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, Defendant.	Case No. 2017 CA 004801 B Honorable Judge Jose Lopez Next Event: Status Hearing March 27, 2020 at 9:30 am

PLAINTIFF'S MEMORANDUM OF LAW IN OPPOSITION TO COCA-COLA'S MOTIONS PURSUANT TO SUPER. CT. R. 12(B)(6) AND 12(F)

In this case, Plaintiffs seek to enjoin Defendant The Coca-Cola Company, under the District of Columbia Consumer Protection Procedures Act ("DCCPPA"), D.C. Code § 28-3901, from continuing to misrepresent to District of Columbia consumers that its sugar-sweetened beverages form part of a healthful diet. After literally hundreds of pages of briefing, and **five** motions to dismiss by Defendants, Plaintiffs ask this Court to finally allow this case to proceed to discovery and litigation of the merits. Plaintiffs have filed an Amended Complaint completely in accordance with the lengthy Order on prior motions issued by the Honorable Judge Elizabeth Wingo on October 1, 2019, and the remaining claims set forth in the Amended Complaint are not only "plausible," but compelling.

Background

In the last 25 years, the adult obesity rate in the District of Columbia has increased by approximately 50%. As of 2011, roughly 40% of the residents in Wards 7 and 8 are obese. More D.C. residents die each year from complications related to obesity than from AIDs, cancer, and

homicides combined. Likewise, 47% of adult residents of the District—almost half—are believed to have diabetes or pre-diabetes. Amended Complaint ¶¶ 59-62.

These statistics are, in no small measure, related to the consumption of soda and other sugar-sweetened beverages ("SSBs"). According to the District of Columbia Department of Health, "obese residents were more likely than residents who were a normal weight or overweight to drink soda three or more times within the past seven days." Id. ¶¶ 60. And this consumption is directly related to the manner in which Coca-Cola and the representatives of the beverage industry have denied the health risks of SSBs, and urged that SSBs are part of a "healthy" lifestyle.

In 2012, the District of Columbia Council amended the DCCPPA to "provide a cause of action when merchants bury the truth and leave false impressions without outright stating falsehoods." *See* Council of the District of Columbia, Committee on Public Services and Consumer Affairs, Report on Bill 19-0581, at 7 (Nov. 28, 2012). According to the accompanying Consumer Affairs Committee Report, the amendment was designed to provide redress in the situation where, "while facts may exist in the public domain as to veracity of claims made, merchants nevertheless flood the market with countervailing representations to hide the truth. . . ." *Id.* The Report specifically referenced the case of *United States v. Philip Morris USA, Inc.,* 449 F.Supp.2d 1 (D.D.C. 2006), in which the court held that defendant Philip Morris and the other major tobacco companies, as well as their trade association, joined together to flood the market with misleading representations about the health risks and addictiveness of cigarettes.

In July 2017, the Plaintiffs filed this case under the 2012 amendment to the DCCPPA, alleging that Defendant The Coca Cola Company ("Coke"), working together with original Defendant The American Beverage Association and several other entities, undertook to flood the market with misrepresentations about the health risks of SSBs. Original Complaint ¶¶ 1-18; Amended Complaint ¶¶ 1-18. In addition to explicitly denying the adverse health effects of SSBs, Coke spent tens of millions on advertising campaigns—both traditional and non-traditional—

promoting the deceptive notion that SSB consumption was part of a healthful routine diet if "balanced" by light exercise, and that a calorie is a calorie regardless of its source. Amended Complaint ¶¶ 89-104. While ordinary consumers who were the targets of this advertising had little reason to study the emerging science, Coke certainly knew the truth. *Id.* ¶¶ 6, 15. Coke was fully aware of the declarations of virtually all leading health authorities linking routine SSB consumption to disease and recommending a reduction in their consumption:

- Food & Drug Administration ("FDA"): "strong and consistent evidence" shows an association between sugar drinks and excess body weight in children and adults. 81 FED. REG. at 33,803;

- CDC: "Frequently drinking sugar-sweetened beverages is associated with weight gain/obesity, type 2 diabetes, heart disease, kidney diseases, non-alcoholic liver disease, tooth decay and cavities, and gout, a type of arthritis. Limiting the amount of SSB intake can help individuals maintain a healthy weight and have a healthy diet." Get the Facts: Sugar-Sweetened Beverages and Consumption, CDC (last reviewed Feb. 7, 2017), https://www.cdc.gov/nutrition/data-statistics/sugar-sweetened-beverages-intake.html;

- World Health Organization ("WHO"): "Current evidence suggests that increasing consumption of sugar-sweetened beverages is associated with overweight and obesity in children. Therefore, reducing consumption of sugar-sweetened beverages would also reduce the risk of childhood overweight and obesity." Reducing Consumption of Sugar-sweetened Beverages to Reduce the Risk of Childhood Overweight and Obesity, WHO, https://www.who.int/elena/titles/ssbs_childhood_obesity/en/ (last visited Jan. 8, 2020); Reducing Consumption of Sugar-sweetened Beverages to Reduce the Risk of Unhealthy Weight Gain in Adults, WHO, https://www.who.int/elena/titles/ssbs_adult_weight/en/ (last visited Jan. 8, 2020);

- 2015 U.S. Dietary Guidelines Advisory Council: "Strong and consistent evidence shows that intake of added sugars from food and/or sugar sweetened beverages are associated with excess body weight in children and adults"; "[s]trong evidence shows that higher consumption of added sugars, especially sugar sweetened beverages, increases the risk of type 2 diabetes among adults and this relationship is not fully explained by body weight." Scientific Report of the 2015 Dietary Guidelines Advisory Committee, at pt. D, ch. 6, p. 20, U.S. Dep't of Agric. & U.S. Dep't of Health & Human Serv. (2015), available at https://health.gov/dietaryguidelines/2015-scientific-report/PDFs/Scientific-Report-of-the-2015-Dietary-Guidelines-Advisory-Committee.pdf (last visited Jan. 8, 2020);

- American Medical Association ("AMA"): adopting policy supporting, among other strategies, "warning labels to educate consumers on the health harms of SSBs," and "work[ing] with 'local school districts to promote healthy beverage choices for students." Sara Berg, AMA Backs Comprehensive Approach Targeting Sugary Drinks, AMA (June 14, 2017), https://www.ama-assn.org/delivering-care/public-health/ama-backs-comprehensive-approach-targeting-sugary-drinks;

- Institute of Medicine ("IOM"): "researchers have found strong associations between intake of sugar-sweetened beverages and weight gain"; "their link to obesity is stronger than that observed for any other food or beverage . . . ." Accelerating Progress in Obesity Prevention: Solving the Weight of the Nation, at ch. 6, p. 169, IOM (May 2012), available at https://www.ncbi.nlm.nih.gov/pubmed/24830053;

- American Heart Association ("AHA"): "There is a robust body of evidence that SSB consumption is detrimental to health and has been associated with increased risk of CVD mortality, hypertension, liver lipogenesis, [type 2 diabetes], obesity, and kidney disease." Linda Van Horn, et al., Recommended Dietary Pattern to Achieve Adherence to the American Heart Association/American College of Cardiology (AHA/ACC) Guidelines: A Scientific Statement from the American Heart Association, 134 CIRCULATION 22 (Oct. 27, 2016), available at https://www.ahajournals.org/doi/full/10.1161/cir.0000000000000462;

- American Public Health Association ("APHA"), "Consumption of [sugar] drinks is a significant contributor to the obesity epidemic and increases the risk of type 2 diabetes, heart disease, and dental decay." Taxes on Sugar-Sweetened Beverages, APHA (Oct. 30, 2012), available at https://www.apha.org/policies-and-advocacy/public-health-policy-statements/policy-database/2014/07/23/13/59/taxes-on-sugar-sweetened-beverages; and

- American Diabetes Association ("ADA"), "Research has also shown that drinking sugary drinks is linked to type 2 diabetes. The American Diabetes Association recommends that people avoid drinking sugar-sweetened beverages and switch to water whenever possible to help prevent type 2 diabetes." Myths about Diabetes, ADA available at https://www.diabetes.org/diabetes-risk/prediabetes/myths-about-diabetes (last visited Jan. 9, 2020).

Id. ¶¶ 40-63.

Plaintiffs seek purely injunctive relief under the DCCPPA, enjoining continued misrepresentation by Coke about the healthfulness of consuming SSBs and the role of consumption in the diet. *Id.* at 32 (Prayer for Relief).

In October 2017, in response to Plaintiffs' Complaint for injunctive relief, Defendants filed *four* motions to dismiss, two under Rule 12(b)(6) and two under the District of Columbia Anti-

SLAPP Act, D.C. Code § 16-5501, *et seq.* Despite the repeated effort in Coke's most recent (its *fifth*) motion to dismiss to mischaracterize Plaintiffs' litigation of this case as overly litigious, it was Coke and its co-defendant who filed over 1000 pages of briefing and supporting materials with Judge Wingo and numerous praecipes of supplemental authority–to the point that Judge Wingo expressly prohibited the filing of further praecipes without leave of court.

I. PLAINTIFFS' AMENDED COMPLAINT IS ENTIRELY CONSISTENT WITH JUDGE WINGO'S ORDER OF OCTOBER 1, 2019, AND SHOULD NOT BE STRICKEN.

While counsel for Plaintiffs strongly disagreed with much of Judge Wingo's October 1, 2019 Order, granting in part and denying in part Coke's Rule 12(b)(6) motion to dismiss, counsel understood that their responsibility after the ruling was to file an Amended Complaint consistent with that ruling (while preserving their rights to appeal later, if that should become necessary). Coke argues, on virtually every page of its fifth motion, that the Amended Complaint filed by Plaintiffs exceeded the scope of Judge Wingo's Order. Coke is wrong.

A. Plaintiffs' Amended Complaint Asserts No Claims Based on Conduct That Occurred Before July 13, 2014.

First, Coke argues that the Amended Complaint alleges actionable conduct more than three years before the filing of the original Complaint, despite Judge Wingo's ruling that claims based on conduct more than three years old (that is, prior to July 13, 2014) are barred by the statute of limitations. However, the Amended Complaint states explicitly that it does not seek relief for conduct that occurred before July 13, 2014. Amended Complaint, at 12 n.35. In order to avoid the very argument that Coke is making now, Plaintiff's counsel took care in the Amended Complaint to state, *before* mentioning any facts that preceded July 13, 2014, that those facts were included only "as background" to the actionable facts dated after July 13, 2014: "Plaintiffs have

set forth facts herein that predate July 13, 2014 as background to the facts relating to deceptive conduct after July 13, 2014 set forth in section IV below." *Id.* If there is any remaining doubt that Plaintiffs are no longer alleging facts before July 13, 2014 as actionable conduct in this case, Plaintiffs reiterate it here.[1] This assurance covers the pre-July 13, 2014 statements of Coke executives that Coke argues were covered by its anti-SLAPP motion. *Id.* ¶¶69-73. There is no reason for the Court to spend even a minute more of its time on the non-issue of pre-July 13, 2014 conduct.

B. Plaintiffs' Amended Complaint Asserts No Claims Based on the Conduct of Third Parties.

Second, Coke argues that the Amended Complaint asserts liability against it for the conduct of other entities, including the ABA and the Global Energy Balance Network, despite Judge Wingo's ruling that Coke cannot be held liable for such conduct under the DCCPPA. Again, however, Plaintiff's Amended Complaint clearly does not assert such claims. The Amended Complaint does not assert claims based on the statements of the Global Energy Balance Network, which pre-date July 13, 2014 (again, these statements are explicitly identified in the Amended Complaint, n.35, as "background facts"). The Amended Complaint also does not assert claims based on the statements of the American Beverage Association. Judge Wingo ruled in January of 2019 that the American Beverage Association ("ABA") is not a "merchant" within the meaning of the DCCPPA, and dismissed the Plaintiffs' claims against the ABA. Order of January 22, 2019. While Plaintiffs disagree with that ruling, they are not pressing that issue further before this Court.[2]

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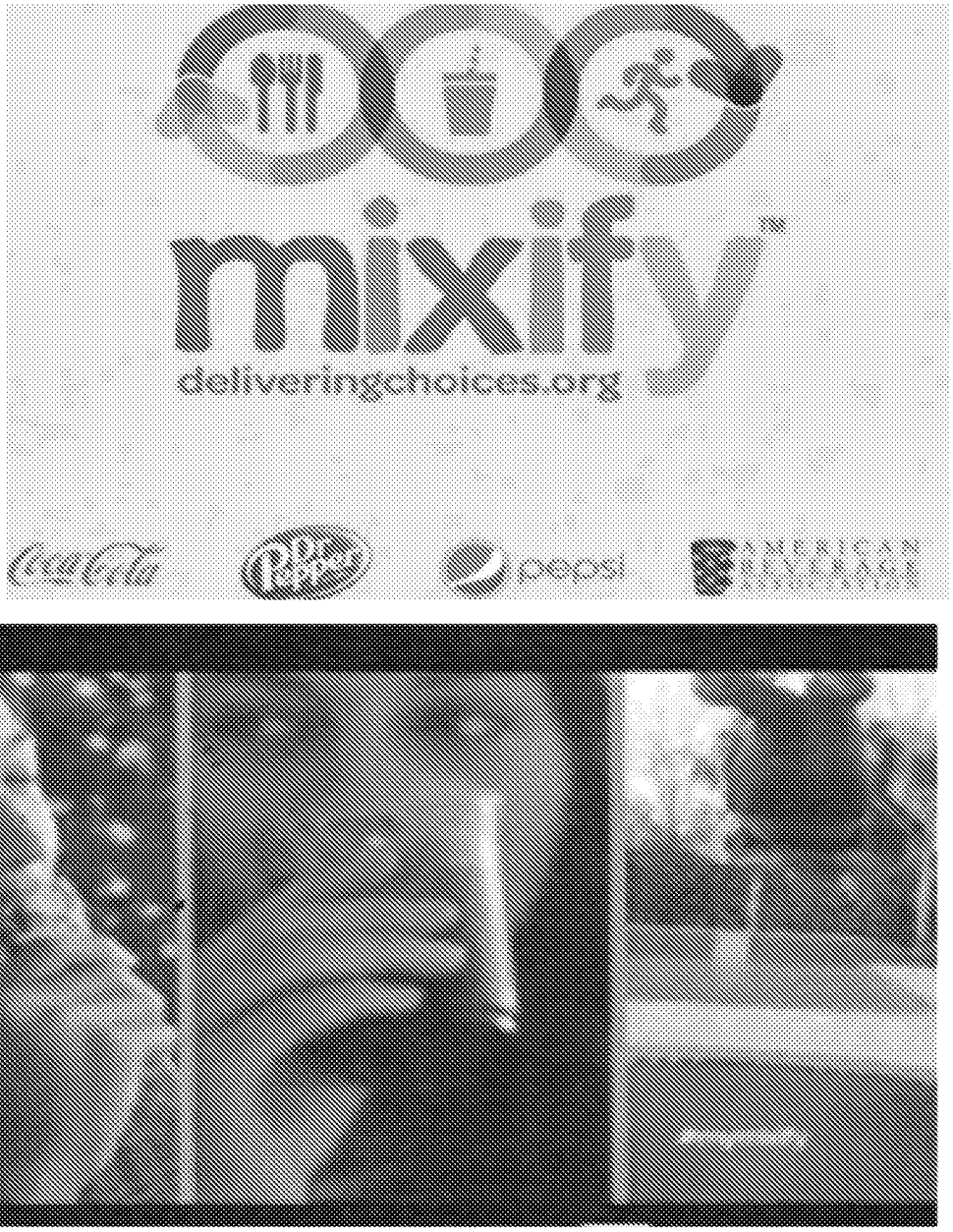
[1] Again, Plaintiffs have and do reserve their rights to appeal Judge Wingo's ruling concerning the statute of limitations, but are not pressing the issue in the further proceedings before this Court.

[2] Plaintiffs also reserve their rights to appeal Judge Wingo's ruling that Coke cannot be held responsible under the DCCPPA for the conduct of third parties.

Plaintiffs do, however, assert claims against Coke for misleading statements made in "Mixify" commercials that Coke *itself* sponsored together with the ABA. Amended Complaint ¶99. Coke's name appears prominently as one of the sponsors of these "Mixify" commercials and its products are shown in "Mixify" commercials. *See* Amended Complaint, Illustrations 4-5:



These "Mixify" commercials were discussed repeatedly in the hearings before Judge Wingo, and there is absolutely nothing in Judge Wingo's Order of October 1, 2019 that bars the Plaintiffs from pressing claims based on Mixify.[3]

C. Plaintiffs' Amended Complaint Properly Asserts Claims by Plaintiffs Coates and Praxis.

Lastly, Coke complains that the Amended Complaint asserts claims by Plaintiffs Coates and Praxis, and not just by Plaintiff Lamar. Coke contends that Judge Wingo decided that these two plaintiffs lacked standing, that that is the "law of the case," and that this Court is therefore required to dismiss their claims. Coke Memorandum, at 17. The problem with Coke's argument is that Judge Wingo said explicitly in her Order of October 1, 2019 that she was not deciding the standing of Plaintiffs Coates and Praxis.

At page 22 of Judge Wingo's Order of October 1, 2019, she wrote:

> Thus, based on Plaintiffs' Supplemental Memorandum of Law and the attachments filed therewith, the Court is persuaded that at least Plaintiff Lamar has standing, given his allegation that he would not have purchased Defendant Coca-Cola's products, specifically Sprite, had Defendant disclosed the link between sugar-sweetened products and obesity, type 2 diabetes, and cardiovascular disease. . . . Moreover, because Plaintiff Lamar has standing, **the Court need not consider the standing of the other plaintiffs**. (emphasis added)

Likewise, she wrote at pages 16-17 of her Order:

> The Court **need not decide**, however, whether it would allow Praxis yet another opportunity to supplement its brief with materials supporting its position that it has diverted a significant amount of its operational costs and resources to advocate and educate against Defendants' misrepresentations regarding its sugar-sweetened beverages. Given the

[3] Similarly, the statements of Coke's paid bloggers were discussed repeatedly in the hearings before Judge Wingo, and there is nothing in Judge Wingo's Order of October 1, 2019 that bars the Plaintiffs from pressing claims based on the statements of these bloggers, agents of Coke who admitted they were paid by Coke to make the statements that they made. Amended Complaint ¶¶ 100-102. Plaintiffs will press their claims based on statements of others only to the extent that they can demonstrate that Coca Cola was responsible for them.

> Court's finding as to Pastor Lamar, *see infra,* Section III.A.c., the Court concludes, at least at this time, no further hearing on the issue of standing is necessary in order for the case to proceed. (emphasis added)

In light of Judge Wingo's explicit conclusion not to decide the standing of Plaintiffs Coates and Praxis, it was not only appropriate, but ethically required, for Plaintiffs' counsel to assert their claims in the Amended Complaint.

1. Pastor Coates Has Standing

In the Amended Complaint, Pastor Coates alleges that he, like Pastor Lamar, purchased sugar-sweetened beverages made by Coke (i.e., Sprite and Fanta) and that he would not have made certain purchases of those products for his children "had [he] been aware of the extent of the health risks posed by consumption of Sprite and Fanta." Amended Complaint ¶ 24. These allegations bring Pastor Lamar squarely within the authority of numerous District of Columbia decisions holding that a single purchase of a consumer product is sufficient to convey standing under the DCCPPA. *See Grayson v. AT & T Corp.*, 15 A.3d 219, 249–50 (D.C. 2011) (upholding standing for one plaintiff who had purchased telephone cards at issue, and rejecting standing for another plaintiff who had not); *Nat'l Consumer League v. Bimbo Bakeries USA*, Case No. 2013 CA 006548 B, 2015 WL 1504745, at *4 (D.C. Super. Apr. 2, 2015) (organization had standing based on its purchase of subject product); *Nat'l Consumers League v. Gerber Products Co.,* Case No. 2014 CA 008202 B, 2015 WL 4664213, at *5 (D.C. Super. Aug. 5, 2015) (organization's standing upheld based on purchase of "two canisters of Good Start"); *Mostofi v. Mohtaram, Inc.,* Case No. 2011 CA 163 B, 2013 WL 8372154, at *3 (D.C. Super. Nov. 12, 2013) ("dispositive consideration is that Plaintiff is a consumer who engaged in a consumer transaction"; "purchase[] of one bottle of Pompeian" sufficed).

Pastor Coates' allegations are also parallel to the allegations of the plaintiff in *Zuckman v. Monster Beverage Corp.,* Case No. 2012 CA 008653 B, 2016 WL 4272477, at *1 & n.1 (D.C. Super. Aug. 12, 2016), which Judge Wingo held supported the standing of Pastor Lamar. Order of Oct. 1, 2019, at 21-22. In *Zuckman,* Judge Motley considered whether to dismiss a DCCPPA claim brought by an individual consumer alleging that the defendant Monster Beverage Corp. failed to disclose the negative health risks associated with its energy drinks. Specifically, the plaintiff in that case, like Pastor Coates here, alleged that he would not have made certain purchases of the defendant's drinks had he known about the negative health risks with which those drinks were associated. Judge Motley observed that "in enacting the CPPA, [the D.C. Council] established substantive rights for consumers to protect them from unlawful trade practices." Specifically, "the CPPA provided [the plaintiff] a statutory right to truthful information concerning Monster Energy drinks," the violation of which was "sufficiently concrete to satisfy the injury-in-fact requirement of Article III."

Coke makes two weak arguments to contest Pastor Coates' allegations of standing in the Amended Complaint. The first argument is that Pastor Coates has added some new standing allegations in the Amended Complaint, and it is too late for him to do so. More precisely, Coke appears to take the erroneous position that the Amended Complaint should have included only the allegations set forth in Pastor Coates' Supplemental Affidavit of Oct. 5, 2018, "even the ones [Judge Wingo] had found insufficient to confer standing," just so that this Court could now dismiss the Pastor. Coke Memorandum, at 12. This argument, it runs counter to established principles of pleading discussed in section 3 below.

Coke's second argument against Pastor Coates' standing is that the Amended Complaint drops allegations that Pastor Coates made in the original Complaint about pastoral care, which

Judge Wingo found did not support his claim of standing. Coke Memorandum, at 13. According to the Defendant, Pastor Coates is wrong if he drops allegations from the original Complaint that Judge Wingo said were insufficient to confer standing, and he is wrong if he adds allegations that were missing from the original Complaint that Judge Wingo found were needed to confer standing. By this logic, Pastor Coates is damned if he does, and damned if he doesn't. Just to state this point is to demonstrate its fallacy.

2. Praxis Has Standing

In the Amended Complaint, Plaintiff The Praxis Project ("Praxis") alleges that it is a nonprofit organization whose mission is to build healthier communities, that it has had to divert resources from its wellness programs and other critical work in order to counteract Coke's misleading representations and material omissions about the science and safety of SSBs, that the work countering Coke's misleading misrepresentations and omissions has diverted 10-20% of the time of Praxis's Executive Director, and has cost the organization at least $60,000. Amended Complaint ¶¶ 25-30. These allegations plainly support standing for a non-profit organization under the DCCPPA.

That the DCCPPA confers standing on non-profit organizations is particularly clear from the Committee Report on the 2012 Amendments to the DCCPPA, Council of the District of Columbia, Committee on Public Services and Consumer Affairs, Report on Bill 19-0581 (Nov. 28, 2012), which states:

> [T]he CPPA allows for non-profit organizational standing to the fullest extent recognized by the D.C. Court of Appeals in its past and future decisions addressing the limits of constitutional standing under Article III. . . .
>
> **Such standing may based on injury to the organization's activities**. . . . (emphasis added).

The Report cites the case of *D.C. Appleseed Center for Law and Justice v. D.C. Department of Insurance,* 54 A.3d 1188, 1202 (D.C. 2012), in which the D.C. Court of Appeals upheld the standing of a non-profit advocacy center that was injured when it diverted resources to dispute a regulatory rate setting decision. *See also Equal Right Center v. Properties, Int'l,* 110 A.3d 599, 603 (D.C. 2015); *Animal Legal Defense Fund v. Hormel Foods Corp.,* Docket No. 2016-CA-004744-B (D.C. Super. Ct. 2017)(to the same effect).

In the face of this clear D.C. precedent supporting Praxis's standing here, Coke cites two federal decisions, *Nat'l Consumers League v. General Mills, Inc.,* 680 F.Supp.2d 132, 136 (D.D.C. 2010), and *Food & Water Watch Inc. v. Vilsack,* 808 F.3d 905 (D.C. Cir. 2015), for the proposition that organizational standing is not available where an organization's primary mission is advocacy and resources are diverted to advocacy. However, the Court of Appeals' decision in *D.C. Appleseed* makes clear that D.C. does not adopt that principle:

> This **does not** mean that in the case of nonprofit organizations, whose mission frequently is directed to an issue of public interest or welfare, standing is defeated because the organization's activities are motivated by an interest in pursuing its overall mission. Rather, the question of standing turns on whether the organization's activities in pursuit of that mission have been affected in a sufficiently specific manner as to warrant judicial intervention. (emphasis added).

54 A.3d at 1205. In other words, it is clear that Praxis has sufficiently alleged standing in this case.

3. The Court Can and Should Consider the Standing Allegations of Plaintiffs Coates and Praxis in the Amended Complaint.

Perhaps Coke's loudest complaint is that Plaintiffs' counsel included in the Amended Complaint some additional allegations of standing for Plaintiffs Coates and Praxis, without seeking leave to do so. Plaintiffs' counsel acknowledges that they have included additional allegations of standing for Plaintiffs Coates and Praxis in the Amended Complaint, but that that this has caused

prejudice to no one, as Coke had and took the very opportunity to contest those allegations in its pending Motion to Strike and to Dismiss.

Rule 15 of the District of Columbia Rules of Civil Procedure encompasses the longstanding principle that leave to amend should be "freely given . . . when justice so requires." *D.C. v. Tinker,* 691 A.2d 57, 59 (D.C. 1969). D.C. also follows the corollary principle that "cases should be decided on the merits" where at all possible. *Bevins v. Lewis,* 254 A.2d 404 (D.C. 1969). Juxtaposed against these broad equitable principles, Coke's complaint that it "should not be required to continue to address [these] issues" rings rather hollow. Coke Memorandum, at 17.

Coke cites five factors that it says militate in favor of dismissing the amended standing allegations by Coates and Praxis (Coke Memorandum, at 18-19), but in fact not one of the factors does so: 1) Plaintiffs have not previously amended their complaint in this case, even once; 2) While this case has been pending since the summer of 2017, the delay is not attributable to anything the Plaintiffs have done, but rather to the *Defendants'* four motions to dismiss and supporting materials totaling more than 1000 pages in length; 3) Plaintiffs have done nothing but try to get their claims heard on the merits and proceed to discovery; 4) As set forth above, the standing allegations they have made not only comport with clear District of Columbia precedents, but were expressly contemplated by the 2012 Amendments to the DCCPPA; and 5) There is absolutely no "prejudice" to Coke, a Fortune 100 company, in having to respond to the allegations of deception made by two pastors and a non-profit organization.

II. PLAINTIFFS' AMENDED COMPLAINT STATES A CLAIM

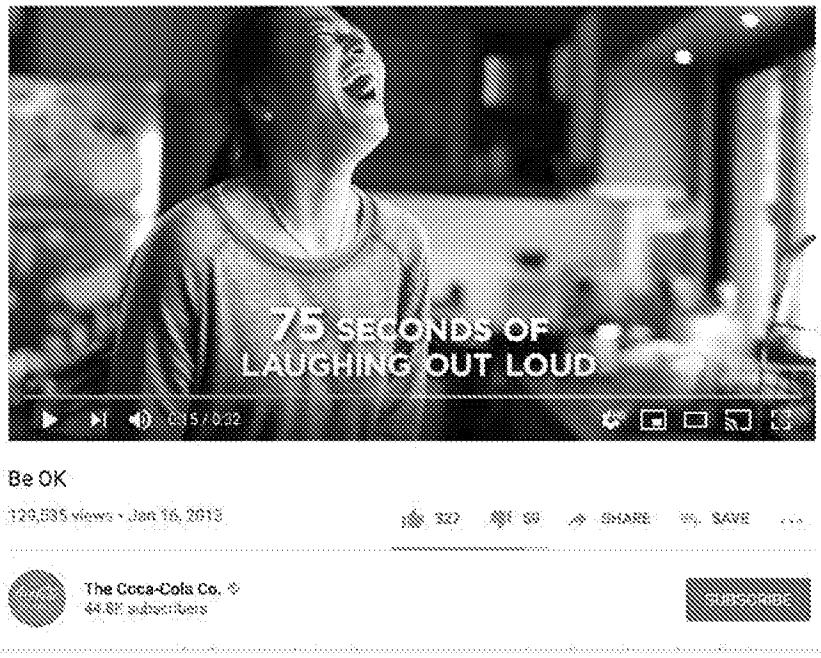
A. Plaintiffs' Claims Based on the "BE OK" and "COMING TOGETHER" Advertisements Are Timely.

Coke argues that Plaintiffs' claims relating to two of its commercials, "Be OK" and "Coming Together," are time-barred.[4] Coke Memorandum, at 21. In doing so, Coke makes both a quasi-factual and a legal argument. The quasi-factual argument is that, after 2013, these two commercials were not being actively disseminated, but rather appeared only in an online "archive." *Id.* at 2, 21. In fact, the two commercials have been and continue to be shown, *to the present day*, on Coke's official corporate "YouTube channel," a social media outlet that it controls: THE COCA-COLA CO., https://www.youtube.com/user/CocaColaCo (last visited January 29, 2020). A corporation's YouTube channel, like its Facebook, Twitter, or Instagram accounts, is part of its active social media presence and, as such, is intended to communicate to an audience. It is not equivalent to an "online archive."

Unlike a true archive,[5] Coke's corporate YouTube channel currently has more than 44,000 subscribers and indicates that the "Be OK" video has been viewed there 129,000 times:

[4] Defendant also argues that the Complaint's allegations that these ads were available on YouTube in 2019 were "made without leave of Court." Def. Br. at 21. However, because the Court anticipated at the July 2019 hearing that the statute of limitations issue concerning these ads would be briefed in Defendant's "motion to dismiss the Amended Complaint," *id.*, Defendant's argument is simply a red herring and should be rejected.

[5]By comparison, the Internet Archive is a 501(c)(3) organization that creates a digital library of websites. One of the online tools it provides to locate historical material on the internet is called the "Wayback Machine" WAYBACK MACHINE, https://archive.org/web/ (last visited January 29, 2020). This web-accessible searchable archive has captured over 330 billion web pages.



Screen Capture of https://www.youtube.com/user/CocaColaCo/search?query=beok (Feb. 3, 2020).

This YouTube channel is controlled by its owner, Coke, who determines what videos it posts and what videos it deletes. This is entirely different from the Internet Archive or other library archives that collect and index material for historical research purposes. The fact is that Coke has continued to publish these videos on its corporate social media outlet since the ads were created in 2013 and is responsible for their sustained publication on its YouTube corporate channel.

For its legal argument, Coke relies on case law involving defamation actions only, as well as the "single publication" rule, a defense used almost exclusively in defamation cases. Coke's Memorandum, at 22-23. Because Defendant's arguments are inapplicable in the context of a consumer fraud case, they should be rejected.

The statute of limitations for defamation claims is different from the statute of limitations for consumer fraud claims. The statute of limitations for defamation is one year, and a defamation cause of action accrues on the date the defamatory statement is first published, because that is the date when the damage to reputation occurs. *Wallace v. Skadden, Arps, Slate,*

Meagher & Flom, 715 A.2d 873, 882 (D.C.1998). By contrast, a cause of action for consumer fraud accrues when the plaintiff discovers the fraud. *Bussineau v. President & Directors of Georgetown Coll.*, 518 A.2d 423, 425 (D.C. 1986); *Johnson v. Long Beach Mortg. Loan Tr. 2001-4*, 451 F. Supp. 2d 16, 42 (D.D.C. 2006). Here, the Amended Complaint alleges that the Plaintiffs did not discover the fraud until 2017. Amended Complaint ¶¶ 21, 24. Thus, because Plaintiff's cause of action did not accrue until 2017, Plaintiffs' claims were brought within the statute of limitations.[6]

Coke's reliance on the single publication rule from defamation law is also misplaced. Although largely applied in the context of defamation cases, D.C. courts have also extended application of the rule to the related tort of invasion of privacy-false light. *See Parnigoni v. St. Columba's Nursery School*, 681 F.Supp.2d 1, 19 (D.D.C. 2010). By contrast, the D.C. Courts have not applied this defense to the publication of misleading statements that form the basis of a consumer fraud claim. In the consumer fraud context, if a deceptive statement is repeated, each repetition of the statement is actionable. *See Beyond Pesticides v. Monsanto Co.,* 311 F.Supp.3d 82, 87-88 (D.D.C. 2018). As the Court explained in *Beyond Pesticides*, addressing a similar claim under the DCCPPA:

> ("[T]he challenged conduct was not the result of one incessant violation, but rather was a series of repeated violations of an identical nature, namely, the Defendants' repeated (false) advertising their drugs . . . . [B]ecause **each violation gives rise to a new cause of action**, each [violation] begins a new statute of limitations period as to that particular event." (emphasis added).

[6] At a minimum, because Coke disputes the time period when "Be OK" and "Coming Together" were shown, disputes when the Plaintiffs knew or should have known of Coke's deception, and thus disputes the date of accrual of Plaintiffs' cause of action, the statute of limitations raises a question of fact that can only be decided by a jury. *Diamond v. Davis*, 680 A.2d 364, 370-71 (D.C. 1996); *Lee v. Wolfson*, 265 F. Supp. 2d 14, 19 (D.D.C. 2003).

311 F.Supp.3d at 87-88 (internal quotation marks omitted)(emphasis added). In this case, as discussed above, Coke has continued, to the present day, to repeat the deceptive "Be OK" and "Coming Together" ads on its YouTube channel. In other words, Coke has made multiple deceptive statements, each of which is actionable.

Moreover, an examination of court decisions outside of this jurisdiction that have considered the application of the single publication rule to non-defamation torts reveals that it should only be applied to those torts (like defamation) whose causes of action are "of the type that could arise at the moment the publication occurs." *Woodard v. Labrada*, 2017 WL 1018307, at *6 (C.D. Cal. Mar. 10, 2017). In *Woodward,* the court rejected application of the rule to torts grounded in fraud because "the accrual of the cause of action is delayed until the plaintiff knew, or with reasonable diligence should have known, of the factual basis for the claim." *Id.* at *6 quoting *Shively v. Bozanich*, 31 Cal. 4th 1230, 1230 (2003).[7]

Here, the Amended Complaint alleges that the "Be OK" and "Coming Together" ads continued to run on YouTube through 2019 and, accordingly, continued to give rise to causes of action under the DCCPPA for years beyond its original air date during January 2013. Comp. ¶¶ 93, 95. Because the single publication rule is inapplicable to claims grounded in consumer fraud, like those here, and because Plaintiffs' causes of action for consumer fraud relating to the "Coming

[7] The single publication rule has also been rejected in contexts where a defendant's illegal conduct, like here, continues to harm a plaintiff beyond the initial publication date, *Chloe SAS v. Sawabeh Information Services Co.*, CV 11-04147, 2014 WL 4402218 (C.D. Cal. Sept. 5, 2014)(rejecting rule in trademark infringement case where defendant's wrongful "infringing" conduct continued beyond the date when counterfeit goods were first offered for sale), and where a plaintiff does not sustain damages until a date beyond the initial publication date. *Consortium Information Services, Inc. v. Experian Information Solutions, Inc.*, No. G037712, 2007 Cal. App. Unpub. WL 2484109, at *4 (Cal. App. 4th Dist. Sept. 5, 2007)(unpublished)(rejecting rule in trade libel case because cause of action did not accrue until plaintiff sustained damages, which occurred beyond date when customer alert list was first published).

Together" and "Be OK" commercials arose within the applicable statute of limitations period for the DCCPPA, Plaintiffs' claims relating to these ads are not time-barred.

B. Coke's Statements Are Misleading and Deceptive in Violation of the DCCPPA.

Coke asks this Court to rule that the challenged statements in Coke's advertisements were "not misleading" *as a matter of law*. Coke's Memorandum, at 23-28. However, the hurdle Coke faces is that, in all but the most unusual cases, the question of whether a statement is misleading or deceptive is a *fact* question for the jury. *See Saucier v. Countrywide Home Loans,* 65 A.3d 428, 445 (D.C. 2013) (holding that "the actual determination of whether [a statement] would be both material and misleading . . . is 'a question of fact for the jury and not a question of law for the court'"). The standard established by the DCCPPA is whether the challenged statement had a "tendency to mislead" a "reasonable consumer" – a standard that, by its very terms, raises a jury question. *Id.*

Indeed, in every recent case where a judge of this Court has been asked to grant a motion to dismiss a DCCPPA claim on the grounds that a statement was "not misleading" as a matter of law, the answer has consistently been "no." *See Organic Consumers Ass'n v. Bigelow Tea Co.,* 2018 D.C. Super. Lexis 11, 11 (2018)(Rigsby, J.)(denying dismissal because "[w]hat a reasonable consumer understands . . . for purposes of a false or misleading representation, is a question of fact"); *Organic Consumers Ass'n v. General Mills, Inc.,* 2017 D.C. Super. Lexis 4, 24-25 (2017)(Edelman, J.)(holding that "whether Plaintiff's claims are meritorious is not at issue at this juncture" because "a reasonable fact-finder considering the facts as alleged could conclude that consumers have been misled in violation of the CPPA"); *Nat'l Consumers League v. Bimbo Bakeries, USA,* 2015 D.C. Super. Lexis 5, 30 (2015)(Mott, J.)(holding that whether reasonable consumer could be misled by statements defendant claimed were factually accurate "constitutes

an issue of fact, which a jury should resolve at trial"); *Nat'l Consumers League v. Doctor's Assocs.,* 2014 D.C. Super. Lexis 15, 19 (2014)(Nash, J.)(denying dismissal because "a fact finder could determine that [defendant's marketing] could have a tendency to mislead a reasonable consumer").[8] *See also Saucier,* 65 A.3d at 445 (reversing a Superior Court ruling that had decided, as a matter of law, that a statement did not have a tendency to deceive, and holding that this was "a question of fact for the jury").

Here, there can be little question that Coke's advertisements had a tendency to mislead a reasonable consumer. Coke's "Be Ok" advertising campaign (challenged in ¶ 94 of the Amended Complaint) was ***actually ordered off the air*** in Great Britain by that country's Advertising Standards Authority, based on a finding that "the ad was likely to mislead." This decision came after viewers complained about the statements in the ad concerning the calories burned by light exercise. *See* ASA Adjudication on Beverage Services LTD T/A Coca-Cola Great Britain (July 17, 2013), https://www.asa.org.uk/rulings/beverage-services-ltd-a13-225058.html. If several random viewers of the ad thought it was misleading, and a self-regulatory body of industry-appointed arbiters thought it was misleading, it would be anomalous for this Court to conclude as a matter of law, as Coke urges, that no reasonable consumer could have been misled by the ad. Coke's Memorandum, at 25.

The same is true of the other deceptive and misleading statements by Coke challenged in the Amended Complaint, including, but not limited to:

- That sugar sweetened beverages can be a part of a balanced lifestyle; ¶94 (also from the "Be OK" ad).

[8] In both *Bimbo Bakeries* and *Doctor's Assocs,* the defendants argued, as Coke argues here, that the challenged statements they made were "accurate," and thus could not be found to be misleading. In both cases, however, the court ruled that even accurate statements can be found misleading, and denied dismissal. *Bimbo Bakeries*, 2015 D.C. Super. Lexis 5, 30; *Doctor's Assocs*,2014 D.C. Super. Lexis 15, 18.

- "All calories count. No matter where they come from including Coke and everything else with calories"; ¶96 (from the "Coming Together" ad)

- That people who do some exercise should drink sugar-sweetened beverages, or are entitled to consumer even more SSBs, through statements such as "Just finished an afternoon Frisbee? Maybe you've earned a little more [soda]"; ¶101 (from the "Mixify" campaign)

- That a soda could be a healthy snack, "like . . . packs of almonds." ¶102 (from a dietitian-blogger paid by Coke)

These statements, which themselves have a "tendency to mislead," are even more deceptive when viewed in the context of Coke's overall campaign to mislead consumers about the health risks of SSBs. Amended Complaint ¶¶ 89-122.[9] Coke's statements imply that that sugary drink consumption is not central to concerns about obesity, type 2 diabetes, and cardiovascular disease, and, by corollary, that mild exercise can redress such concerns. Likewise, Coke's promotion of physical activity events—in which it both "heavily promote[s] the consumption of Coke", and ***deceptively brands Coke itself as part of the obesity solution***, *id.* ¶¶ 114-122 —cannot be disassociated from its multimillion dollar advertising campaigns, in which it misleadingly implies that the sugar-sweetened beverages are part of a balanced lifestyle. *See id.* ¶¶ 89-101. All of these

[9] Indeed, the thrust of the Amended Complaint, as with the original Complaint, is that Coca-Cola made a conscious overarching plan to deny the health risks of its SSBs and to advance the notion that its products are part of a nutritious and healthy lifestyle, and developed advertising campaigns to further that plan. Amended Complaint ¶¶ 2-13. In this respect, Plaintiffs' claims are similar to the claims asserted in *Pelman v. McDonald's Corp.,* 396 F.3d 508 (2d Cir. 2005), in which the plaintiffs alleged that "the combined effect of McDonald's various promotional representations . . . was to create the false impression that its food products were nutritionally beneficial and part of a healthy lifestyle if consumed daily," and that its foods were "were healthy and wholesome, not as detrimental to their health as medical and scientific studies have shown, ... [and] of a beneficial nutritional value." *Id.* at 510. In *Pelman,* the Second Circuit held that the plaintiff's allegations stated a claim of misleading and deceptive marketing that should be allowed to proceed to discovery. This Court should do the same here.

statements are part and parcel of the Defendant's unlawful efforts to flood the consumer market with countervailing representations to hide the truth.

The deceptiveness of these statements is also clear when the statements are juxtaposed against the statements on the same subjects by leading public health authorities. *See* Compl. ¶¶ 88-91, 96-98. Take, for example, the company's statements that imply that all calories are the same, whether they come from a SSB or from a pack of almonds. Compl. ¶¶ 96, 102. While it is surely true that all calories are equal units of energy, such statements obfuscate the consensus differentiating empty sugar drink calories from calories – such as those from almonds - that deliver needed nutrients, and solid food calories that create satiety. They obfuscate the FDA's recognition of the need "to avoid the excess contribution of empty calories." 81 FED. REG. at 33,766. And they obfuscate the abundant scientific research specifically linking sugar drinks with obesity, type 2 diabetes, and cardiovascular disease. Importantly, they also obfuscate that the United States Dietary Guidelines Advisory Council has concluded that "[s]trong evidence shows that higher consumption of added sugars, especially sugar sweetened beverages, increases the risk of type 2 diabetes among adults and *this relationship is not fully explained by body weight.*" Scientific Report of the 2015 Dietary Guidelines Advisory Committee, at pt. D, ch. 6, p. 20, U.S. DEP'T OF AGRIC. & U.S. DEP'T OF HEALTH & HUMAN SERV. (2015), available at https://health.gov/dietaryguidelines/2015-scientific-report/PDFs/Scientific-Report-of-the-2015-Dietary-Guidelines-Advisory-Committee.pdf (last visited Jan. 8, 2020). In other words, mere calories and weight gain do not alone account for the link between type 2 diabetes and SSB

consumption; other factors are at work, such as a distinctive link to production of dangerous liver fat.[10]

In sum, Plaintiffs here have gone well beyond asserting plausibly stated claims against Coke for deceptive advertising that are capable of misleading reasonable consumers. Coke's deceptive statements are contrary to, and omit to even acknowledge, the many reports linking SSBs to chronic disease as authored by virtually all leading health authorities and concluding that mild to moderate exercise alone will not offset the harm. A reasonable consumer "could" think that routine consumption of Coke's SSB products is part of a healthy diet, and that this issue is well-settled when it is not. This Court should roundly reject Coke's contention that no reasonable consumers could ever believe—as a matter of law—that routinely drinking Coke is conducive to or consistent with their well-being.

III. THE FIRST AMENDMENT IS NOT GROUNDS FOR DISMISSAL.

Finally, Coke argues that its advertising constitutes commercial speech protected by the First Amendment, and that Plaintiffs' claims are thus constitutionally barred. Premised on the contention that its speech is not "inherently deceptive," Coke's argument is erroneous as well as disingenuous—ignoring abundant precedent to the contrary—and represents little more than another attempt to weaponize the First Amendment to enable unfettered labeling and advertising (regardless of consumer deception or regulatory restraints). Indeed, under Coke's interpretation, the DCCPPA and virtually all state consumer protection statutes *nationwide* would be

[10] So too, experts acknowledge that exercise is *not* the dominant solution to obesity and related disease; diet is. *See* Compl. ¶¶ 89-90 ("The federal government itself has acknowledged that 'the contribution that physical activity makes to weight loss and weight stability is *relatively small*'"; "Even intensive exercise programs often *fail to improve weight*" (quoting U.S. Department of Health and Human Services and citing myriad scientific studies) (emphasis added).

unconstitutional as they provide causes of action for claims of consumer deception based on innuendo, omission, overall context, inference, and, more generally, statements deceptive to the reasonable consumer—that is, something far short of "inherently deceptive." So too, Coke's contention unravels literally *thousands* of judicial decisions *over decades* that routinely did not address whether the statements at issue were "inherently deceptive," let alone as a *threshold* matter in the litigations. Coke's Memorandum, at 28.[11] Coke's First Amendment argument is not only wrong, it is radical.

It is long-established that commercial speech receives less protection under the First Amendment than pure speech, and that deceptive commercial speech is entitled to *no protection* under the First Amendment. In *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976), for example, the United States Supreme Court made plain that the Constitution protects only truthful advertising, and that it accords no protection to speech that is "false . . ., deceptive or misleading," nor does it "prohibit the State from insuring that the stream of commercial information flow cleanly as well as freely." *Id.* at 771-72. To be protected, in other words, commercial speech must "at least . . . not be misleading." *Cent. Hudson Gas & Elec. Corp. v. Public Service Comm'n*, 447 U.S. 557, 566 (1980). Plaintiffs here allege that Coke engaged in false, deceptive, and misleading advertising and promotion of sugar drinks.[12] There is absolutely nothing unconstitutional about such claims.

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[11] The argument also renders unconstitutional Sections 5 and 12 of the FTCA, which similar to the DCCPPA prohibit, and direct the FTC to prevent, "unfair or deceptive acts or practices in or affecting commerce," defining such acts to include any "advertisement . . which is misleading in a material respect" by way of "representations made or suggested" or "a fail[ure] to reveal facts material in the light of such representations." 15 U.S.C. § 45(a)(1), 52(a)-(b).

[12] Notably, Plaintiffs' allegations do not equate with Coke's absurd characterization of them—that is, that "people would make bad decisions if given *truthful* information." Coke's Memorandum, at 20 (emphasis added).

Coke's reliance on *Pearson v. Shalala* in support of its argument is equally disingenuous. Coke's Memorandum, at 28-29 (citing *id.*, 164 F.3d 650, 655 (D.C. Cir. 1999)). In *Pearson*, a *state actor* sought categorically to ban a set of qualified health claims where a disclaimer (which Coke is not advocating for as an ameliorative here) would have adequately informed consumers of any FDA concern, and where the court found that the FDA's determination of inadequate scientific substantiation for the claims was arbitrary and capricious. *See also Pearson v. Shalala*, 130 F. Supp. 2d 105, 110 (D.D.C. 2001). That scenario is inapposite to the facts and private claims here. Furthermore, the standard articulated in *Pearson* and its progeny is not "inherently misleading," but rather whether a statement is "inherently misleading" *or* "misleading in fact." As articulated by the Supreme Court, "when the particular content or method of the advertising suggests that it is inherently misleading or when experience has proved that in fact such advertising is subject to abuse, the States may impose appropriate restrictions." *In re R.M.J.*, 455 U.S. 191, 203 (1982). *See also Peel v. Attorney Registration and Disciplinary Com'n of Ill.*, 496 U.S. at 111, (1990) (Marshall, J. concurring)("States may prohibit *actually* or inherently misleading commercial speech entirely.")(emphasis added). So even assuming some (factually absent) state action here, the operative question, as the Supreme Court and courts nationwide have long recognized, is whether the complaint states a plausible allegation of deception in fact, or alternatively, inherent deception.

As set forth above, Plaintiffs state plausible claims of deception. Indeed they state claims of deception that are well-supported not just by their own experience and allegations but by *throngs* of scientific findings (that a calorie is not a calorie, that a bit of exercise cannot undue the link between routine consumption of SSBs and adverse health outcomes, that SSBs, regardless of moderate exercise, do not comprise part of a healthful daily diet, and more), academic articles,

health authority recommendations, and an earlier decision by the United Kingdom Advertising Standards Board to *ban* as deceptive one of Coke's advertisements on "happy calories."[13]

Finally, Coke's reliance on *American Beverage Association v. City and Country of San Francisco* is also unavailing, at best. *See* Coke's Memorandum, at 29 (citing *id.*, 871 F.3d 884 (9th Cir. 2017). Coke argues that the Ninth Circuit found a warning on SSB advertisements—which reflects the stated positions of myriad leading health authorities and scientific experts—to be "deceptive in light of the current state of research," and that this purported Ninth Circuit authority somehow has fatal First Amendment implications for the deceptive advertising claims at issue here. Coke's Memorandum, at 29. Coke is very well aware, however, that sitting *en banc*, the Ninth Circuit *declined to follow* the flawed reasoning of the panel that Coke cites as authority. The Ninth Circuit found merely that an effective warning could be smaller than 20% of the disputed signage—in other words, because of its size, the warning was unduly burdensome. *Id.,* 916 F.3d 749, 757-58 (9th Cir. 2019). So not only is the case inapposite to deceptive advertising claims, it is inaccurately referenced by Coke.

At bottom, Plaintiffs' claims are precisely the type of claims that the D.C. Council enabled when it enacted the 2012 Amendments to the DCCPPA. There are no valid constitutional concerns here on the part of Coke. Instead, Coke spooks in an effort to dissuade the Court, as it tried to do with the Pastor Plaintiffs, from scrutinizing the claims of deception because the evidence will show that Coke not only deceived but intentionally deceived consumers through the use of "innuendo," "ambiguity," "omission," and otherwise, D.C. Code § 28-3904(f), and by "flood[ing] the market with countervailing representations to hide the truth," and in doing so, violated the DCCPPA. *See* Council of the District of Columbia, Committee on Public Services and Consumer Affairs, Report

[13] *Supra* at 19.

on Bill 19-0581, 7 (Nov. 28, 2012)(citing tobacco industry efforts to "confuse the public about the link between cigarettes and cancer" and stating Council's intent to render such conduct unlawful) (quoting *U.S. v. Philip Morris USA, Inc.*, 449 F. Supp. 2d 1, 208 (D.D.C. 2006), *aff'd in part and vacated in part on other grounds*, 556 F.3d 109 (D.C. Cir. 20009)).

Conclusion

In its Motion to Dismiss, Defendant Coke has failed to meet its burden to show that Plaintiffs, in their Amended Complaint, improperly asserted claims that were time-barred, based on the conduct of third parties, or otherwise inconsistent with Judge Wingo's prior rulings in this case. Defendants also failed to show that Coke's challenged advertising statements could not mislead a reasonable consumer as a matter of law under the DCCPPA. Finally, Defendants failed to show that Coke's deceptive statements, as alleged by Plaintiffs, are protected speech under the First Amendment.

Plaintiffs, therefore, respectfully ask this Court to deny Defendant's most recent Motion to Dismiss and allow this case to proceed to Discovery.

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Date: February 6, 2020

Respectfully submitted,

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SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
CIVIL DIVISION

PASTOR WILLIAM H. LAMAR IV, PASTOR DELMAN L. COATES, *and* THE PRAXIS PROJECT, *on behalf of themselves and the general public*, Plaintiffs, v. THE COCA-COLA COMPANY, Defendant.	Case No. 2017 CA 004801 B Honorable Judge Jose Lopez Next Event: Status Hearing March 27, 2020, at 9:30 a.m.

CERTIFICATE OF SERVICE

I hereby certify that on February 6, 2020, I caused a copy of the foregoing Memorandum to be electronically served via the CaseFileXpress system on the following:

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