns on "how the [challenged] practice would be viewed and understood by a reasonable consumer." *Saucier v. Countrywide Home Loans*, 64 A.3d 428, 442 (D.D.C. 2013) (internal quotation marks omitted). An "accurate statement . . . generally would not be actionable" under the statute because "a reasonable consumer generally would not deem an accurate statement to be misleading." *Id.*; *see, e.g.*, *Whiting v. AARP*, 701 F. Supp. 2d 21, 29 (D.D.C. 2010) (plaintiff "failed to identify any conduct actionable under the CPPA" where the "statements that she point[ed] to as misleading [we]re in fact either accurate, not misleading to a reasonable consumer, or mere puffery.") A CPPA claim must be dismissed if the plaintiff's proposed interpretation of a statement is objectively unreasonable. *See, e.g.*, *Floyd v. Bank of Am.*, 70 A.3d 246, 257 (D.C. 2013) (CPPA claim over alleged deceptive statement dismissed where plaintiffs' interpretation of the statement was not "objectively reasonable") (alteration and internal quotation marks omitted); *Alicke v. MCI Comm'cns Corp.*, 111 F.3d 909, 912 (D.C. 1997) (affirming dismissal of CPPA claim because "no reasonable customer could actually believe" interpretation of statement proffered by plaintiff).

Here, the Amended Complaint does not identify any objectively misleading representation. Rather, the three disputed ads convey an indisputable truth: consumers may gain weight if the calories they consume, including those from SSBs, exceed the calories they burn through physical activity. The first ad, "Coming Together," provides as follows:

> Beating obesity will take action from all of us, based on one simple, common-sense fact: all calories count, no matter where they come from, including Coca-Cola and everything else with calories. And if you eat and drink more calories than you burn off, you'll gain weight.

Exs. 1-2. The remainder of the ad highlights Coca-Cola's low- and no-calorie beverage options

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quality, grade, style, or model," *id.* § 28-3904(d); or that Coca-Cola "advertise[d] or offer[ed] goods or services without the intent to sell them . . . as advertised or offered," *id.* § 28-3904(h).

and states that "[o]ver the last 15 years this has helped reduce the average calories per serving across our industry products in the U.S. by about 22%." *Id.* These representations are true, and Plaintiffs do not allege otherwise. Consumption of excess calories in relation to physical activity causes weight gain. And all calories count toward that equation.

In an attempt to manufacture deception, Plaintiffs twist the statement "all calories count" into a representation that "all calories are equal" and do not "carry different values." Am. Compl. ¶¶ 96-97. But the ad says no such thing. It does not represent that all calories have equal nutritional value, or that the calories from SSBs have any nutritional value whatsoever. Rather, it says that calories not burned as energy contribute to weight gain—a premise that Plaintiffs do not and cannot dispute.

The second ad, "Be OK," states that

> A 12 oz Coke = 140 calories. There are many ways to burn those calories through EXTRA physical activity and have fun while doing so.

Exs. 3-4; *see also* Am. Compl. ¶ 92, ill. 1. The commercial then depicts a series of physical activities—separated by "plus" signs—that, collectively, could burn 140 calories. The ad concludes with the prominent statement "Calories burned may vary. For more on energy balance, visit Coke.com/140." The concluding sequence also shows an image of Coke Zero®—a zero-calorie product—alongside the statement "CALORIES OPTIONAL." *Id.*

The only representations in this ad are (i) that a can of Coke contains 140 calories, and (ii) that those calories can be burned through "EXTRA physical activity." The ad does not remotely suggest that unlimited SSB consumption "would 'be ok' if . . . coupled with various light activities," as Plaintiffs allege. Am. Compl. ¶ 92. Indeed, courts routinely hold such generic phrases as "be OK" to be non-actionable puffery. *See, e.g.*, *Pearson v. Soo Chung*, 961 A.2d 1067, 1074-75 (D.C. 2008) ("Satisfaction Guaranteed" sign was not an unconditional

guarantee of satisfaction); *Blue Buffalo Co. v. Nestle Purina Petcare Co.*, 2015 U.S. Dist. LEXIS 74905, *24 (E.D. Mo. June 10, 2015) ("100% Complete & Balanced Nutrition" was non-actionable puffery "because whether something is complete or balanced nutrition is merely an opinion about quality and is not capable of being proven true or false"); *Fraker v. KFC Corp.*, 2007 U.S. Dist. LEXIS 32041, *7-8 (S.D. Cal. Apr. 27, 2007) ("You can enjoy 'fast food' as part of a sensible balanced diet" non-actionable puffery). A reasonable consumer would not interpret the ad—which explicitly calls attention to the caloric content of Coke—as an assurance that unrestricted SSB consumption will not lead to weight gain.

Plaintiffs' objection to the ad's use of "deceptively trim models" is also insufficient to state a claim. Courts have repeatedly recognized that "[t]he use of physically fit and attractive models using and enjoying advertised products is so ubiquitous that it cannot be reasonably understood to convey any specific meaning at all." *Geffner v. Coca-Cola Co.*, 928 F.3d 198, 200 (2d Cir. 2019); *see also Becerra v. Coca-Cola*, 2018 U.S. Dist. LEXIS 31870, *9 (N.D. Cal. Feb. 27, 2018) ("reasonable consumers understand" advertising will feature attractive people). Courts in the District apply this same logic. *See Hakki v. Zima*, 2006 D.C. Super. LEXIS 10, *7-9 (Mar. 28, 2006) ("techniques" that were likely to appeal to minors "because they employ attractive models, video games" and so on did not amount to actual and material misrepresentations); *see also Goodwin v. Anheuser-Busch Cos.*, 2005 Cal. App. LEXIS 2070, *12-13 (Sup. Ct. App. Div. Jan. 28, 2005) (same under California's consumer protection statute where "plaintiffs [did] not identify any advertising that is misleading or false" but rather "focus[ed] on puffery or on qualities that are not affirmations of fact such as the fun, sexiness, popularity, social acceptance, athleticism, etc. that drinking alcohol can bring").

The final ad at issue, "Mixify," was not disseminated by Coca-Cola but rather by the

ABA on behalf of its members. It provides:

> Spend a day on the couch? Go for something less. Just finished an afternoon of Frisbee? Maybe you've earned a little more. Balance what you eat and drink with what you do.

Exs. 5-6. By its terms, this ad does nothing more than recommend to consumers that they "[b]alance" their food and beverage intake with their physical activity. It makes no statement of fact, much less one that is false or misleading. Seemingly recognizing as much, Plaintiffs manipulate the ad: instead of "Maybe you've earned a little more," the Amended Complaint misquotes it to read "Maybe you've earned a little more [*soda*]." Am. Compl. ¶ 99 (emphasis added). But the voice-over does not mention "soda," and the ad plainly states that consumers should monitor their total mix of physical activity and "what [they] *eat and* drink." Exs. 5-6 (emphases added). Plaintiffs' contrary interpretation is implausible as a matter of law.

Not only do Plaintiffs fail to allege that "reasonable consumers" construe the ads in the idiosyncratic manner alleged, they do not claim that *they themselves* ever held that interpretation. None of them alleges that they even saw, much less relied upon, any of the ads. Rather, the Amended Complaint rests on the *ipse dixit* of counsel as to how consumers are likely to view the advertising. Courts routinely dismiss false advertising complaints where, as here, they are predicated on similarly fanciful readings of benign advertising or marketing statements. *See, e.g.*, *Geffner v. Coca-Cola Co.*, 928 F.3d 198, 199-200 (2d Cir. 2019) ("diet" in "Diet Coke" not misleading under New York's General Business Law as it could not reasonably convey product assisted in weight loss) (collecting cases); *Figy v. Frito-Lay N. Am., Inc.*, 67 F. Supp. 3d 1075, 1091 (N.D. Cal. 2014) (finding it "utterly implausible" that reasonable consumers would interpret "FAT FREE" claim to mean that product "made only positive contributions to a diet").[11]

---

[11] In construing the CPPA, D.C. courts have looked to decisions construing New York's and California's analogous statutes as informative. *See, e.g.*, *Dahlgren v. Audiovox Communs. Corp.*,

At bottom, Plaintiffs can point to no well-pleaded facts that would give rise to the plausible inference that consumers were misled by any of the disputed ads. *See Organic Consumers Ass'n v. Bigelow Tea Co.*, 2018 D.C. Super. LEXIS 11, *13 (D.C. Super. Oct. 31, 2018).[12] Because Plaintiffs' "expansive interpretation of [the advertisements] is not supported by law or reason," their claim fails as a matter of law. *Pearson*, 961 A.2d at 1076.

III. COCA-COLA'S STATEMENTS ARE PROTECTED BY THE FIRST AMENDMENT

Finally, while the Court need not reach their constitutional implications, Plaintiffs' faulty claims are also barred by the First Amendment.

Commercial speech such as the ads at issue is entitled to constitutional protection so long as it is not "inherently misleading." *Pearson v. Shalala*, 164 F.3d 650, 655 (D.C. Cir. 1999) (quoting *In re R.M.J.*, 455 U.S. 191, 203 (1982)); *see also Sorrell v. IMS Health, Inc.*, 564 U.S. 552, 571-72 (2011) (same). The burden of showing that speech is "inherently misleading," as opposed to "potentially misleading," is a demanding one: if the statement consists of a "truthful representation" of fact, even one that may be confusing in context, a "concern about the *possibility* of deception in hypothetical cases" is insufficient to strip it of protection. *Ibanez v. Fla. Dep't of Bus. & Prof. Reg.*, 512 U.S. 136, 145 (1994) (emphasis added) (internal quotation marks omitted). For the same reasons that Plaintiffs have not identified any material misrepresentation, they fail to establish that any of Coca-Cola's statements is "inherently

---

2010 D.C. Super. LEXIS 9, *25-26 (July 8, 2010) (looking to New York's General Business Law); *Hakki*, 2006 D.C Super. LEXIS 10, *9 (looking to California's Unfair Competition Law). Indeed, California's Unfair Competition Law was the model for the 2000 amendments to the CPPA. *See, e.g.*, *Margolis v. U-Haul Int'l, Inc.*, 2009 D.C. Super. LEXIS 8, *20-21 (Dec. 17, 2009).

[12] Coca-Cola's sponsorship of youth sports, Am. Compl. ¶¶ 112-120, is also not actionable under the CPPA, as it does not constitute the provision of "goods or services" under the statute. By sponsoring youth sports, Coca-Cola does not "sell, lease, or transfer, either directly or indirectly, consumer goods or services." *See* D.C. Code §§ 28-3901(a)(3), (a)(7). Accordingly, Coca-Cola's activities in this area are beyond the reach of the statute.

misleading."

Because Coca-Cola's ads are alleged to be, at most, "potentially misleading," they can be constrained only if the restriction (i) serves a substantial interest, (ii) directly and materially advances that interest, and (iii) is narrowly drawn. *Bergman v. District of Columbia*, 986 A.2d 1208, 1217 (D.C. 2010) (citing *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of N.Y.*, 447 U.S. 557 (1980)). Plaintiffs' "fear that people would make bad decisions if given truthful information" is not a substantial interest. *Sorrell*, 564 U.S. at 577. Moreover, their proposal that Coca-Cola be required to fund a public information campaign that peddles their orthodoxy is not narrowly drawn to that interest. *See, e.g.*, *Nat'l Ass'n of Mfrs. v. SEC*, 748 F.3d 359, 371-73 (D.C. Cir. 2014) (SEC rule mandating disclosure of "conflict free" minerals did not pass *Central Hudson* test because SEC did not show less restrictive alternatives to compelled speech were less effective), *overruled on other grounds by Am. Meat Inst. v. United States Dep't of Agric.*, 760 F.3d 18, 22-23 (D.C. 2014).

Plaintiffs cannot show that their proposed remedies meet these requirements. Even under a lesser standard of scrutiny, a panel of the U.S. Court of Appeals for the Ninth Circuit has held that requiring sellers of SSBs to espouse Plaintiffs' views would impose a constitutionally improper burden. *Am. Bev. Ass'n v. City and County of San Francisco*, 871 F.3d 884, 894-97 (9th Cir. 2017), *aff'd en banc*, 916 F.3d 749 (9th Cir. 2019) (ordinance requiring manufacturers to disclose that SSBs "contribute to obesity and diabetes" was "deceptive in light of the current state of research" and "promote[d] . . . views that . . . are biased against or are expressly contrary to the corporation's views") (citation omitted). Plaintiffs' proposal to silence Coca-Cola's speech on an issue of public concern, and force it to adopt a "corrective public education campaign" that embraces their contrary position, is constitutionally impermissible.

CONCLUSION

Plaintiffs' Amended Complaint is a rehash of claims that have already been dismissed. The Court should strike all allegations that have previously been determined to be legally deficient, and should rule that what remains of Plaintiffs' pleading fails to state a claim upon which relief can be granted. The Court should further direct that Plaintiffs' claims be dismissed, in their entirety, with prejudice.

Dated: December 20, 2019

Respectfully submitted,

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Counsel for Defendant The Coca-Cola Company

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
Civil Division

THE PRAXIS PROJECT, et al.,	)	Case No. 2017 CA 004801 B
Plaintiffs,	)	
v.	)	Honorable Judge Jose M. Lopez
THE COCA-COLA COMPANY, et al.,	)	
Defendants.	)	

INDEX OF EXHIBITS TO COCA-COLA'S RULE 12(F) MOTION TO STRIKE AND RULE 12(B)(6) MOTION TO DISMISS

Exhibit 1. Video of "Coming Together" Advertisement, *available at* https://goo.gl/BpjqxP (cited in Compl. ¶ 116) (hard copy filed pursuant to Super. Ct. R. 5(d)(7)(B)).

Exhibit 2. Storyboard for "Coming Together" Advertisement (cited in Compl. ¶ 116).

Exhibit 3. Video of "Be OK" Advertisement, *available at* https://goo.gl/l2e520 (cited in Compl. ¶¶ 109, 113) (hard copy filed pursuant to Super. Ct. R. 5(d)(7)(B)).

Exhibit 4. Storyboard for "Be OK" Advertisement (cited in Compl. ¶¶ 109, 113).

Exhibit 5. Video of "Mixify" Advertisement, *retrieved from* https://goo.gl/8azpWA (cited in Compl. ¶ 115) (hard copy filed pursuant to Super. Ct. R. 5(d)(7)(B)).

Exhibit 6. Storyboard for "Mixify" Advertisement (cited in Compl. ¶ 115).

Exhibit 7. Candice Choi, *Coca-Cola Teams up with Nutritionists to Push Coke as Healthy Treat*, FOOD MANUFACTURING (Mar. 16, 2015) (cited in Compl. ¶ 92).

Exhibit 8. Declaration of Plaintiff Pastor William H. Lamar IV dated Oct. 5, 2018 (previously submitted as Ex. F to Plaintiffs' Supplemental Memorandum of Law dated Oct. 5, 2018).

Exhibit 9. Declaration of Plaintiff Pastor Delman Coates dated Oct. 5, 2018 (previously submitted as Ex. G to Plaintiffs' Supplemental Memorandum of Law dated Oct. 5, 2018).

Exhibit 10. Declaration of Xavier Morales PhD, MRP dated Oct. 4, 2018 (previously submitted as Ex. H to Plaintiffs' Supplemental Memorandum of Law dated Oct. 5, 2018).

Exhibit 11. Bruce Horovitz, *Executive Answers Questions about Sugary Drinks*, USA TODAY (June 7, 2012) (cited in Compl. ¶ 75).

Exhibit 12. Robyn Flipse, *Every Day Heart Health in February and Beyond*, BRANDPOINTCONTENT, *available at* https://www.brandpointcontent.com/article/21501 (Feb. 20, 2015).

EXHIBIT 1

Hard Copy Filed Pursuant to Super. Ct. R. 5(d)(7)(B)

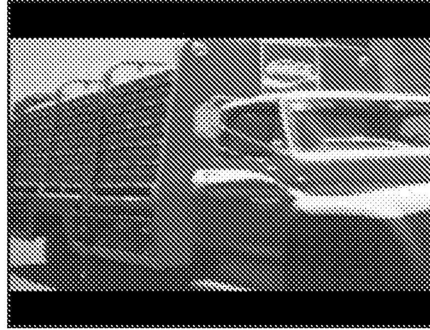
EXHIBIT 2

Competitrack
A Market Track Company

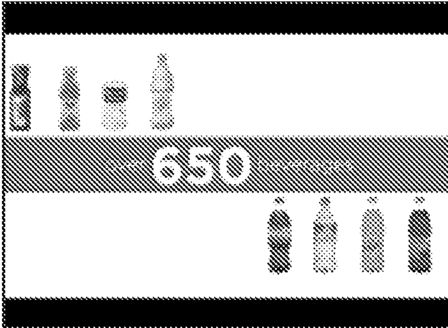
Advertiser: Coca-Cola
Product: Coca-Cola Image
Title: Coming Together (TV)
Ad Code: COCAFB-5768

First Date: 01/14/13
Source: CNN
Length: 120
New/Recut: Recut

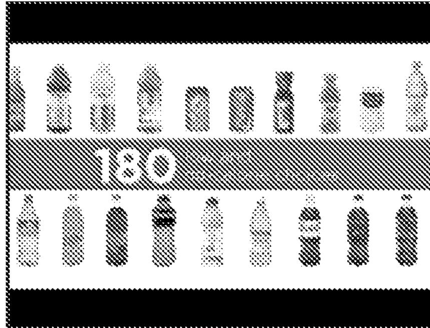
(Music)
VOICE OVER: For over a 125 years we've been bringing people together.


Today we'd like people to come together on something that concerns all of us. Obesity.

The long term health of our families and the country's is at stake and as the nation's leading...

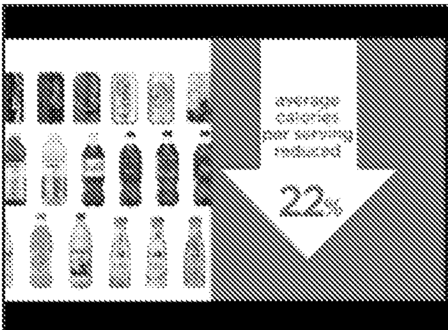


beverage company we can play an important role. Across our portfolio of more than 650 beverages...



we now offer over a 180 low and no calorie choices...

and most of our full calorie beverages now have low or no calorie versions.

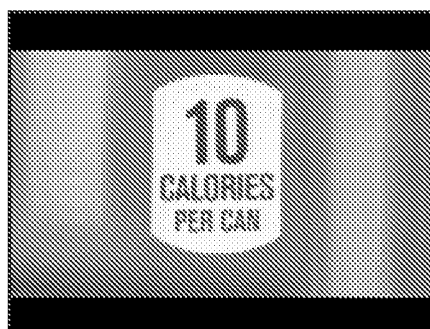


Over the last 15 years this has helped redued the average calories per serving across our industry products in the U.S. by about 22%.

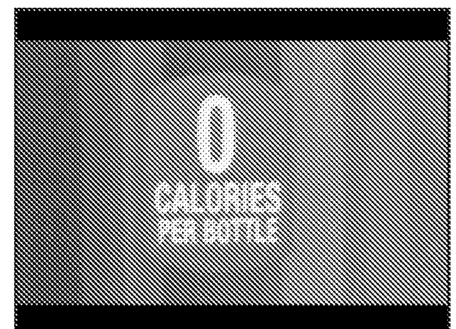
We've created smaller portion controlled sizes for our most popular drinks and will have them in about 90% of the country by the end of this year.

We've added the calorie content of all our beverages on the front to help make it even easier for people to make informed decisions.

For elementary, middle and high schools our industry has volunterily...



changed its offerings to primarily water...



juices and low and no calorie options.

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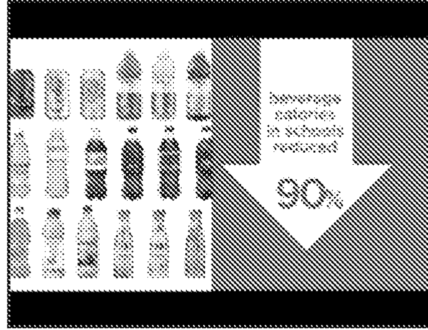
Competitrack
A Market Track Company

Advertiser: Coca-Cola
Product: Coca-Cola Image
Title: Coming Together (TV)
Ad Code: COCAFB-5768(2)

First Date: 01/14/13
Source: CNN
Length: 120
New/Recut: Recut

(Music)
VOICE OVER: This has helped reduced the calories from...

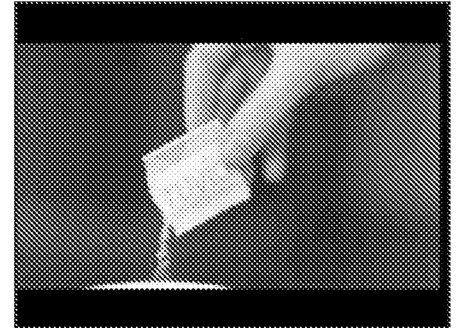


our industries beverages in those schools by 90% since 2004.

We support programs like the Boys and Girls Clubs of America...

that enable young people to get active and start healthy habits early.

Leading is also about new thinking which is why we will continue to work with scientists and nutritionists...

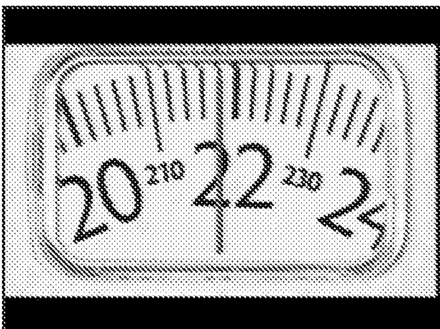


on innovative things like zero calorie all natural sweeteners.

But beating obesity will take action from all of us based on one simple common sense fact.

All calories count no matter where they come from including Coca-Cola and everything else with calories.

And if you eat and drink more calories than you burn off you'll gain weight.



The well-being of our families and communities concerns everyone.

Finding a solution will take continued effort from all of us. But at Coca-Cola we know that when people come together...

we can make a real difference. To learn more visit coke.com/comingtogether.
(Fade Out)

Text: coke.com/comingtogether

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EXHIBIT 3

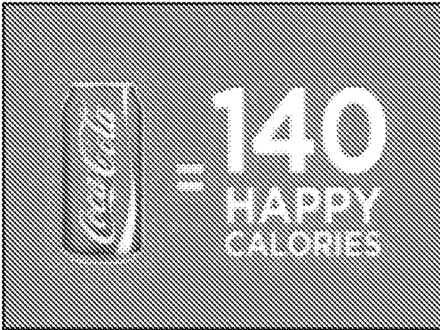
Hard Copy Filed Pursuant to Super. Ct. R. 5(d)(7)(B)

EXHIBIT 4

Competitrack
A Market Track Company

Advertiser: Coca-Cola
Product: Coca-Cola Products
Title: Canned Energy
Ad Code: COCAFB-5775

First Date: 01/16/13
Source: FOX
Length: 30
New/Recut: New



(Music)

SONG: *I just wonna be okay. Be okay...*

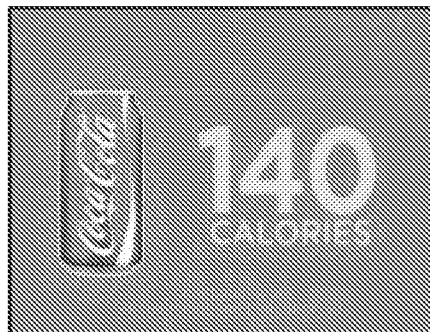
(Woman running with dog)

(Man dancing)

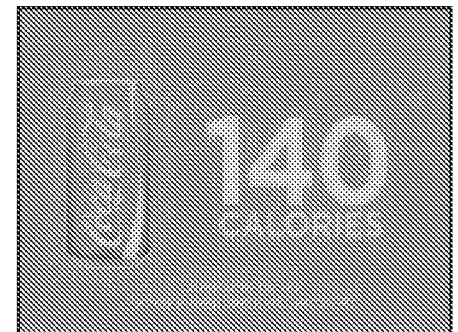
(Man dancing and text shown on screen)

(Man laughing)

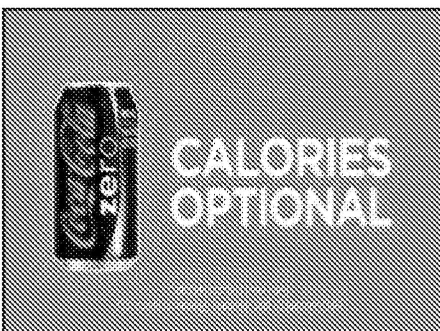
(Man dancing at a bowling alley)



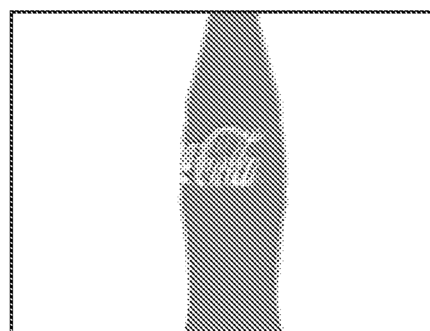
SONG: *I just wonna know today...*



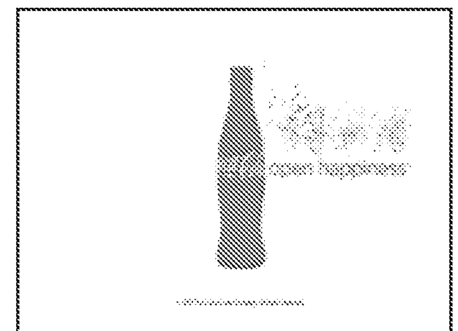
know today, know today.



Now that maybe...



I can be okay.



(Fade Out)

Text: (Illegible).

Text: (Illegible) The Coca-Cola Company. All rights reserved.

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EXHIBIT 5

Hard Copy Filed Pursuant to Super. Ct. R. 5(d)(7)(B)

EXHIBIT 6

Competitrack
A Market Track Company

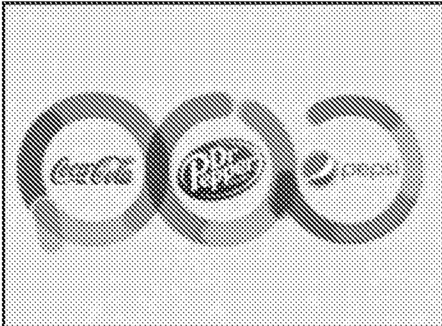
Advertiser: American Beverage Association
Product: Mixify
Title: Mixify
Ad Code: AMEBAS-0057

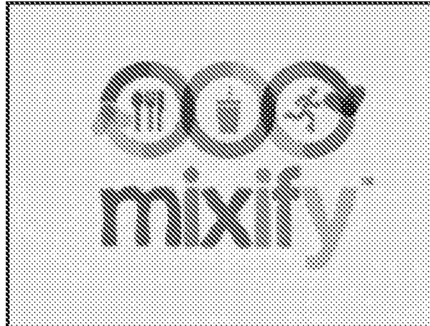
First Date: 09/24/14
Source: New York City
Length: 30
New/Recut: New

(Music)
VOICE OVER: Every day is a mix of...

food, drinks and physical activities.

But some days are more balanced than others.


So Coke, Dr. Pepper and Pepsi...



have joined forces to launch Mixify.

A new project with tips, tools and inspiration...

Text: #mymixify.

to help find a balance that's right for you.

Spend a day in the couch? Go for something less.

Just finished an afternoon of Frisbee? Maybe you've earned a little more.

Balance what you eat and drink with what you do.

That's how you mixify. Balance your mix at mymixify.com and share it with #mymixify.

Text: mymixify.com

(Fade Out)

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EXHIBIT 7

Coca-Cola Teams Up With Nutritionists to Push Coke as Healthy Treat

Mon, 03/16/2015 - 8:25am by CANDICE CHOI, AP Food Industry Writer

NEW YORK (AP) — If a column in honor of heart health suggests a can of Coke as a snack, you might want to read the fine print.

The world's biggest beverage maker, which struggles with declining soda consumption in the U.S., is working with fitness and nutrition experts who suggest its cola as a healthy treat. In February, for instance, several wrote online pieces for American Heart Month, with each including a mini-can of Coke or small soda as a snack idea.

The mentions — which appeared on nutrition blogs and other sites including those of major newspapers — show the many ways food companies work behind the scenes to cast their products in a positive light, often with the help of third parties who are seen as trusted authorities.

Ben Sheidler, a Coca-Cola spokesman, compared the February posts to product placement deals a company might have with TV shows.

"We have a network of dietitians we work with," said Sheidler, who declined to say how much the company pays experts. "Every big brand works with bloggers or has paid talent."

Other companies including Kellogg and General Mills have used strategies like providing continuing education classes for dietitians, funding studies that burnish the nutritional images of their products and offering newsletters for health experts. PepsiCo Inc. has also worked with dietitians who suggest its Frito-Lay and Tostito chips in local TV segments on healthy eating. Others use nutrition experts in sponsored content; the American Pistachio Growers has quoted a dietitian for the New England Patriots in a piece on healthy snacks and recipes and Nestle has quoted its own executive in a post about infant nutrition.

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For Coca-Cola Co., the public relations strategy with health experts in February focused on the theme of "Heart Health & Black History Month." The effort yielded a radio segment and multiple online pieces.

One post refers to a "refreshing beverage option such as a mini can of Coca-Cola." Another suggests "portion-controlled versions of your favorites, like Coca-Cola mini cans, packs of almonds or pre-portioned desserts for a meal."

The focus on the smaller cans isn't surprising. Sugary drinks have come under fire for fueling obesity rates and related ills, and the last time Coke's annual U.S. soda volume

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almonds or pre-portioned desserts for a meal."

The focus on the smaller cans isn't surprising. Sugary drinks have come under fire for fueling obesity rates and related ills, and the last time Coke's annual U.S. soda volume increased was in 2002, according to the industry tracker Beverage Digest. More recently, the company is pushing its mini-cans as a guilt-free way to enjoy cola. The cans also fetch higher prices on a per ounce basis, so even if people are drinking less soda, Coke says it can grow sales.

In a statement, Coca-Cola said it wants to "help people make decisions that are right for them" and that like others in the industry, it works with health experts "to help bring context to the latest facts and science around our products and ingredients." It said any communications by the experts it works with contain the appropriate disclosures.

Most of the pieces suggesting mini-Cokes say in the bios that the author is a "consultant" for foodcompanies, including Coca-Cola. Some add that the ideas expressed are their own. One column is marked at the bottom as a "sponsored article," which is an ad designed to look like a regular story. It ran on more than 1,000 sites, including those of major news outlets around the country. The other posts were not marked as sponsored content, but follow a similar format.

Kelly McBride, who teaches media ethics at The Poynter Institute, said the phrasing of the disclosure that the author is a "consultant" for food companies, including Coca-Cola, doesn't make it clear the author was specifically paid by Coke for the column.

"This is an example of opaque sponsored content," McBride said.

The Academy of Nutrition and Dietetics, a professional group for dietitians, says in its code of ethics that practitioners promote and endorse products "only in a manner that is not false and misleading." A spokesman for the academy did not respond when asked if the posts on mini-Cokes meet those guidelines.

Meanwhile, a group called Dietitians for Professional Integrity has called for sharper lines to be drawn between dietitians and companies. Andy Bellatti, one of its founders, said companies court dietitians because they help validate corporate messages.

The message that Coke can be a healthy snack is debatable. Alice Lichtenstein, a professor of nutrition science and policy at Tufts University and a member of the nutrition committee at the American Heart Association, said a smaller can of soda might be a "move in the right direction" for someone who regularly drinks soda. Still, she wouldn't recommend soda as a snack.

The health experts who wrote the pieces mentioning Coke stand by their recommendations.

Robyn Flipse, the dietitian who wrote the sponsored article for Coke, said she would suggest mini-cans of Coke even if she wasn't being paid. Although she doesn't drink soda herself, she said the smaller cans are a way for people who like soda to enjoy it sensibly.

"I absolutely think that I provided valuable information," she said.

Flipse said the idea to mention mini-cans of Coke in the post was hers and came about after a public relations agency for Coke suggested a piece on heart health and asked what she might "work in."

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Flipse said the idea to mention mini-cans of Coke in the post was hers and came about after a public relations agency for Coke suggested a piece on heart health and asked what she might "work in."

Flipse has worked with Coca-Cola and the American Beverage Association for years; her roles have included sending out messages on social media refuting the idea that sugary drinks are to blame for obesity and making herself available as an expert for news outlets. If a story says something negative about artificial sweeteners, Flipse said she might contact the PR agency and ask, "Do you want me to do something about that?"

Sylvia Melendez-Klinger, a dietitian who wrote another piece mentioning mini- cans of soda, said it's important that health professionals share their expertise with companies and that her work reflects her own views.

She said she could not recall if she was paid for her article mentioning mini-sodas.

Operations

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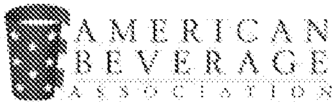
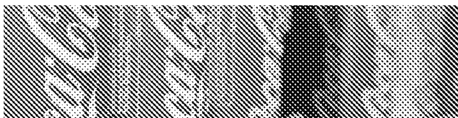


Soda Group Suspends Payments to Dietitians Opposing New Tax



Coca-Cola Consolidates Marketing for Namesake Colas

Ex-PepsiCo CEO who Helped Lead 'Cola Wars' has Died

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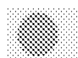

Start the discussion...

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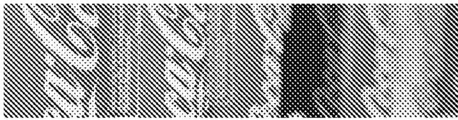

Coca-Cola Sued Over Sugar Claims

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Coca-Cola Consolidates Marketing for Namesake Colas

Ex-PepsiCo CEO who Helped Lead 'Cola Wars' has Died

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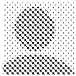

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TT2 — Ah 70 hour work weeks. Sounds all to familiar with American Companies. Then they go and state they can't find enough American workers. ...right!

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Da_Jokah — Farmers of "Indian Descent" make cranberries in British Columbia just north of Washington state. They bring in all kinds of cheap labor from india to keep Canadian wages low. A lady once ...

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JQuan DiMarcus — California FRUITS. Each chicken must receive 2.3 hugs per day, a kiss on the beak and 5 minutes of sweet loving chicken talk ... or bawk

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2 comments • 3 months ago

Tellus — Then just don't buy/eat it. Don't you have choices?

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EXHIBIT 8

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 **DECLARATION OF PLAINTIFF PASTOR WILLIAM H. LAMAR IV**

I, William H. Lamar IV, hereby declare:

1. I am one of the Plaintiffs in this action.

2. I have been exposed to Defendants' false and deceptive advertising.

3. On July 12, 2017, I purchased several drinks sold by Coca-Cola from CVS Pharmacy, 1418 P Street, NW, Washington, D.C. 20005; Giant Food, 1400 7th Street, NW, Washington, D.C. 20001; and Safeway, 490 L Street, NW, Washington, D.C. 20001.[1]

4. I purchased these products in order to evaluate and test their purported qualities and characteristics, including but not limited to their sugar content and Defendants' representation that a calorie of these drinks is equivalent to a calorie of any other food.

5. 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

[1] I purchased the following drinks: Barq's Root Beer; Coke (original, cherry, vanilla); Fanta (grape, berry, pineapple, orange, fruit punch); Fuze Iced Tea; Gold Peak Lemon Tea; Gold Peak Salted Caramel Coffee Drink; Honest Tea Peach Tea; Mello Yello; Minute Maid (pink lemonade, lemonade); Odwalla Blueberry Protein Shake; Pibb Xtra; PowerAde Fruit Punch; Seagram's Ginger Ale; Simply Lemonade; Sprite; and VitaminWater Energy.

the sugar quantities from grams to teaspoons, and I compared those sugar levels to the recommendations of the American Heart Association ("AHA").

6. The 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 nutrients.

7. Based 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.

8. In addition, as recently as the spring of 2017, I purchased drinks sold by Coca-Cola, including Sprite, in the District of Columbia for my personal consumption.

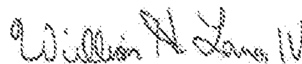
9. At the time of those purchases, I was unaware that science had definitively established a link between these drinks and obesity, type 2 diabetes, and cardiovascular disease.

10. Had the Defendants disclosed that link, instead of flooding of the market with misleading representations and material omissions about the science and safety of these drinks, I would not have purchased them.

11. On the other hand, if the Defendants were to adequately warn of these health risks, I would be able to make an informed decision about whether to purchase them. Alternatively, if the Defendants were to re-formulate their products to comport with their public statements, I would be interested in purchasing them again.

I declare under penalty of perjury that the following is true and correct.

Executed under the penalties of perjury this 5th day of October 2018.



William H. Lamar IV

EXHIBIT 9

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 **DECLARATION OF PLAINTIFF PASTOR DELMAN COATES**

I, Delman Coates, hereby declare:

1. I am one of the Plaintiffs in this action.

2. I have been exposed to Defendants' false and deceptive advertising.

3. On July 12, 2017, I purchased several drinks sold by Coca-Cola from CVS Pharmacy, 1418 P Street, NW, Washington, D.C. 20005; Giant Food, 1400 7th Street, NW, Washington, D.C. 20001; and Safeway, 490 L Street, NW, Washington, D.C. 20001.[1]

4. I purchased these products in order to evaluate and test their purported qualities and characteristics, including but not limited to their sugar content and Defendants' representation that a calorie of these drinks is equivalent to a calorie of any other food.

5. 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

[1] I purchased the following drinks: Barq's Root Beer; Coke (original, cherry, vanilla); Fanta (grape, berry, pineapple, orange, fruit punch); Fuze Iced Tea; Gold Peak Lemon Tea; Gold Peak Salted Caramel Coffee Drink; Honest Tea Peach Tea; Mello Yello; Minute Maid (pink lemonade, lemonade); Odwalla Blueberry Protein Shake; Pibb Xtra; PowerAde Fruit Punch; Seagram's Ginger Ale; Simply Lemonade; Sprite; and VitaminWater Energy.

the sugar quantities from grams to teaspoons, and I compared those sugar levels to the recommendations of the American Heart Association ("AHA").

6. The 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 nutrients.

7. Based 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.

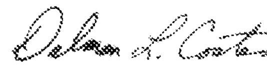
8. As recently as the spring of 2017, I purchased drinks sold by Coca-Cola in the District of Columbia for my children. I did so believing that Coca-Cola's would not market a product to children that could cause them serious disease, and that any negative effects to my children from drinking Coca-Cola products could be eliminated by proper exercise.

9. At the time of those purchases, I had not been informed that science has definitively established a link between these drinks and obesity, type 2 diabetes, and cardiovascular disease, or that casual exercise does not eliminate the risk of these diseases.

10. Had the Defendants disclosed the truth, instead of flooding of the market with misleading representations and material omissions about the science and safety of these drinks, I would not have purchased them, and would have urged my children to avoid them.

I declare under penalty of perjury that the following is true and correct.

Executed under the penalties of perjury this _5th_ day of October 2018.



Delman Coates

EXHIBIT 10

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 **DECLARATION OF XAVIER MORALES, PhD, MRP**

I, Xavier Morales, hereby declare:

1. I am the Executive Director of the Praxis Project, one of the Plaintiffs in this action.

2. Praxis is a non-profit organization, whose mission is to build healthier communities, including through ensuring the presence of positive determinants of health and wellness and by promoting and protecting the interests of consumers, especially those living in communities experiencing poorer health and wellness outcomes.

3. Praxis has an interest in promoting healthier eating and drinking by consumers, and the Defendants' misrepresentations about the sugar drinks they sell has damaged that interest in numerous respects. Exposure to misleading advertising and marketing of unhealthy products is a negative determinant of health, particularly in poorer communities.

4. Praxis has had to divert resources from other compelling projects in order to counteract the Defendants' misleading representations and material omissions about the science and safety of sugar drinks.

5. Approximately 50% of my own time is spent on advocacy of healthier eating and drinking, not including any time that I have spent participating in this litigation. Of that 50% of

my time, I have had to devote 10-20% to public education, advocacy, and training counteracting the Defendants' misleading misrepresentations about sugar drinks. Among other things, Praxis has had to spend resources to create opportunities for community education in order to provide accurate information about the scientifically established link between sugar drinks and obesity, type 2 diabetes, and cardiovascular disease.

6. Thus, Praxis has had to divert thousands of dollars of my time that could have been spent on more critical needs, such as productively promoting the consumption of healthful food and beverages, ensuring the accessibility of safe potable water sources, developing school health and wellness policies, and improving community safety. Instead, our resources have had to be spent counteracting the misleading information put out by the Defendants.

7. Apart from the time that Praxis has spent outside of litigation counteracting the Defendants' misleading information, Praxis seeks in this litigation to represent the interests of consumers in the District of Columbia who have been damaged by the Defendants' unfair trade practices.

I declare under penalty of perjury that the following is true and correct.

Executed under the penalties of perjury this 4th day of October 2018.

Xavier Morales

EXHIBIT 11

Coke executive answers questions about sugary drinks

Updated 6/7/2012 9:18 PM

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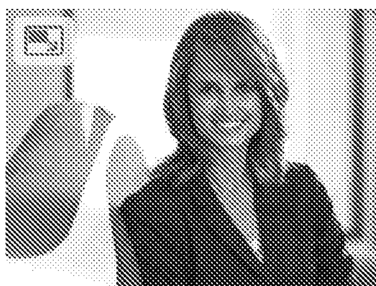
Until now, beverage giant Coca-Cola hasn't put a face to its staunch opposition to last week's proposal by New York Mayor Michael Bloomberg to limit to 16 ounces the size of sugary drinks sold at New York restaurants, movie theaters and street carts. But in an exclusive interview, **Katie Bayne**, Coca-Cola's 45-year-old president of sparkling beverages in North America, explains to USA TODAY marketing reporter **Bruce Horovitz** where she differs with Bloomberg and discusses which beverages she permits her young sons to drink. She will speak on Monday in New York City at a *Beverage Digest* conference. This interview is edited for clarity and space.



Coca-Cola

Katie Bayne is president and general manager of sparkling beverages for Coca-Cola North America.

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Q: If Mayor Bloomberg were sitting across from you, what would you say to him?

A: I'd say, Mayor, we believe you're absolutely right. Obesity is a critical health challenge facing our nation. But singling out single brands or foods is not going to help the situation. Working together in a partnership will.

STORY: Coke says obesity grew as sugary drink consumption fell

Q: Is there any merit to limits being placed on the size of sugary drinks folks can buy?

A: Sugary drinks can be a part of any diet as long as your calories in balance with the calories out. Our responsibility is to provide drink in all the sizes that consumers might need

Q: Is anyone at Coca-Cola trying to figure out a way to get sugar out of all drinks?

A: There is a large portion of the population that relies on the carbohydrates and energy in our regular beverages. When my son gets home from school, he needs a pick-up with calories and great taste.

Q: But critics call soft drinks "empty" calories.

A: A calorie is a calorie. What our drinks offer is hydration. That's essential to the human body. We offer great taste and benefits whether it's an uplift or carbohydrates or energy. We don't believe in empty calories. We believe in hydration.

Q: Because sugary drinks have been linked with obesity, some suggest soft-drink makers place "warning" labels on cans and bottles.

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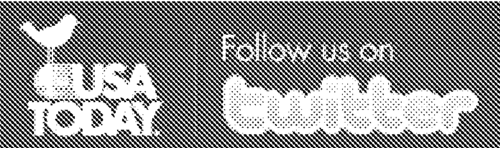

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Q: But critics call soft drinks "empty" calories.

A: A calorie is a calorie. What our drinks offer is hydration. That's essential to the human body. We offer great taste and benefits whether it's an uplift or carbohydrates or energy. We don't believe in empty calories. We believe in hydration.

Q: Because sugary drinks have been linked with obesity, some suggest soft-drink makers place "warning" labels on cans and bottles.

A: There is no scientific evidence that connects sugary beverages to obesity. If you look at the data, you can see that during the same period obesity was rising, sugar intake from beverages was decreasing. Between 1999 and 2010, sugars from soda consumption decreased by 39%, but the percentage of obese children increased by 7%, and 13% for adults.

Q: Shouldn't teens drink less cola and more milk and water?

A: Teens should get a healthy diet through food and beverage choices throughout the day.

Q: How much Coke should a kid drink a day?

A: We don't make recommendations on what kids should drink. But a 12-ounce can of Coke has 140 calories, the same as a lunch-box-size bag of pretzels.

Q: What sugary drink limits do you place on your kids?

A: My job as a parent is to guide them through the day to make the best choices. If my son has lacrosse practice for three hours, we go straight to McDonald's and buy a 32-ounce Powerade.

Q: What do you drink daily?

A: I might have a mini Diet Coke while cooking breakfast for my family. After the kids leave for school, I go for a run and then have a Powerade Zero. At work I may have a Diet Coke in the morning and in the afternoon, Gold Peak Tea. In the middle of the afternoon, I may have an 8-ounce Coke. I'd rather have that than a candy bar or cookie for a pick-me-up.

Q: What do you say to those who believe that sugar — particularly in soft drinks — works on the brain like an addictive substance?

A: There is no scientific evidence.

Q: Critics say Coke is pushing sugary drinks in China and India and will cause obesity there just like here.

A: Every person in those countries is different and should be able to choose what's right for them.

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Ray Gibson

Dr. Pepper and Mr. Pibb could get married in NYC but heaven forbid they serve 20 oz bottles at the reception. ...

Like · Reply · 19 · Jun 7, 2012 6:53pm

Nathan Mathias · Anchorage, Alaska

Who said Dr. Pepper isn't a woman? (assuming your comment is a gay marriage reference)

Like · Reply · 7 · May 8, 2013 11:37am

Jim Charbonneau

We don't have many "sugar" drinks. Get rid of the high fructose corn syrup, and go back to sugar.

Like · Reply · 35 · Jun 7, 2012 7:46pm

David Pipe

Have you ever had a Coke manufactured in Mexico? They still use real cane sugar ... the taste is amazing - so much better! Now, if they'd just go back to putting real cocaine in the recipe...

Like · Reply · 15 · Jul 6, 2012 5:24am

Bruce Tears · Parsippany High School

GMO is high fructose corn syrup double dose of poison ! Boycott all coke products .

Like · Reply · 8 · May 8, 2013 7:02am

Evan Follmer · Site Leader / Manager at Staples Promedia

Switch to Jones Soda - pure cane sugar - no corn syrup

Like · Reply · 3 · May 8, 2013 11:14am

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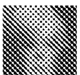


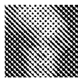
Infinity Oh · Director at The Jupiter Project

anything that you mix (in your stomach) with Coke becomes indigestible .
We need nutrients not 'calories' .

Like · Reply · 21 · Jun 7, 2012 8:26pm

Jacqueline Stickel · Registered Dietitian at Prince Albert Parkland Health Region

I agree that we need nutrients, not calories...but Coke itself doesn't prevent



Infinity Oh · Director at The Jupiter Project

anything that you mix (in your stomach) with Coke becomes indigestible .
We need nutrients not 'calories' .

Like · Reply · 21 · Jun 7, 2012 8:28pm

Jacqueline Stickel · Registered Dietitian at Prince Albert Parkland Health Region

I agree that we need nutrients, not calories...but Coke itself doesn't prevent food components from being digested or nutrients from being absorbed. Yes, it's acidic, but your stomach acid is even more acidic.

Like · Reply · 2 · May 8, 2013 9:58pm

Modesto Rodriguez Montes · Los Angeles, California

There is more than enough scientific evidence that fructose (around 50% of the sugar we eat) is basically a poison that has to be metabolized in our livers and creates a whole bunch of toxins in our bodies.

This video gives a lot of data on this matter. It opened my eyes and the eyes of the 2.4 M people that has seen it. It is sometimes too scientific, but it is very clear on how sugar is pounding our bodies as a poison: http://www.youtube.com/watch?v=dBnniua6-oM

Mrs. Baynes will never accept any argument like this. It does not matter who says it or how much science is behind it. She is doing what many others do, close your eyes and continue counting your money. I would not mind if the lives of so many people would not be at stake.

The best way to get more people to realize about this situation and stop drinking colas and sugary drinks is to provide information about the problem. It is better than regulate, as there is an understanding of what is going on.

Like · Reply · 33 · Jun 7, 2012 9:03pm

Danielle Curry

Rocky Sly, as Modesto said--education NOT regulation, however, there are a lot of people with vested interests funding junk science. That said, let the people decide, then let natural selection take over!

Like · Reply · 9 · Jun 8, 2012 11:32am

George Butiri · CTO at ActingShowcase.com

Rocky, I agree. Everything is harmful when not in moderation. We have to learn to control our own selves before we blame others for our actions.

Like · Reply · 6 · Jun 8, 2012 4:50pm

Jake Freppel · Napoleon, Ohio

Too bad restaurants have taken away our right to choose more sensible portion sizes of drinks.

Like · Reply · Jun 8, 2012 6:38pm

Show 6 more replies in this thread

Robert Willison · Chief Engineer, US Post Office Next Generation Vehicle at Workhorse Group

"I might have a mini Diet Coke while cooking breakfast for my family " - This is the dream. To have sugar drinks morning, noon, and night. So funny... "Please keep drinking our stuff so we make money......" Junk Marketing at its finest .

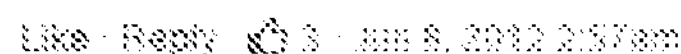
Like · Reply · 3 · Jun 8, 2012 2:57am

Mark Arena · London, United Kingdom

The PR Verdict: F (Full Fiasco) for Coke. Claiming you are as concerned about diabetes and obesity as the next person while advocating the sale of jumbo sodas is a hard sell. Why resist the flow toward health for consumers?

Like · Reply · 1 · Jun 8, 2012 7:18am

drinking our stuff so we make money....." Junk Marketing at its finest..



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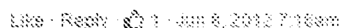


Larry Gregerson · Eastern Illinois University

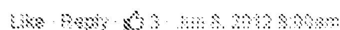
The Coke PR team really got her prepared. Sugar is like a drug...unhealthy and very difficult to kick the habit.

Kevin Butler

She's totally right. Companies print the calories right on the product. If you're too stupid to moderate your intake, the fault is yours. This whole tactic of blaming companies for producing items is ridiculous.

Now, if Coke was putting acid in their drinks and not putting it on the labels, then by all means, sue them. But everything is right there on the label.

The lazy and stupid don't deserve to profit from their laziness and stupidity.



Christina Sabo

I had a passenger on my aircraft that works in a Coca Cola factory and will never drink it again. He claimed that the syrup dropped on his shoe and the acidity ate right through the fabric! And, you're right.. the acid is on the label. It's just that most are too ignorant to know what those big words mean or care enough to look it up. They would rather just be dumb and happy and fat.

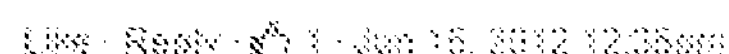
Kevin Butler

Actually, any acid, in a high enough concentration, can eat through things. Even citric acid.

Like · Reply · Jun 14, 2012 4:04am

Sarah Craighead Dedmon · Machiasport, Maine

You're right! That's why I'm coming out with my new line of radioactive gumballs, with machines to sell it on playgrounds. If your kids are too stupid not to buy them, well, don't blame me.



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Raymond Daniel · Works at Defense Finance and Accounting Service

She is right. People are responsible for their daily health needs and choices. This is after all America. to single out a product is not right. I would rather see high fructose corn syrup taken out of all the canned and boxed products. This is what is making Americans fat and not Coke.

Like · Reply · Jun 8, 2012 8:17am

Jeff Chausse · Principal UX Designer at Forrester

A calorie is not a calorie... Intense sweetness (even artificial) has been proven to override self-control mechanisms. The calories in a Coke may have the same effect on your body as those in a salad, but the Super Size Fries you then eat due to sugar-driven cravings are another thing.

"In 2007, researchers at the University of Bordeaux, France, reported that when rats were allowed to choose between a calorie-free sweetener and intravenous cocaine, 94 percent preferred the sugar substitute. The researchers concluded that "intense sweetness can surpass cocaine reward . . . The supranormal stimulation of these receptors by sugar-rich diets, such as those now widely available in modern societies,

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enough to work it up. They would rather just be dumb and happy and fat.

Like · Reply · 6 · Jun 9, 2012 4:22pm

Kevin Butler

Actually, any acid, in a high enough concentration, can eat through things. Even citric acid.

Like · Reply · Jun 14, 2012 4:04am

Sarah Craighead Dedmon · Machiasport, Maine

You're right! That's why I'm coming out with my new line of radioactive gumballs, with machines to sell it on playgrounds. If your kids are too stupid not to buy them, well, don't blame me.

Like · Reply · 1 · Jun 16, 2012 12:35pm

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Raymond Daniel · Works at Defense Finance and Accounting Service

She is right. People are responsible for their daily health needs and choices. This is after all America. to single out a product is not right. I would rather see high fructose corn syrup taken out of all the canned and boxed products. This is what is making Americans fat and not Coke.

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Jeff Chausse · Principal UX Designer at Forrester

A calorie is not a calorie... Intense sweetness (even artificial) has been proven to override self-control mechanisms. The calories in a Coke may have the same effect on your body as those in a salad, but the Super Size Fries you then eat due to sugar-driven cravings are another thing.

"In 2007, researchers at the University of Bordeaux, France, reported that when rats were allowed to choose between a calorie-free sweetener and intravenous cocaine, 94 percent preferred the sugar substitute. The researchers concluded that "intense sweetness can surpass cocaine reward . . . The supranormal stimulation of these receptors by sugar-rich diets, such as those now widely available in modern societies, would generate a supranormal reward signal in the brain, with the potential to override self-control mechanisms and thus to lead to addiction.""

http://www.details.com/.../carbs-caffeine-food-cocaine...

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Every day heart health in February and beyond

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It's February again, and that means it's American Heart Month. With all of the health information out there, it can be hard to figure out how to work heart healthy choices into your daily routine. Robyn Flipse, MS, MA, RDN says that by keeping a few simple tips in mind for foods, beverages and overall health, you can make small changes this month that will benefit your heart all year round.

A balanced healthy eating plan (http://www.heart.org/HEARTORG/GettingHealthy/NutritionCenter/HealthyEating/How-to-Eat-Healthy_UCM_307257_Article.jsp) that is low in saturated fat and sodium and full of fruits, vegetables, beans and lentils, nuts and seeds, fish, high-fiber whole grain breads and cereals will help improve heart health. Select from this wide variety of meal options and make heart-healthy choices all day long.

Heart-healthy ways to start your day

Simple swaps like full fat dairy for lower fat milk, yogurt and cheese will help start your day on a heart-healthy note. A few more examples to kick your day off right include:

* Smoothie made with frozen fruit, fat-free milk and flax seed or wheat germ.

* Ready-to-eat high-fiber whole grain cereal or cooked oats prepared with fat-free milk, raisins or other dried fruit.

* Parfait layered with cut-up fruit, low-fat yogurt or cottage cheese and low-fat crunchy granola.

* Corn meal pancakes or whole grain waffles topped with fruit and a dollop of fat-free ricotta cheese.

* Whole wheat wrap spread with natural peanut butter or low-fat cream cheese with sliced pears or chopped peaches.

* Corn tortilla filled with black beans, salsa and shredded reduced-fat cheddar cheese.

Lunchtime meal solutions

Base your mid-day meal with vegetables, then add low-fat dairy and whole grains for a balanced plate.

* Roasted vegetable salad with turkey, fresh spinach and light vinaigrette, plus a whole wheat roll with mashed avocado.

* Easy vegetable soup made with low-sodium tomato juice, frozen mixed vegetables and canned beans, plus whole wheat crackers with low-fat cheese and spicy mustard.

* Lean beef slider with caramelized onion on potato roll, plus Napa cabbage slaw tossed in reduced-fat mayonnaise and a baked apple topped with low-fat Greek yogurt and toasted walnuts.

Eating right into the night

Choose lean proteins like chicken, fish and certain cuts of beef and flavor them with fresh or dried herbs and spices for a satisfying meal lower in fat and sodium, and healthier for your heart.

* Stir-fried sirloin steak strips and portabella mushrooms over quick-cooking brown rice, plus garlicky green beans and cucumber salad with dill for sides.

* Black bean veggie burger on multigrain bread with sliced red onion, plus side dishes of a roasted half acorn squash filled with chopped apple, honey and cinnamon, and a bulgur pilaf with broccoli.

* Sauteed shrimp and cherry tomatoes over orzo with crumbled reduced-fat feta cheese and grilled zucchini basted in olive oil, plus kiwi and strawberry slices over arugula with balsamic vinaigrette.

Sensible snacks for any time of day

Reducing calories and smart snacking can go hand in hand, just watch your portion sizes.

* Air-popped popcorn, roasted and seasoned chickpeas, melon cubes, unsalted nuts, citrus sections, dried dates or figs, steamed edamame, bowl of berries, banana chunks dipped in light yogurt, nut butter on whole grain crackers or frozen seedless grapes.

* Select portion-controlled versions of your favorites, like Coca-Cola mini cans, packs of almonds or pre-portioned desserts for a meal that won't break the calorie bank, helping you manage your weight for better heart health.

Know your numbers

Maintaining a healthy body weight can reduce the risk for heart disease, and this requires knowing how many calories you eat each day. But aside from weight and calories, it's important to know all the factors that contribute to heart health. Be sure to talk to your doctor about lipid levels (cholesterol and triglyceride), blood pressure, fasting glucose (blood sugar), Body Mass Index and weight circumference numbers, and discuss any changes to your routine that can improve your heart health this February and beyond.

Robyn Flipse, MS, MA, RDN is a registered dietitian and cultural anthropologist with a focus on the societal forces continually shaping eating behavior and food trends. Her 30 year career includes maintaining a busy nutrition counseling practice, teaching food and

nutrition courses at the university level, authoring two popular diet books (The Wedding Dress Diet and Fighting the Freshman Fifteen) and numerous articles on diet and health and her high-traffic blog, TheEverydayRD. Today she is multimedia spokesperson and consultant to global food and beverage companies, including The Coca-Cola Company.

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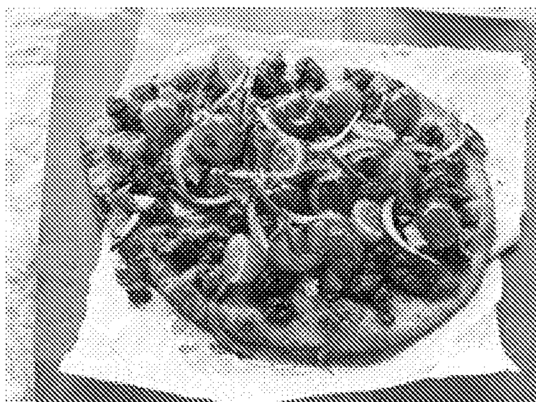

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SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
Civil Division

THE PRAXIS PROJECT, et al.,	)	Case No. 2017 CA 004801 B
Plaintiffs,	)	
	)	Honorable Judge Jose M. Lopez
v.	)	
THE COCA-COLA COMPANY, et al.,	)	Next Event: Status Hearing March 27, 2020 at 9:30 a.m.
Defendants.	)	

RULE 12-I(A) CERTIFICATION

Pursuant to Rule 12-I(a) of the Superior Court Rules of Procedure, the undersigned certifies that the parties conferred on the relief requested in the underlying motions and Plaintiffs do not consent to such relief.

[SIGNATURE BLOCK ON NEXT PAGE]

Dated: December 20, 2019

Respectfully submitted,

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CERTIFICATE OF SERVICE

On December 20, 2019, the undersigned hereby certifies that a true and correct copy of the foregoing Memorandum of Law in Support of Coca-Cola's Motions to Dismiss and to Strike Pursuant to Super Ct. R. 12(b)(6) and 12(f) was electronically served via the CaseFileXpress system on:

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PROPOSED ORDER

Upon review of Defendant The Coca-Cola Company's Motion to Strike portions of Plaintiffs' Amended Complaint pursuant to Rule 12(f) of the Superior Court Rules of Civil Procedure, and its Motion to Dismiss the Amended Complaint pursuant to Rule 12(b)(6) of the Superior Court Rules of Civil Procedure, and good cause being shown, it is hereby:

ORDERED that the Motion to Strike is **GRANTED**, and paragraphs 23-24, 30, 62-87, 93, 95, and 100-110 are hereby stricken from the Amended Complaint**;** and it is further:

ORDERED that the Motion to Dismiss is **GRANTED;** and it is further:

ORDERED that Plaintiffs' Amended Complaint is dismissed with prejudice.

SO ORDERED.

____

Honorable Judge Jose M. Lopez
(signed in chambers)