No. 23-CV-1020

In the

District of Columbia Court of Appeals

CORPORATE ACCOUNTABILITY LAB,

Appellant,

v.

SAMBAZON, INC.,

Appellee.

On Appeal from the Superior Court of the District of Columbia
Civil Division in Case 2023 CAB 1954 (Honorable Shana Frost Matini, Judge)

BRIEF FOR APPELLANT

KIM E. RICHMAN, ESQ.
DC BAR NO. 1022878
RICHMAN LAW & POLICY
1 Bridge Street, Suite 83
Irvington, New York 10533
(914) 693-2018
krichman@richmanlawpolicy.com

Attorney for Appellant

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CP COUNSEL PRESS (800) 4-APPEAL • (327960)

RULE 26.1 CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule of Appellate Procedure 26.1, Plaintiff-Appellant Corporate Accountability Lab states that it has no parent corporation, and there is no publicly held corporation that owns 10% or more of its stock.

RULE 28(a)(2) DISCLOSURE STATEMENT

Pursuant to Rule of Appellate Procedure 28(a)(2), Plaintiff-Appellant states that the following Parties and counsel were involved in this matter in the trial court and appellate proceeding:

RICHMAN LAW & POLICY
Kim E. Richman (D.C. Bar No. 1022978)
1 Bridge Street, Suite 83
Irvington, New York 10533
Tel: (914) 693-2018
krichman@richmanlawpolicy.com

Attorney for Plaintiff-Appellant

K&L GATES
Brian D. Koosed (D.C. Bar No. 1034733)
1601 K Street NW
Washington, DC 20006
Tel: (202) 778-9000
brian.koosed@klgates.com

Sarah A. Decker
210 Sixth Avenue
Pittsburgh, PA 15222
Tel: (412) 355-6500
sarah.decker@klgates.com

VENABLE LLP
Caitlin C. Blanche
2049 Century Park East, Suite 2300
Los Angeles, CA 90067
Tel: (310) 229-0340
cblanche@venable.com

Attorneys for Defendant-Appellee

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JURISDICTIONAL STATEMENT

Plaintiff-Appellant Corporate Accountability Lab (CAL) brought a claim under the District of Columbia Consumer Protection Procedures Act (CPPA), D.C. Code § 28-3901 *et seq.*, against Defendant-Appellee Sambazon, Inc. CAL alleged that Sambazon made misleading representations to District consumers by marketing its açaí product supply chain as thoroughly monitored and free from child labor. In reality, CAL alleged, child labor is endemic to the açaí industry, and Sambazon's supply chain is not as protected as the company promises. CAL sought declaratory and injunctive relief, and alleged just one count, violation of the CPPA. The lower court had jurisdiction pursuant to D.C. Code §§ 28-3905(k)(1)(B), (k)(1)(D), and (k)(2). On November 14, 2023, the lower court, following a choice-of-law analysis, granted Sambazon's motion to dismiss *in toto* based on application of California law. On December 1, 2023, CAL filed its notice of appeal from that decision. This Court has jurisdiction under D.C. Code § 11-721 and D.C. Rules of Appellate Procedure 3 & 4.

STATEMENT OF THE ISSUES

(1) Did the Superior Court err in finding a true conflict between the District of Columbia's Consumer Protection Procedures Act (CPPA), D.C. Code § 28-3901 *et seq.*, and California's Unfair Competition Law (UCL), Cal. Bus. & Prof. Code § 17200 *et seq.*, on the facts of this case?

(2) Assuming a true conflict existed, did the Superior Court err in its application of the Restatement (Second) of Conflicts of Laws Section 145 factors when it found that California had the stronger governmental interest?

(3) Assuming the Superior Court's conflict-of-law holding was error, did defendant's remaining arguments require dismissal?

STATEMENT OF THE CASE

CAL filed its Complaint in Superior Court on March 28, 2023, alleging that Sambazon violates the CPPA by making false and misleading statements about the labor conditions in its açaí berry supply chain. (Complaint ("Compl.") ¶¶ 14-22, 61-67; A9-11, A18-19.)[1] CAL asserted its standing to contest these misrepresentations as a nonprofit organization under D.C. Code § 28-3905(k)(1)(C), which authorizes such suits on behalf of the general public, and as a public interest organization under Section 28-3905(k)(1)(D), which allows suits if a District consumer could also sue. (Compl. ¶¶ 62-63; A18.). In addition to the overwhelming evidence of child labor as endemic and foundational to the açaí harvesting industry, CAL identified specific evidence that defendant, contrary to Sambazon's promises, its own supply chain is porous and does not guarantee the absence of child labor. Two Brazilian açaí merchants, identified in CAL's Complaint by name, have stated, for example, that

[1] CAL also named Ecocert USA, creator of the "Fair for Life" certification program used by Sambazon, as a defendant. CAL voluntarily dismissed its claims against Ecocert USA on September 12, 2023.

they sold berries to ships supplying Sambazon with "no questions asked" about the origin of those berries. (*Id.* ¶ 40; A14.)

On its products and consumer-facing website, however, Sambazon makes representations inconsistent with this reality:

> "[B]y creating our own responsibly managed supply chain . . . we can establish a direct connection between our farmers and our consumers. [W]e oversee the traceability of the Organic Açaí, from the moment it is wild harvested and transported by riverboats, to its inspection by hand. . . ." (Compl. ¶ 10; A8.)
>
> "[A]ll Sambazon products are ethically sourced." (*Id.* ¶ 23; A11.)
>
> "[Sambazon] care[s] for the people [it] works with." (*Id.*; A11.)
>
> "Every time you enjoy [Sambazon's Fair for Life Certified açaí products] you're . . . directly giving back to family farmers who harvest wild Açaí" by driving a "Fair Wages & Labor Practices." (*Id.* ¶ 24; A11.)
>
> "Each time you purchase a SAMBAZON product, you can feel good knowing you are helping the Amazon and its people . . . ." (*Id.* ¶ 25; A12.)
>
> "We believe in transparency. And we understand how important it is to know the food you and your family consume is of the highest quality, while also being ethically sourced, transported, and processed. By creating our own supply chain, we can oversee every step of its journey, from the moment our fair trade food is hand-harvested and transported by riverboats, to its inspection (by hand) and environmentally responsible processing. It's our guarantee to you: From the palm of the tree to the palm of your hand." (*Id.* ¶ 26; A12.)

Sambazon also claims that its "Fair for Life" certification means it follows "rigorous standards" for "respect of human rights and fair working conditions," and "ensur[es] no child/slave labor occurs." (*Id*. ¶¶ 27, 28; A12-13.)

In its Complaint, CAL alleged that Sambazon violates the CPPA, given the reality on the ground, by representing to D.C. consumers that its açaí goods "have a source" or "characteristics" they lack; representing the goods as possessing a "standard, quality, grade, style, or model" they do not; misrepresenting a "material fact" with a tendency to mislead; failing to state a material fact whose omission has a tendency to mislead; using innuendo or ambiguity as to a material fact, with a tendency to mislead; and advertising the goods without the intent to sell them as advertised, in violation of D.C. Code § 28-3904(a), (d), (e), (f), (f-1), and (h). (*Id*. ¶ 67; A19.) CAL also alleged that these misrepresentations are material, as consumers care deeply about child labor and will change their purchase habits if they became aware of a brand using child labor. (*Id*. ¶¶ 47-52; A16-17.) CAL sought injunctive and declaratory relief but no monetary damages. (*Id.* ¶ 22; A11.) The relief sought pertains only to the District of Columbia and is based specifically upon misrepresentations to consumers in the District. (*Id*. ¶¶ 21-22, 57-60; A11, A17-18; Prayer for Relief; A19-20.)

On July 28, 2023, Sambazon moved to dismiss based on choice-of-law principles, arguing that its being headquartered in California creates a conflict of law between the District's CPPA and California's consumer protection statutory scheme, the Unfair Competition Law (UCL), California Business & Professions Code §§ 17200 *et seq.* Both the CPPA and the UCL prohibit false or misleading

advertising. The conflict, Sambazon asserted, was that California's UCL requires private plaintiffs to establish injury-in-fact through lost money or property, while the CPPA does not. (MTD at 7-9; A32-34.) Sambazon argued that under the Restatement (Second) of Conflicts, to which DC courts look in the face of a true conflict, California is the forum with the most significant relationship to the dispute. (*Id*. at 9-13; A34-38.)

Sambazon also argued that CAL lacks standing to bring the action. Sambazon contended that that (1) Article III standing requirements apply to nonprofit actions under the CPPA, which CAL could not meet because of the lack of injury-in-fact (*Id*. at 13-15; A38-40); and (2) a public interest organization can have DC Code § 28-3905(k)(1)(D) standing only if it identifies a specific consumer or class of consumers who have standing, which CAL did not do in its Complaint (*Id*. at 15-16; A40-41).

Finally, Sambazon argued that CAL failed to state a claim for relief. It asserted that CAL had not pled any false or misleading statements, or what consumers understand ethically sourced to mean. Sambazon asserted that ethical sourcing is not "merely limited to the issue of forced or child labor"; that it did not make specific guarantees against child labor; and that CAL failed to allege facts that that would show child labor was actually occurring in its supply chain. (*Id*. at 16-19; A41-44.)

CAL opposed dismissal on September 13, 2023. CAL noted that the CPPA provides "maximum standing" for public interest organizations, above and beyond

the requirements of Article III, and does not require injury-in-fact. (Opposition (Opp.) at 2-6; A328-32.) CAL also argued that there was no choice-of-law issue, because (1) the Complaint seeks to end unlawful conduct in the District only, (2) Sambazon sells and markets products in the District, and (3) such questions are usually not appropriate for a motion to dismiss. (*Id.* at 7-10; A333-36.) Finally, CAL countered that the misrepresentations were actionable under the CPPA, and that the meaning of those representations, including "ethical sourcing," was clear. (*Id.* at 10-15; A336-41.)[2] Sambazon replied in support of the motion to dismiss on October 10, 2023.

On November 11, 2023, the Superior Court, by Hon. Shana Frost Matini, granted Sambazon's motion based on choice of law [hereinafter Order.] The court looked to whether a true conflict existed between the District's CPPA and California's UCL and answered affirmatively: the distinction in how the CPPA and the UCL are written, with the CPPA permitting nonprofit public prosecution suits without injury and the UCL requiring financial injury to bring such cases, sufficed to show a true conflict existed. (Order at 3-4; A352-53.)

Since the court found that both jurisdictions had an interest here—the District in protecting its consumers and California in governing entities headquartered

[2] To the extent the District Court might disagree with the clarity of the allegations, CAL sought leave to amend. (*Id.* at 15; A341.)

there—it applied the four-part modified governmental interest analysis drawn from the Restatement (Second) of Conflicts Section 145: "(1) the place where the injury occurred; (2) the place where the conduct causing the injury occurred; (3) the residence, place of incorporation and place of business of the parties; and (4) the place where the relationship, if any, is centered." (*Id*. at 2, 4; A351, A353.)

The first factor broke for the District, as CAL alleged the injury occurred where Sambazon sold its products and that Sambazon aimed marketing and advertising at District consumers (*Id*. at 4-5; A353-54). The court found that the second factor favored California, as the court concluded that CAL had conceded that California was where defendant made its advertising and packaging decisions—in the court's view, where the injury was caused. The third factor favored neither jurisdiction, as neither party was domiciled or incorporated in the District. (*Id*. at 5; A354.) The fourth factor, the Superior Court found, favored California: in false advertising cases, the "plaintiff's relationship with the defendant" is where defendant has its primary place of business and makes its advertising policies. (*Id*. at 5-6; A354-55.) Balancing the factors, the court concluded that California law applied. The court then held that plaintiff failed to meet the California UCL's requirement of showing loss of money or property, and so granted the motion. (*Id*. at 6-7; A355-56.)

CAL appealed to this Court on December 1, 2023.

STATEMENT OF THE FACTS

Açaí berries are an increasingly popular health food in the United States. This litigation arises from credible evidence of child labor in açaí berry supply chains, including that of Defendant Sambazon, despite Sambazon's consumer-facing representations to the contrary. Açaí berries come from the Amazon rainforest, growing on spindly trees that can reach up to 65 feet high. Because there is no widespread mechanized process for harvesting açaí berries, workers must climb up trees with machetes to cut the berries down—tall, thin trees incapable of bearing much weight. The workers rarely have any protection beyond wearing burlap over their feet; injuries, particularly from falling, are common and sometimes fatal. A 2016 Brazilian government study, for example, found that nine out of every ten açaí harvesters had a family member suffer an injury in the industry. (Compl. ¶¶ 3, 32-33, 37; A7, A13.)

The açaí harvesting industry is rife with child labor, since children, with their lighter frames, are more able to scramble up the trees. Child labor is a "crucial element" of the extraction process. Due to the growing açaí market, children now climb 10 or more trees a day, even needing to jump from one tree to another. In 2022, the United States Department of Labor added açaí to its "List of Goods Produced by Child Labor or Forced Labor." (*Id.* ¶¶ 32-35; A13-14.)

Plaintiff CAL is a nonprofit public interest organization focused on labor and other human rights violations. CAL aims to hold corporations nationwide accountable for widespread abuse of worker rights. To that end, CAL works to inform the public, including District consumers, about labor and sustainability problems in various industries, including through publication of articles and reports about labor issues. (*Id.* ¶¶ 5, 20, 56; A7, A10, A17.) CAL brought the instant CPPA suit in an effort to keep consumers informed of such labor abuses. (*Id.* ¶¶ 20-22; A10-11.)

Defendant Sambazon is a privately held company headquartered in California and incorporated in Delaware, and one of this country's largest importers and merchants of açaí products. Sambazon's products are available in a range of stores in the District, as well as nationwide. (*Id.* ¶¶ 6, 53; A8, A17.)

SUMMARY OF THE ARGUMENT

The Superior Court erred in dismissing CAL's complaint based on its choice of law analysis, which led it to wrongly apply California law to CAL's claim. First, no true conflict existed between District and California law, because applying the District's law would further the District's policies, where the policies of California would not be advanced. The CPPA is the nation's broadest consumer protection law, and it reflects the District's policy favoring nonprofit or public interest organizations bringing claims on behalf of consumers. The Legislature has amended the CPPA to

push back against any "chilling effect" on the ability of organizational plaintiffs to bring suits in consumers' interests. The CPPA also reflects the District's policy of bringing action to halt potential harm, not just on responding to past harm. Applying the CPPA to CAL's claims—just the sort of public interest organization, prophylactic claim on behalf of District consumers' rights that the District favors—would further District policy. Applying the UCL, which is not concerned with District consumers or public interest organizations standing in for those consumers, and not similarly focused on stopping misrepresentations before they harm consumers, would not further a California interest in this matter. Thus, there was no true conflict. Moreover, there was no true conflict because CAL could have established organizational standing in California, given California's relatively liberal organization standing rules and CAL's role as a labor rights nonprofit expending resources on the issue. No Restatement analysis was necessary.

Second, even if a true conflict existed, the lower court erred in how it weighed the four Restatement factors used to determine which jurisdiction had the greater interest. The court found that both Factor Two—where the conduct causing the injury occurred—and Factor Four—where the relationship was centered—favored California. But both factors should have favored neither jurisdiction, leaving the balance of factors favoring District law.

While the Superior Court granted Sambazon's motion to dismiss solely on choice of law, Sambazon raised two other arguments as well. Neither provides a ground for upholding the dismissal. Sambazon argued that CAL lacks standing, but CAL has standing to pursue this matter as a public interest organization under D.C. Code Section 28-3905(k)(1)(D) and as a nonprofit under Section (k)(1)(C). Sambazon contended that CAL had failed to state a claim for relief under the CPPA, but CAL alleged facts showing that Sambazon made actionable misrepresentations.

STANDARD OF REVIEW

Trial court orders granting a motion to dismiss are reviewed *de novo*. *See Wetzel v. Capital City Real Estate, LLC*, 73 A.3d 1000, 1002 (D.C. 2013) (citing *Hillbroom v. PricewaterhouseCoopers LLP*, 17 A.3d 566, 573 (D.C. 2011)). Choice-of-law issues are also subject to *de novo* review. *See Washkoviak v. Sallie Mae*, 900 A.2d 168, 180 (D.C. 2006) (citations omitted). On appeal from a motion to dismiss, this Court "take[s] all factual allegations in the complaint as true." *Papageorge v. Zucker*, 169 A.3d 861, 863 (D.C. 2017) (citing *Solers, Inc. v. Doe*, 977 A.2d 941, 947-48 (D.C. 2009)). Any "uncertainties or ambiguities" must be resolved in the plaintiff's favor; to affirm a grant of dismissal, it must be "self-evident from the face of the complaint" that the plaintiff cannot succeed. *Washkoviak*, 900 A.2d at 180. Complaints "need not plead law, nor do they have to match facts to every element

of a legal theory." *ALDF v. Hormel Foods Corp.*, 258 A.3d 174, 188 (D.C. 2021) (quotations omitted).

ARGUMENT

I. The Superior Court Erred in Dismissing CAL's Complaint Based on Choice of Law.

District of Columbia courts apply a two-step analysis to choice-of-law questions. First, they assess whether there is a "true conflict" between the District's law and the law of the foreign jurisdiction allegedly sharing an interest in the matter. *Pietrangelo v. Wilmer Cutler Pickering Hale & Dorr, LLP*, 68 A.3d 697, 714 (D.C. 2013). A "true conflict" arises when the two jurisdictions' laws are different and would produce different results in the case at bar. *Id.*; *see also Krukas v. AARP, Inc.*, 376 F. Supp. 3d 1, 27 (D.D.C. 2019); *Levine v. Am. Psychological Ass'n (In re APA Assessment Fee Litig.)*, 766 F.3d 39, 51 (D.C. 2014). A "false conflict" occurs where states' laws are "1) the same; 2) different but would produce the same outcome under the facts of the case; or 3) when the policies of one state would be furthered by the application of its laws while the policy of the other state would not be advanced by the application of its laws." *Samenow v. Citicorp Credit Servs.*, 253 F. Supp. 3d 197, 203 (D.D.C. 2017); *see also Barimany v. Urban Pace, LLC*, 73 A.3d 964, 967 (D.C. 2013). A conflict of laws "does not exist when the laws of the different jurisdiction are identical or would produce the identical result on the facts presented." *USA Waste, Inc. v. Love*, 954 A.2d 1027, 1032 (D.C. 2008) (citing *Greaves v. State Farm*

Ins. Co., 984 F. Supp. 12, 14 (D.D.C. 1997)). The absence of a true conflict requires the application of District law by default. *Pietrangelo*, 68 A.3d at 714.

If a true conflict is identified, then District law evaluates which jurisdiction has the greater interest by looking to four factors enumerated in the Restatement (Second) of Conflict of Laws Section 145. *See Iron Vine Sec., LLC v. Cygnacom Sols., Inc.*, 274 A.3d 328, 348-49 (D.C. 2022). Those factors are: "(a) the place where the injury occurred, (b) the place where the conduct causing the injury occurred, (c) the domicil[e], residence, nationality, place of incorporation and place of business of the parties, and (d) the place where the relationship, if any, between the parties is centered." Restatement (Second) of Conflict of Laws Section 145(2); *see also Washkoviak*, 900 A.2d at 180. These factors are to be evaluated "according to their relative importance with respect to the particular issue." *Id.* If the Restatement factors do not favor either jurisdiction, the forum jurisdiction's law should apply. *See Levine*, 766 F.3d 39 at 55 (citing *Washkoviak*, 900 A.2d at 182).

A. The Superior Court erred in finding a true conflict between the consumer protection laws of the District of Columbia and California on the facts of this case.

The Superior Court found that a true conflict existed between California's UCL and the District's CPPA. The court observed that the laws are not written identically: the CPPA permits public interest organizations to act as private prosecutors standing in the shoes of District consumers, without themselves having

to suffer an injury. The UCL, by contrast, requires that any plaintiff have suffered an "injury in fact and ha[ve] lost money or property." (Order at 3; A352 (citing D.C. Code § 28-3905(k) and Cal. Bus. & Prof. Code § 17204).) Based on this difference, the Superior Court concluded that District law "would allow a nonprofit to bring the instant case, whereas California would not," and so moved on to consider the four Restatement factors. (Order at 4; A353.)

The Superior Court erred in finding a true conflict.[3]

1. There was no true conflict because application of District law would advance District policy, while application of California law would not advance California policy.

First, there was no true conflict because "the policies of [the District] would be furthered by the application of its laws while the policy of [California] would not be advanced by the application of its laws." *Samenow*, 253 F. Supp. 3d at 203.

[3] This absence of true conflict is preserved for the Court's review. Sambazon argued that a true conflict existed because CAL "could not bring" this action under the UCL. Specifically, Sambazon argued that there were no allegations that CAL "lost money or property, or was otherwise injured." (MTD at 8-9; A33-34.) In response, CAL argued that Sambazon's claimed conflict of laws issue was substantively baseless and ill-timed, being appropriate for a summary judgment motion instead. (Opp. at 7-8; A333-34; *accord* Reply at 2; A344.) In reply, Sambazon reiterated its argument for a true conflict. (Reply at 2; A344.) In its Order, the Superior Court explicitly addressed the question, finding that "the District of Columbia would allow a nonprofit to bring the instant claim . . . whereas California would not." (Order at 4; A353.) As an issue raised in a motion to dismiss and addressed by the lower court, the question is reviewable. *See Charlton v. Mond*, 987 A.2d 436, 440 (D.C. 2010).

District courts will apply another jurisdiction's law if that state's "interest in the litigation is substantial" and applying District law "would frustrate the clearly articulated public policy of that state." *Iron Vine*, 274 A.3d at 348-49. That was not the case here.

The CPPA and UCL address different evils in different ways, focusing on different kinds of plaintiffs. From a policy standpoint, the CPPA (along with its remedial features) is prophylactic, designed to address ***potentially*** harmful conduct, and ongoing conduct. *See* D.C. Code § 28-3904 (barring unfair or deceptive trade practices "whether or not any consumer is in fact misled, deceived, or damaged thereby"). The CPPA is to be "construed and applied liberally to promote its purpose." D.C. Code Section 28-3901(c). As part of that liberal application, and reflecting the legislature's recognition that pursuing a CPPA action for misrepresentation is typically cost-prohibitive for individual consumers—*see* Comm. on Public Servs. and Consumer Affairs Memorandum on Bill 19-0581 (Nov. 18, 2012) (Alexander Report), at 6 (attached as Addendum A)—the legislature in 2012 amended the CPPA to create new avenues to standing for nonprofit and public interest organizations. The "stated purpose" of the amendments was to "provide explicit new authorization for non-profit organizations and public interest organizations to bring suit under the District's consumer protection statute." Alexander Report, at 1. The amendments were made to counter the "chilling effect"

of *Grayson v. AT&T Corp.*, 15 A.3d 219 (D.C. 2011), on litigation by nonprofit and public interest organizations: "The bill responds to *Grayson* by being more explicit about the types of suits the Council intends to authorize," Alexander Report 4, and by effecting "maximum standing" for public interest organizations. *Id.* at 6. Thus, the strong policy of the District is to protect ***its*** consumers by permitting public interest organizations like CAL to counter all forms of misrepresentation within the District, regardless of whether the misrepresentation already has injured those consumers.

In terms of its policy aims, California's UCL is different—meant to address established, direct harm, not on prophylactic actions on behalf of the general public. *Compare* CPPA Section 28-3905(k)(1)(D) (empowering public interest organization with nexus to consumer interests to bring action on behalf of those consumers' interests, including for harm not yet incurred) *with* UCL Section 17204 (limiting actions to persons who have "lost money or property as a result of the unfair competition"); *see also Cal. Med. Ass'n v. Aetna Health Inc.*, 14 Cal. 5th 1075, 1085-86 (Cal. 2023) (acknowledging that 2004 ballot proposition altered UCL to require plaintiffs to establish standing through injury from the noncompetitive practice). Moreover, the UCL does not specifically encourage nonprofit public interest organizations to bring claims where litigation would be cost-prohibitive for

individual consumers; the CPPA is intended to do just that. *See* Alexander Report at 6.

In other words, the CPPA applies a precautionary principle to prevent harm before it occurs, and it encourages nonprofit and public interest organizations to act on behalf of consumers, given that misrepresentation claims are often too expensive for individual consumers. The UCL, by contrast, seeks to remedy direct harms after they occur and makes no special provision for encouraging organizational representation to ensure greater access to justice for consumers. Hence, the policy of the District would be advanced by applying its law here, as CAL seeks to prevent future anticompetitive harm on behalf of District consumers at large. California's interest in remedying past anticompetitive harms is not implicated. The gap in policy concerns means any conflict of laws is "false," and the Superior Court's analysis should have ended there.

2. There was no true conflict because application of California law would still have allowed CAL to establish organizational standing.

Setting aside the policy concerns that obviate the conflict analysis altogether, the Superior Court erred by failing to consider whether the actual outcome would differ under the two jurisdictions' consumer protection regimes on the facts presented in CAL's Complaint. (*See* Order at 3-4; A352-53.) The Superior Court was correct that the two laws contain a clear textual difference that ***may*** (but does not

have to) result in diverging outcomes: the UCL requires that a plaintiff suffer injury-in-fact where the CPPA does not. *Compare* Cal. Bus. & Prof. Code § 17204 *with* D.C. Code § 28-3905(k)(1)(D); *ALDF*, 258 A.3d at 179. But California law ***does*** allow UCL actions under a theory of organizational/*Havens* standing, *see Havens Realty Corp. v. Coleman*, 455 U.S. 363, 378-79 (1982), and does so relatively liberally. *See, e.g.*, *Cal. Med. Ass'n,* 14 Cal. 5th at 1082-83 (organizational standing where plaintiff diverted staff time to combat harmful policy through investigation, preparing informational materials, engaging with affected parties, and lobbying); *ALDF v. LT Napa Partners LLC*, 234 Cal. App. 4th 1270, 1282-83 (Cal. App. 2015) (organizational standing for nonprofit challenging violation of foie gras ban based on expending resources supporting the ban, investigating defendant, and bringing information to authorities).

Although CAL's Complaint was not drafted with an eye toward California's UCL (because this is an action aimed at protecting ***District*** consumers), CAL nevertheless alleged facts sufficient to show that it would have organizational standing under that law. This obviates any conflict between the UCL and CPPA in this case, meaning District law should apply. *See Pietrangelo*, 68 A.3d at 714. California allows organizational standing under the UCL when, "in furtherance of a bona fide, preexisting mission, [the organization] incurs costs to respond to perceived unfair competition that threatens that mission." *Aetna*, 14 Cal. 5th at 1082-

83. Those expenses do not include spending on the litigation itself, *see id.*, but almost any other plausible expense spent fighting a defendant's unfair practice can suffice for injury-in-fact to challenge that practice under the UCL. Diversion of staff time and office resources to combat a defendant's misbehavior are an injury, since all organizations operate with finite resources, and so having to divert labor or funds necessarily means the organization could not spend those resources advancing its mission in other ways. *See id.* at 1096-97. Time spent investigating or spent lobbying authorities to act against a harm, for example, is such an expense. *See LT Napa Partners LLC*, 234 Cal. App. 4th at 1280. So too is diversion of staff time from other ongoing cases. *See, e.g.*, *S. Cal. Housing Rights Ctr. v. Los Feliz Towers Homeowners Ass'n*, 426 F. Supp. 2d 1061, 1063 (C.D. Cal. 2005). Even acts such as designing and disseminating literature to challenge a defendant's anticompetitive behavior can be an injury for UCL standing. *See Friends of the Earth v. Sanderson Farms*, 992 F.3d 939, 942 (9th Cir. 2021). The expense need not be high, just an "identifiable trifle" or "nontrivial amount." *Aetna*, 14 Cal. 5th at 1082-83.

Given plaintiff's mission, California's willingness to accept organizational standing for nonprofits spending resources to combat a wrong, and the allegations in the Complaint, there is no true conflict here. CAL is a nonprofit organization whose "bona fide, preexisting mission" is to address labor and other human rights violations. CAL works to inform the public about labor and sustainability issues in

a variety of industries through communications, research, and outreach. (Compl. ¶¶ 5, 20, 56; A7, A10, A12.) Widespread child labor in the açaí industry, and specifically the issue of porous supply chains and of misrepresentation to consumers about those problems, threatens that mission. As the Complaint alleges, CAL expended resources investigating Sambazon's policies, products, and representations. (Compl. ¶¶ 23-30; A11-13). Moreover, CAL intervened in disputes surrounding Sambazon's "Fair For Life" certification and how the process fails to protect against abuses sufficiently. (*Id.* ¶ 32 n.15; A13 (*See* Terrence McCoy, *Small children are climbing 60-foot trees to harvest your açaí*, Washington Post (Nov. 28, 2021), https://www.washingtonpost.com/world/2021/11/28/brazil-acai-child-labor/.) As noted, California can consider such expenditures to meet the UCL's injury-in-fact requirement. Therefore, the Superior Court erred in finding a true conflict of laws and turning to the Restatement factors.

In the alternative, this Court should remand for CAL to amend its Complaint to address its standing under California law and the lack of true conflict. CAL requested amendment if any portion of the pleading were found insufficient (Opp. at 15; A341), but the Superior Court's Order does not address this request. Given the allegations already in the complaint, and California law's willingness to confer organizational standing under the UCL, such amendment would likely be fruitful.

B. Even if there were a true conflict, the Superior Court erred in applying and balancing the four Restatement factors.

If a true conflict exists, a court applies the four Restatement factors to determine which jurisdiction has the most significant relationship to the dispute:

> (a) the place where the injury occurred,
>
> (b) the place where the conduct causing the injury occurred,
>
> (c) the domicil[e], residence, nationality, place of incorporation and place of business of the parties, and
>
> (d) the place where the relationship, if any, between the parties is centered.

Restatement (Second) of Conflict of Laws Section 145(2); *see Pietrangelo*, 68 A.3d at 714. The Superior Court found that two of those factors favored California: where the conduct causing the injury happened (factor two), and where the relationship was centered (factor four). The Superior Court found that one factor favored the District, where the injury itself occurred (factor one), while physical ties (factor three) favored neither forum. (Order at 4-6; A353-55.) On balance, the court concluded California had the greater interest, applied California law, and dismissed CAL's Complaint. (*Id.* at 6-7; A355-56.)

The Superior Court's determinations regarding the second and fourth factors—where the conduct causing the injury to occur happened, and where the relationship was centered—were error. Neither factor should have favored California, given the pleadings and the nature of the case as a nonprofit action in the

interest of District consumers. Instead, both factors should have been held to be neutral, leaving one factor favoring the District and three that were neutral. On that balance, even if a true conflict did exist (as set forth above, it did not), District law should have been applied. *See Jones v. Clinch*, 73 A.3d 80, 82 (D.C. 2013) (holding that if two jurisdictions both have interest in application of their laws, "the forum law will be applied ***unless*** the foreign state has a greater interest in the controversy").

Regarding the second factor (the place where the conduct causing the injury occurred), the Superior Court reasoned that a misrepresentation occurs where the defendant sets its practices and policies. (Order at 5; A354 (citing *Margolis v. U-Haul Int'l, Inc.*, 818 F. Supp. 2d 91, 105 (D.D.C. 2011).) The Superior Court concluded that this location was California, asserting that CAL "essentially concede[d] that Defendant creates its advertising materials in California," and thus weighing factor in favor of applying California law. (Order at 5; A354 (citing Opp. at 8; A334).)

But CAL made no such concession. In its Opposition, CAL argued that "the fact that Sambazon may create the deceptive advertisements in California is immaterial" (Opp. at 8; A334), language that the Superior Court cited (Order at 5; A354 (citing Opp. at 8; A334)). But there was no concession—the use of "may," and the framing of the sentence itself, make clear that this sentence was assuming ***for the sake of argument*** that Sambazon creates its messages in California. The Superior

Court read too much into what CAL said. The document actually at issue, CAL's Complaint, contains no allegations about where Sambazon makes its decisions regarding advertisements, packaging labels, and the like, or whether Sambazon has regional marketing divisions responsible for allowing the misrepresentations to enter the District. At no point has CAL asserted that Sambazon makes those decisions in California, and no discovery has been taken on the issue, because the case is at the pleadings stage. Indeed, Sambazon asserted in its motion to dismiss that the vast majority of its business is in Brazil and that it is incorporated in Delaware. (MTD at 1, 11; A26, A36.) CAL's Complaint, by contrast, alleges that Sambazon's marketing is directed at District consumers and that products labeled with the misrepresentations are widely sold in the District. (Compl. ¶¶ 22, 24, 58, 60; A11, A18.) With no allegations and certainly no discovery as to where these policies were made, or any concession that such policies are made in California, the Superior Court erred when it weighed this factor in California's favor. At the pleadings stage, "all inferences therefrom [ ] drawn in favor of the plaintiff." *Carlyle Inv. Mgmt. L.L.C. v. Ace Am. Ins. Co.*, 131 A.3d 886, 894 (D.C. 2016). The second factor should have favored neither jurisdiction.

The Superior Court also erred in finding that the fourth factor, "the place where the relationship, if any, between the parties is centered," favored California. The court reasoned that, since CAL's claims "arise out of the Defendant's marketing

decisions, which are made in California," that is where their relationship was centered. The court relied on *Krukas v. AARP, Inc.*, 376 F. Supp. 3d 1 (D.D.C. 2019), in which a plaintiff sued over misrepresentations involving an insurance policy the plaintiff had purchased. Although the plaintiffs in *Krukas* bought the policy in Louisiana and renewed it in Florida, the relationship between the parties was found to be centered in the District, because that was where the advertisements on which the plaintiff relied were made. (*See* Order at 5-6; A354-55 (citing *Krukas*, 376 F. Supp. 3d at 31).) The Superior Court's error was in applying this factor at all, because there is no preexisting relationship between the parties here; this case is about misrepresentations aimed at District consumers, not (necessarily) about products purchased. The Restatement asks the court to look to the "relationship, ***if any***" between the parties. Restatement Section 145(2) (emphasis added). As such, this factor is applicable only where "there is a relationship between the plaintiff and the defendant and when the injury was caused by an act done in the course of the relationship." *Am. Nat'l Ins. Co. v. JPMorgan Chase & Co.*, 164 F. Supp. 3d 104, 110 (D.D.C. 2016) (quoting Restatement [Second] of Conflicts of Laws, Section 145 comment e); *see also Levine*, 766 F.3d at 54 (holding that relationship between nonprofit and its members did not have a clear "center"). Other matters where the fourth factor has applied have involved wronged consumers with some kind of preexisting financial relationship with defendant. *See, e.g.*, *Krukas*, 376 F. Supp. at

9-10, 31 (buying insurance); *Margolis*, 818 F. Supp. 2d at 106 (renting a U-Haul). That was not the case here. The case does not depend on such a relationship, and so this factor should favor neither jurisdiction. *See Am. Nat'l Ins. Co.*, 164 F. Supp. 3d at 110.

And even if the fourth factor were germane here, the court would still have erred in incorrectly relying on CAL's purported "concession," discussed above, which the Superior Court used to find that the relationship was centered there. (Order at 5-6; A354-55 (citing Opp. at 8; A334).) Again, CAL made no such concession, and the court should not have concluded otherwise.

C. Questions of choice of law should be reserved for summary judgment.

As CAL argued below (Opp. at 7; A333), choice-of-law questions are "better suited to resolution on motions for summary judgment, after an opportunity for discovery." *Jones v. Lattimer*, 29 F. Supp. 3d 5, 10 n.3 (D.D.C. 2014) (citing *La Reunion Aerienne v. Socialist People's Libyan Arab Jamahiriya*, 477 F. Supp. 2d 131, 137 (D.D.C. 2007)). That is particularly true if the court thinks the allegations in the pleading are "insufficient to evaluate adequately the choice of law issues raised by the defendant's motion." *Id.* And of course, a tie goes to the runner: on a motion to dismiss, the court construes all facts, inferences, and uncertainties in the plaintiff's favor. *See Washkoviak*, 900 A.2d at 182.

The Superior Court's analysis was premature. As discussed, while CAL's allegations suffice to show it would have had standing under California's UCL on these facts, and thus that there was no true conflict, the complaint was not written toward that end, and so factual development would have permitted a more complete evaluation of the issue. Similarly, CAL did not plead where Sambazon makes its advertising and marketing decisions, or where Sambazon makes its decisions regarding the District, since CAL does not know. Those are issues of significant import in the Restatement analysis, particularly in a misrepresentation case. *See Krukas*, 376 F. Supp. 3d at 30; Restatement (Second) of Conflicts of Laws Section 145 and comments. Factual development would have aided in clarity.

Resolving this issue as a matter of law was unnecessary, and was error, given that factual development would have resolved lingering uncertainties. This question, to the extent the Restatement factors needed to be considered at all—as set forth above, CAL contends there was no true conflict necessitating consideration of the Restatement factors at all—should have been left for summary judgment.

* * *

There was no true conflict here. But if there had been, the second and fourth Restatement factors should have been neutral, not weighed in favor of applying California law. Properly weighing the factors leaves the first factor favoring District

law and the three other factors silent, so the Restatement factors favor applying District law.

And even if this Court were to find that one factor supports District law while another supports California law, an equal balance of factors would favor the District, CAL's chosen forum. At a bare minimum, the balance of the factors would be unclear—it would certainly not favor California. If the Restatement factors do not favor either jurisdiction, the forum jurisdiction's law should apply. *Levine*, 766 F.3d 39 at 55 (citing *Washkoviak*, 900 A.2d at 182).

II. Sambazon's additional arguments before the Superior Court ran counter to this Court's precedent and did not require dismissal of the Complaint.

The Superior Court disposed of this matter entirely under choice-of-law principles and did not reach Sambazon's two additional arguments for dismissal. (Order at 6-7; A355-56.) First, Sambazon argued that CAL failed to plead injury-in-fact to either itself or District consumers and therefore lacks standing. (MTD at 13-16; A38-41; *see also* Reply at 4; A346.) Second, Sambazon argued that CAL fails to state a claim because the Complaint does not identify any false or misleading statements, allege what "ethically sourced" means to District consumers, or allege facts proving child labor is actually occurring in Sambazon's supply chain. (MTD at 16-19; A41-44; *see also* Reply at 4-5; A346-47.) The first argument runs counter to

this Court's decisions and the words of the CPPA, and the second argument distorts the Complaint. Neither argument would have warranted dismissal.

A. CAL has standing to pursue this CPPA claim on behalf of DC consumers as a public interest organization and as a nonprofit.

First, CAL had standing to bring this action. Sambazon argued in the court below that CAL "does not plead injury in fact to, respectively, itself or District consumers." (MTD at 13; A38.) As this Court is aware from previous decisions, the CPPA provides for two types of standing for organizations like CAL, neither of which requires pleading injury-in-fact beyond what CAL already has pleaded (*see* Opp. at 1-6; A327-32). A public interest organization may, "on behalf of the interests of a consumer or a class of consumers, bring an action seeking relief from the use by any person of a trade practice in violation of a law of the District if the consumer or class could bring an action," provided the public interest organization has a "sufficient nexus to the interests involved of the consumer." D.C. Code § 28-3905(k)(1)(D). There is no additional requirement of injury-in-fact. *See ALDF v. Hormel Foods Corp.*, 258 A.3d 174, 179 (D.C. 2021); *see also* D.C. Code § 28-3904 (stating that CPPA violation occurs "whether or not any consumer is in fact misled, deceived, or damaged thereby"). Alternatively, a nonprofit "may, on behalf of itself or any of its members, or on any such behalf and on behalf of the general public, bring an action seeking relief from the use of a trade practice in violation of a law of the District"; there is no injury-in-fact requirement in that statute either. D.C. Code

§ 28-3905(k)(1)(C).[4] Subparagraph (C) permits nonprofits to sue on behalf of itself or its members, including "tester standing," based on the organization buying goods or services to test their qualities; *Havens*/organizational standing is also available. *Id.*; *see also Hormel*, 258 A.3d at 190, Alexander Report at 4-6.

Subsection (k)(1)(D) was "intended to confer maximum standing for public interest organizations, beyond what would be afforded in a federal case under a narrow reading of prior federal court decisions on federal standing." *Ctr. For Inquiry, Inc. v. Walmart, Inc.*, 283 A.3d 109, 114-15 (D.C. 2022); *cf. Beyond Pesticides v. Sargento Foods*, No. 2021 CA 000178 B, 2021 D.C. Super. LEXIS 11, at *8 (D.C. Sup. Ct. June 23, 2021) (noting that (k)(1)(D) was "intended to explicitly and unequivocally authorize the court to find that a public interest organization has standing . . . beyond what would be afforded under a narrow reading of prior DC court decisions, and beyond what would be afforded in federal case"). In an action brought under (k)(1)(D), specifically, the Superior Court has interpreted the statute and this Court's decisions to establish that "violations of the [CPPA] (for example, improper trade practices and misrepresentations in advertising) can by themselves confer standing on affected consumers, regardless of whether the consumers suffer

[4] A nonprofit is an entity that is not an individual and not operating for profit; a public interest organization is a nonprofit operating in whole or part to promote the rights of consumers. D.C. Code § 28-3901(14) & (15). There is no dispute that CAL meets both definitions.

further injury." *Organic Consumers Ass'n v. Gen. Mills, Inc.*, No. 2016 CA 6309 B, 2017 D.C. Super. LEXIS 4, at *6-7 (July 6, 2017) (citing *Grayson*, 15 A.3d at 250). Nor is a (k)(1)(D) plaintiff obligated to establish Article III standing. *See Hormel Foods*, 258 A.3d at 183.

The test for standing under (k)(1)(D) does not require injury. Instead, it poses three questions: is the plaintiff a "public interest organization," has a consumer or class of consumers that could sue in their own right been identified, and does the plaintiff have a sufficient nexus to those consumers' interests to adequately represent them. *See Hormel Foods*, 258 A.3d at 185 (citing D.C. Code § 28-3905(k)(1)(D)). CAL is a public interest organization. (Compl. ¶¶ 5, 20, 56; A7, A10, A17.) There is a class of District consumers capable of bringing this suit; the challenged misrepresentations are reaching District consumers (*id.* ¶¶ 6-7, 23-27, 29-30; A8, A11-12, A13), and that CPPA violation by itself confers standing on those consumers, *see, e.g.*, *Gen. Mills, Inc.*, 2017 D.C. Super. LEXIS 4, at *6-7. Finally, CAL has a strong nexus to the interests of consumers in revealing and avoiding child labor in corporate supply chains, because such labor abuses are CAL's primary focus (Compl. ¶ 56; A17) and CAL is suing to vindicate the rights of District consumers (*id.* ¶¶ 19-21, 62; A10-11, A18). Therefore, CAL has standing under (k)(1)(D). *See, e.g.*, *Ctr. For Inquiry, Inc.*, 283 A.3d at 115-17 (anti-pseudoscience public interest organization had standing to challenge misrepresentations regarding homeopathic

products); *Hormel Foods*, 258 A.3d at 185-87 (animal rights public interest organization had standing to challenge misrepresentations of factory-farmed meat as natural).

CAL also had standing to bring this claim under (k)(1)(C). Unlike (k)(1)(D), and while it does not have a statutory requirement to show injury, subsection (C) remains subject to the requirements of Article III standing, including some injury-in-fact. *See Hormel Foods*, 258 A.3d at 182 n.5. In addition to standing on behalf of its members or as a "tester" of goods and services, groups can establish organizational standing under Subparagraph (C). District courts apply organizational standing "in a wide range of circumstances." *D.C. Appleseed Ctr. for Law & Justice, Inc. v. D.C. Dep't of Ins.*, 54 A.3d 1188, 1205-10 (D.C. 2012). The organization's activities must be "impaired" in some way—which can include that the organization was needed to expend resources to combat a problem—and there must be a "direct conflict" between the defendant's conduct and the organization's mission. *Id.* at 1209. As discussed above, the allegations in the complaint show that CAL spent resources investigating Sambazon's representations, products, and reports, and CAL has been involved in advocacy around the Fair for Life certification, which Sambazon represents as evidence of how secure its supply chain is against abuses. (*See* Compl. ¶¶ 23-30, 32 n.5; A11-13.)

In sum, the allegations in the complaint established that CAL had standing to sue under both D.C. Code § 28-3905(k)(1)(D) and D.C. Code § (k)(1)(C).

B. CAL's Complaint states a CPPA claim.

Sambazon argued that CAL fails to state a claim because the Complaint does not identify any false or misleading statements, what "ethically sourced" means to District consumers, or facts proving child labor is actually occurring in Sambazon's supply chain. (MTD at 16-19; A41-44; *see also* Reply at 4-5; A346-47). The Superior Court did not reach this issue. Sabazon's contentions are wrong, and CAL's allegations suffice to state a claim under the CPPA. This ground is not an alternative basis for upholding the Superior Court's decision.

A claim that a trade practice is unfair turns on how that practice "would be viewed and understood by a reasonable consumer." *Ctr. for Inquiry, Inc.*, 283 A.3d at 120 (quoting *Pearson v. Soo Chung*, 961 A.2d 1067, 1075 (D.C. 2008)). This is usually a question of fact for a jury. Indeed, "if a plaintiff's interpretation of a challenged statement is not facially illogical, implausible, or fanciful, then a court may not conclude that it is nondeceptive as a matter of law." *Id.* (quoting *Bell v. Publix Super Mkts., Inc.*, 982 F.3d 468, 493 (7th Cir. 2020)).

CAL's Complaint identifies many deceptive statements made by Sambazon, both online and on its product packaging:

> "[B]y creating our own responsibly managed supply chain . . . we can establish a direct connection between our farmers and our consumers.

> [And that] [w]e oversee the traceability of the Organic Açaí, from the moment it is wild harvested and transported by riverboats, to its inspection by hand. . . .” (Compl. ¶ 10; A8.)
>
> “[A]ll Sambazon products are ethically sourced.” (*Id.* ¶ 23; A11.)
>
> “[Sambazon] care[s] for the people [it] works with.” (*Id.*; A11.)
>
> “Every time you enjoy [Sambazon’s Fair for Life Certified açaí products] you’re . . . directly giving back to family farmers who harvest wild Açaí” by driving a “Fair Wages & Labor Practices.” (*Id.* ¶ 24; A11.)
>
> “Each time you purchase a SAMBAZON product, you can feel good knowing you are helping the Amazon and its people . . . .” (*Id.* ¶ 25; A12.)
>
> “We believe in transparency. And we understand how important it is to know the food you and your family consume is of the highest quality, while also being ethically sourced, transported, and processed. By creating our own supply chain, we can oversee every step of its journey, from the moment our fair trade food is hand-harvested and transported by riverboats, to its inspection (by hand) and environmentally responsible processing. It’s our guarantee to you: From the palm of the tree to the palm of your hand.” (*Id.* ¶ 26; A12.)
>
> Sambazon’s Fair for Life certification means that it is following “rigorous standards” for “respect of human rights and fair working conditions.” (*Id.* ¶ 27; A12.)
>
> Sambazon’s Fair for Life certification means that it is “ensuring no child/slave labor occurs.” (*Id.* ¶ 28; A13.)

Despite what Sambazon asserts (MTD at 16-17; A41-42; Reply at 5; A347), these statements are neither puffery nor properly qualified. Instead, they consist of language like “all,” “every,” “each time,” “every step,” “from the moment . . . to,” “ensuring,” “no”—language with well-understood meanings that are both firm and

falsifiable. If a manufacturer says "all," consumers will rightly assume one means "all." *See e.g.*, *Saucier v. Countrywide Home Loans*, 64 A.3d 428, 442 (D.C. 2013) (noting that CPPA claims depend on how the challenged practice "would be viewed and understood by a reasonable consumer").

CAL's Complaint also alleges facts sufficient to show that these representations are false and/or misleading. CAL alleges that child labor is endemic to açaí harvesting such that avoiding its involvement would be almost impossible (Compl. ¶¶ 32-35; A13-14), and that two açaí merchants in Brazil have said that they sold açaí berries to ships supplying Sambazon with "no questions asked" (*id.* ¶ 40; A14). These two allegations serve to bring Sambazon's representations into question for a jury's determination. If açaí merchants are selling to Sambazon ships without oversight, Sambazon is not ensuring that it oversees the "traceability" of the berries from "the moment it is wild harvested and transported by riverboats, to its inspection," nor is it "oversee[ing] every step of its journey" or ensuring "all" its products are ethically sourced and that "no child/slave labor occurs." Sambazon cannot be meeting these promises that it is carefully overseeing its products at every stage of their lifecycle if merchants on the ground are saying otherwise.

The context of açaí harvesting being an industry rife with dangerous child labor adds a further level of misrepresentation. Sambazon makes unqualified, maximalist statements about its product sourcing, the social benefits a consumer

generates "every time" that consumer buys a Sambazon product, and how Sambazon "guarantee[s]" tree-to-consumer supervision of its supply chain. This confident language carries the implication that success has been achieved or at least is plausibly within Sambazon's reach. The reality of the industry makes this misleading: the Department of Labor added açaí to its list of goods made with child labor just two years ago, and reporting shows child labor has been and remains endemic. Sambazon's marketing suggests the company somehow manages to avoid these endemic problems, when its suppliers suggest otherwise. Sambazon is in actuality failing to fully control its supply chain, and an ordinary person reading Sambazon's representations would find them misleading if that person knew the underlying facts. Certainly, it cannot be said that arguing that District consumers would be misled by these representations is "illogical, implausible, or fanciful." *Ctr. for Inquiry, Inc.*, 283 A.3d at 120.

Sambazon's remaining arguments do not require a different result. It is irrelevant that CAL's Complaint does not specifically allege individual acts of child labor in Sambazon's supply chain (MTD at 19; A44; Reply at 4-5; A346-47); the false and misleading statements concern Sambazon's purported ***protections against*** the endemic child labor in the industry, which go well beyond what Sambazon can actually guarantee. Nor was it necessary for CAL to further define what consumers understand "ethical sourcing" to mean in order for that specific statement to be false

(MTD at 16-17; A41-42)—it is hardly fanciful to assert that consumers understand an ethically sourced product to mean the product was not made using child labor. Indeed, CAL pleads that consumers would stop buying products if they found out child labor was involved, because consumers understand child labor to be an ethical issue in supply chains (Compl. ¶¶ 48, 51; A11).

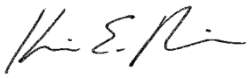
CAL properly stated a claim under the CPPA.

CONCLUSION

Based on all the foregoing, Plaintiff-Appellant Corporate Accountability Lab asks the Court to reverse the Superior Court and remand for further proceedings applying District of Columbia law, or in the alternative, with instructions to permit Corporate Accountability Lab to amend its Complaint, or in further alternative, to allow for discovery on issues of standing under California law.

Date: April 22, 2024

Respectfully submitted,



Kim E. Richman (D.C. Bar No. 1022978)
RICHMAN LAW & POLICY
1 Bridge Street, Suite 83
Irvington, NY 10533
Tel: (914) 693-2018
krichman@richmanlawpolicy.com

Attorney for Plaintiff-Appellant

District of Columbia
Court of Appeals

REDACTION CERTIFICATE DISCLOSURE FORM

Pursuant to Administrative Order No. M-274-21 (filed June 17, 2021), this certificate must be filed in conjunction with all briefs submitted in all cases designated with a "CV" docketing number to include Civil I, Collections, Contracts, General Civil, Landlord and Tenant, Liens, Malpractice, Merit Personnel, Other Civil, Property, Real Property, Torts and Vehicle Cases.

I certify that I have reviewed the guidelines outlined in Administrative Order No. M-274-21 and Super. Ct. Civ. R. 5.2, and removed the following information from my brief:

1. All information listed in Super. Ct. Civ. R. 5.2(a); including:

   - An individual's social-security number
   - Taxpayer-identification number
   - Driver's license or non-driver's' license identification card number
   - Birth date
   - The name of an individual known to be a minor
   - Financial account numbers, except that a party or nonparty making the filing may include the following:

     (1) the acronym "SS#" where the individual's social-security number would have been included;
     (2) the acronym "TID#" where the individual's taxpayer-identification number would have been included;
     (3) the acronym "DL#" or "NDL#" where the individual's driver's license or non-driver's license identification card number would have been included;
     (4) the year of the individual's birth;
     (5) the minor's initials; and
     (6) the last four digits of the financial-account number.

2. Any information revealing the identity of an individual receiving mental-health services.

3. Any information revealing the identity of an individual receiving or under evaluation for substance-use-disorder services.

4. Information about protection orders, restraining orders, and injunctions that "would be likely to publicly reveal the identity or location of the protected party," 18 U.S.C. § 2265(d)(3) (prohibiting public disclosure on the internet of such information); *see also* 18
U.S.C. § 2266(5) (defining "protection order" to include, among other things, civil and criminal orders for the purpose of preventing violent or threatening acts, harassment, sexual violence, contact, communication, or proximity) (both provisions attached).

5. Any names of victims of sexual offenses except the brief may use initials when referring to victims of sexual offenses.

6. Any other information required by law to be kept confidential or protected from public disclosure.

/s/ Kim E. Richman
Signature

23-CV-1020
Case Number(s)

Kim E. Richman
Name

4/22/24
Date

krichman@richmanlawpolicy.com
Email Address

Addendum A

COUNCIL OF THE DISTRICT OF COLUMBIA
COMMITTEE ON PUBLIC SERVICES AND CONSUMER AFFAIRS
COMMITTEE REPORT
1350 Pennsylvania Avenue, NW, 20004

TO: All Councilmembers

FROM: Councilmember Yvette M. Alexander, Chairperson, Committee on Public Services and Consumer Affairs

DATE: November 28, 2012

SUBJECT: Report on Bill 19-0581, the "Consumer Protection Amendment Act of 2012"

The Committee on Public Services and Consumer Affairs to which Bill 19-0584, the "Consumer Protection Amendment Act of 2012" was referred, reports favorably thereon and recommends its adoption by the Council.

CONTENTS

I. BACKGROUND & COMMITTEE REASONING

The stated purpose of Bill 19-0581, the "Consumer Protection Amendment Act of 2012," is to amend Title 28 of the District of Columbia Code to revise the definition of consumer; to prohibit the willful use of falsehood, innuendo, or ambiguity; to prohibit representing that a transaction confers rights that it does not; to provide explicit new authorization for non-profit organizations and public interest organizations to bring suit under the District's consumer protection statute; to recognize a right of action for consumers that purchase products for the purpose of testing and evaluating those products; and to establish a unit pricing requirement for consumer commodities.

In 2000, the Council amended the Consumer Protection Procedures Act (CPPA) to allow non-profit public interest organizations and the private bar to bring litigation in the public interest. In an effort to provide a more robust consumer protection enforcement structure, the 2000 amendments permitted persons (including non-profit organizations and other entities) to sue "on behalf of themselves or the general public" when the act had been violated. *See* D.C.

Code § 28-3905 *et seq*. Accordingly, in years past, both public interest organizations and the private bar have acted as "private attorneys general" in the District of Columbia by suing on behalf of members of the general public that would have been injured by a given unlawful trade practice, and have obtained great relief for District of Columbia citizens.[1]

However, in 2011, the Court of Appeals rendered a decision in *Grayson v. AT & T Corp*, 15 A.3d 319 (D.C. 2011) (*en banc*) that limited standing to persons that had suffered an actual injury, or an "injury-in-fact." The court stated that it had followed the injury-in-fact standing requirement applied by the Supreme Court under Article III of the Constitution as a prudential matter even though the District of Columbia courts are not subject to Article III—and the Court of Appeals was unwilling to determine that the CPPA overrode these requirements in the absence of an explicit indication of intent to do so by the Council of the District of Columbia. While *Grayson* did not discuss litigation brought by non-profit public interest organizations, the decision had a chilling effect on non-profit public interest organizations litigating cases in the public interest.[2]

Bill 19-581 clarifies that non-profit organizations and public interest organizations may act as private attorneys general for the public under circumstances that ensure the organization has a sufficient stake of its own to pursue the case with appropriate zeal. Those clarifications provide the courts with a variety of ways to consider standing options that satisfy the prudential standing principles for non-profit and public interest organizations acting as private attorneys general, while encouraging the courts to be receptive to other approaches that rely on different means of ensuring a sufficient stake in the outcome of the case.

Questions raised by public interest advocates[3] and other judicial decisions have also demonstrated the need for additional clarifying amendments in B19-581 pertaining to the types of violations that are actionable under the act, each of which is discussed below.

Lastly, Bill 19-581 introduces a new Unit Pricing requirement for the District of Columbia retailers that will make it easier for consumers to compare prices of goods by basing the cost of the goods on a unit of measure. The Unit Pricing scheme was derived from a model act drafted by the National Institute of Standards and Technology, which many industry trade associations had a part in creating. The model act has been adopted by nineteen states, including Maryland.

A. ***Section 28-3901 – Definitions and Purposes***

The bill makes a number of revisions and additions to the definitions in section 28-3901(a).

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[1] For example, the National Consumers League, a consumer organization founded in 1899, brought suit on behalf of the general public against Kellogg Company for making false health claims on its cereal boxes. *See, e.g., Nat'l Consumers League v. Kellogg Co.*, No. 2009 CA005211 B (D.C. Super. Ct.). As a result of that litigation, Kellogg agreed to donate $200,000 to food-based charities and programs and 8,000 cases of cereal to local D.C. food banks and charities.

[2] *See generally* Attachment 3, Testimony from October 11, 2012 Hearing on B19-0581, the "Consumer Protection Procedures Act of 2012."

[3] *Id.*

Section 28-3901(a)(2) is revised to make a number of clarifications to the definition of "consumer." First, it clarifies the distinctions between the noun and adjective uses of the term. Second, in conjunction with revisions to 28-3905(k)(1) regarding who can bring action, it broadens the definition to include those who purchase or receive for the purpose of testing.

Third, it incorporates key elements of the definition of "consumer" as used in the Magnuson Moss Warranty Act, 15 U.S.C. § 2301(1) (2006), by replacing "primarily" with "normally" and specifying that the acquisition of the good or service cannot be for the purposes of resale. Using "normally" in the adjective definition will remove any necessity to prove what portion of a consumer's use of the good or service is devoted to personal, household, or family purposes, so long as one of those purposes can be shown to be among a consumer's normal uses of the good or service. Adding "other than for purposes of resale" to the noun definition ensures that the other changes to the definition do not inadvertently open up the CPPA to suits regarding business-to-business disputes or to suits against consumers by sellers, lessors, and other suppliers. It should be noted that this restriction is not intended to exclude personal investments (such as securities or collectibles) from the definition, even though they may have been acquired for eventual resale. It is the intention of the Committee that private actions under the CPPA remain confined to those brought by consumers as that term is generally understood, and as refined and expanded here by these amendments.

Section 28-3901(a) is also revised to add definitions of "non-profit organization" and "public interest organization," new terms in section 28-3905(k)(1) that describe who can bring private actions in the circumstances described.

The bill amends section 28-3901(c) to clarify that the CPPA establishes an enforceable right to truthful information from merchants about consumer goods and services that are or would be purchased, leased, or received in the District of Columbia. This is intended to more explicitly illuminate that the kinds of harm actionable under the CPPA include the provision of untruthful or misleading information, whether or not measurable economic damages demonstrably result to any particular consumer. In part, this also responds to standing questions raised in *National Consumers League v. General Mills*, 680 F. Supp. 2d 132, 135 (D.D.C. 2010) and *Equal Rights Center v. Post Properties, Inc.*, 657 F. Supp. 2d 197, 201 (D.D.C. 2009) regarding whether an interest in truthful information is a sufficient stake upon which to base a claim. This change affirms that such an interest is indeed sufficient and codifies language found in *Grayson v. AT&T*, 15 A.3d 219, 249 (D.C. 2011) (en banc) ("The basis for Mr. Grayson's standing and the manifestation of his alleged injury in fact is similar to that in *Havens, supra*. There, the Court determined that § 804(d) of the Fair Housing Act[94] 'established an enforceable right to truthful information concerning the availability of housing,' *id.* at 373, 102 S. Ct. 1114, and thus, plaintiffs were injured in fact and had standing to sue because of 'deprivation of information about housing availability,'), and *Shaw v. Marriott Int'l Inc.*, 605 F.3d 1039, 1042 (2010) ("[t]he deprivation of . . . a statutory right [to be `free from improper trade practices'] may constitute an injury-in-fact sufficient to establish standing, even though the plaintiff `would have suffered no judicially cognizable injury in the absence of [the] statute.").

B. *Section 28-3905 – Complaint Procedures*

The bill revises section 28-3905(k)(1), which provides a private right of action for violations of the CPPA and other consumer protection laws, to provide further clarity in the wake of the D.C. Court of Appeals' decision in *Grayson*. In *Grayson*, the court held that the Council, in its 2000 amendments to the CPPA, had not clearly demonstrated that it had altered the court's jurisprudence regarding the scope of who has standing to bring legal action. The court's prior holdings on standing for the courts of the District of Columbia, established under Article I of the U.S. Constitution, had looked to the standing limits established for federal courts under Article III, specifically the requirement that plaintiffs must have their own injury-in-fact as the basis for bringing action. The DC Court of Appeals held in *Grayson* that, if the Council had intended to alter these prior holdings, it would have made that intent more explicit in the statute or in the legislative history.

Although *Grayson* involved suit by individuals, in its wake, uncertainty has arisen regarding whether its holding also applies to suits by non-profit organizations, including those organized and operating to promote the interests of consumers, whom the 2000 amendments to the CPPA were designed to encourage to act as private attorneys general on behalf of those interests.

The bill responds to *Grayson* by being more explicit about what kinds of suits the Council intends to authorize. The bill would replace the single standing provision, which *Grayson* interpreted more narrowly with respect to suits by individuals, with four separate, independent standing provisions. Each provision illuminates the differing situations in which consumers or organizations acting on behalf of consumer interests might have standing to sue under the act.

i. *Consumers*

New subsection (k)(1)(A) provides a right of action for consumers. It is not intended to alter any right a consumer currently has to bring an action, whether individually, jointly with other consumers, as a private attorney general on behalf of the general public, as the representative of a class of consumers, or otherwise.

ii. *Testers*

New subsection (k)(1)(B) provides a right of action for consumers who act as product or service testers. Such consumers need not actually have been misled by a misrepresentation regarding a consumer good or service to have suffered an injury-in-fact giving rise to an actionable claim. As the amendment to section 3901(c) makes clear, the CPPA establishes an enforceable right to truthful information from merchants in their marketing of consumer goods and services. Subparagraph (B) authorizes these individuals to bring an action on their own behalf, for the good or service they purchased or received for the purpose of testing it without running afoul of a smattering of decisions denying standing based on notions of "self-inflicted harm" or "manufactured standing." They may also bring an action on behalf of themselves and

the general public, so as to better enable them to obtain relief in scope that fully addresses the prohibited practice.

Such "tester standing" has a long and storied history in our nation's civil rights jurisprudence. In *Havens Realty v. Coleman*, 455 US 363 (1982), the Supreme Court upheld the standing of an organization seeking to enforce nondiscrimination laws of Title VIII of the Civil Rights Act of 1968, the Fair Housing Act, 42 U.S.C.§ 3604, when that organization sent "testers" into a housing complex inquiring about rental properties. In affirming the statutory injury of the black tester, the *Havens* court determined that the Fair Housing Act conferred standing to plaintiff via his statutory right to truthful information in the context of housing accommodations. Similarly, the D.C. Court of Appeals has held with regard to a D.C. civil rights statute that "the statutory violation and accompanying injury exist without respect to the testers' intentions in initiating the encounters." *Molovinsky v. Fair Employment Council of Greater Washington, Inc.*, 683 A.2d 142, 146 (D.C. 1996) (analyzing D.C. Human Rights Act).

Like the testers in *Havens* and *Molovinsky,* D.C. consumers must be allowed to offer to purchase, or actually purchase, products or services with the intent of determining whether those products or services are what they claim to be.

iii. *Non-profit Organizations*

New subsection (k)(1)(C) provides a similar right of action to that in subparagraph (B), for non-profit organizations who test consumer goods or services. As with an individual who tests goods or services, a testing organization that has not actually been misled may nevertheless have standing based on a violation of its right to truthful information about the goods or services it tests. The non-profit organization may sue on behalf of its own interests, or on behalf of the interests of any of its members. And as with subparagraph (B), the non-profit organization may sue on behalf any of the above interests as well as the interests of the general public, to better enable it to obtain the full relief that ends unlawful practices.

But new section (k)(1)(C) goes further than standing for testers. Indeed, it is intended to clarify that the 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. *E.g., D.C. Appleseed Center for Law and Justice, Inc. v. District of Columbia Department of Insurance, Securities, and Banking*, 2012 *D.C. App. LEXIS* 473 (D.C. 2012). Such standing may be based on injury to the organization's activities or injury to any of the organization's members. For example, a public interest organization may bring a CPPA action seeking relief against violations that significantly impair its ability to effectively serve consumers. *Cf. Havens Realty Corp. v. Coleman*, 455 U.S. 363, 379 (1982) (standing based on impairment of housing counseling services). Or a membership organization, such as an association of persons of retirement age, may bring a CPPA action seeking relief against violations that harm consumers who are members of the organization. *Cf. Hunt v. Washington State Apple Advertising Comm'n*, 432 U.S. 333 (1977) (associational standing on behalf of apple growers).

This section also addresses the decision in *National Consumers League v. General Mills* (680 F. Supp. 2d 132 (D.D.C. 2010)) and *D.C. Appleseed Center for Law and Justice, Inc., v. District of Columbia Dept. of Ins., Securities, and Banking, Respondent, et al.* (--A.3d --, 2012 WL 4006425 (D.C. 2012)). In *General Mills*, the Court held that an organization does not have standing if the alleged violation only sets back the organization's abstract social interests or frustrates its objectives. *See General Mills*, 680 F. Supp. 2d at 135 ("challenging conduct like General Mills' alleged mislabeling is the very purpose of consumer advocacy organizations…[General Mills'] conduct does not hamper NCL's advocacy effort; if anything it gives NCL an opportunity to carry out its mission."). However, in *Appleseed*, the court held that the organization had standing because the defendant had interfered with one of its many projects, specifically, the enhancement of the availability of affordable healthcare.

iv. *Public Interest Organizations*

New subsection (k)(1)(D) responds most directly to *Grayson* and the Committee's desire to explicitly state the maximum of the Council's intentions for maximum standing in enacting the 2000 amendments to the CPPA. Subparagraph (D) is intended to reach, for persons who qualify as public interest organizations under section 3901(a)(15), the full extent of standing as may be recognized by the District of Columbia courts. This may include bases for standing that the D.C. courts would find not reached by subparagraph (C). And it may include bases for standing that the D.C. courts have not yet had occasion to recognize at all.

For example, the Committee recognizes that public interest organizations – non-profit organizations that are organized and operating in whole or in part for the purpose of promoting interests of consumers – can have a special suitability for promoting those interests through court action in appropriate circumstances, and may be able to do so in situations where it is not feasible for the affected consumers to do so personally.

Subparagraph (D) is intended to explicitly and unequivocally authorize the court to find that a public interest organization has standing beyond what would be afforded under subparagraphs (A)-(C), beyond what would be afforded under a narrow reading of prior DC court decisions, and beyond what would be afforded in a federal case under a narrow reading of prior federal court decisions on federal standing.

Subparagraph (D) is not without important limits, however. In addition to the threshold requirement that only a public interest organization may bring action under (D), (D)(ii) provides that an action brought under (D) shall be dismissed if the court determines that the public interest organization does not have sufficient nexus to the interests involved of the consumer or class to adequately represent those interests. This enables the court to ensure that, as it considers the application of standing principles to new situations, standing is recognized in those circumstances where the public interest organization has a sufficient stake in the action – whether or not the stake falls squarely within the stakes recognized in prior cases – to be relied upon to pursue the action with the requisite zeal and concreteness.

C. *Section 28-3904(f-1) – Additional Unlawful Act*

The bill also adds a new section 28-3904(f-1) which prohibits the willful use, in written representations, of falsehood, innuendo, or ambiguity as to a material fact. It has come to the Council's attention that in many instances, 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. In such scenarios, courts have inconsistently found materiality. *Cf. 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, U.S. v. Philip Morris USA, Inc.*, 566 F.3d 109 (D.C. 2009) ("companies similarly spent years confusing the public about the link between cigarettes and cancer.") and *Schwab v. Philip Morris USA, Inc.*, 449 F. Supp. 2d 992, 1130-31 (E.D.N.Y. 2006) (same) *with Dahlgren v. Audiovox Commc'ns Corp.*, 2010 WL 2710128, at *18 (D.C. Superior July 8, 2010). New 28-3904(f-1) seeks to address this inconsistency and provide a cause of action when merchants bury the truth and leave false impressions without outright stating falsehoods.

D. ***Section 28-3904(e-1) – Additional Unlawful Act***

The bill adds to 28-3904 (e-1) as a violation if a merchant represents that a transaction confers or involves rights, remedies, or obligations which it does not have or involve, or which are prohibited by law. According to testimony from the National Consumers League and other consumer advocates in the District of Columbia, it is a common for merchants to insert illegal terms into contracts and then seek their enforcement. This amendment is intended to address that practice.

E. ***New Chapter 53 – Unit Pricing Act***

Finally, the bill adds a unit pricing measure, which is based in part on the Department of Commerce's National Institute of Standards and Technology ("NIST") model act. Currently, nineteen (19) states and two (2) territories have unit pricing laws or regulations in force. Eleven (11) of these have mandatory unit pricing provisions: Connecticut, Maryland, Massachusetts, New Hampshire, New Jersey, New York, Oregon, Puerto Rico, Rhode Island, Vermont and the Virgin Islands. *See* NIST Handbook 130, Chapter II (2013) (available at http://www.nist.gov/pml/wmd/pubs/hb130-13.cfm).

According to the Food Marketing Institute, an industry trade association, three quarters of all grocery shoppers rely on unit pricing to make comparisons. Unit pricing provides the price of good based on cost per unit of measure, and is calculated by dividing the price of the product by an accepted unit of measurement (e.g. grams, liters). It allows customers to compare the value of different brands, sized packages, types and products, by permitting customer to use one consistent measure. It also reduces the need for excessive packaging that can prove deceptive.

Unit pricing benefits retailers by promoting sales and helping customers compare prices of the same product between two stores, enabling business to showcase that they have the lowest prices and the best value. Ultimately, it helps consumers to make a more educated purchase decision that promotes health competition among businesses.

Many stores voluntarily provide unit pricing, but in an inconsistent manner and using different units of measurement for similar products or only selectively providing pricing for certain brands in a product category. A survey done by the National Consumers League found that unit pricing is not uniform in the District of Columbia. Among seven stores surveyed, NCL found that each store had different labeling system, there was a wide variation in the units used, and many pricing calculations were incorrect. This can mislead consumers comparing products or prices between stores.

The Unit Pricing Act adopts the exemptions found at Md. Code Ann., Com. Law § 14-101.

II. LEGISLATIVE CHRONOLOGY

November 15, 2011	Bill 19-0581, the "Consumer Protection Amendment Act of 2012," is introduced by Councilmember Cheh, co-sponsored by Chairman Mendelson, and referred to the Committee on Public Services and Consumer Affairs.
November 25, 2011	Notice of intent to act on Bill 19-0581 is published in the D.C. Register.
September 14, 2012	Notice of public hearing is published in the D.C. Register.
October 11, 2012	Committee on Public Services and Consumer Affairs holds a public hearing on Bill 19-0581
November 28, 2012	Committee on Public Services and Consumer Affairs marks-up Bill 19-0581.

III. SUMMARY OF TESTIMONY

The Committee on Public Services and Consumer Affairs held a public hearing on Bill 19-0581, the "Consumer Protection Amendment Act of 2012" on October 11, 2012. Please see the attached testimony.

IV. FISCAL IMPACT

According to the Fiscal Impact Statement prepared by the Office of the Chief Financial Officer dated November 20, 2012, funds are sufficient in the FY 2013 through FY 2016 budget and financial plan to implement Bill 19-581.

V. SECTION BY SECTION ANALYSIS

Section 1: Amends Chapter 39 of Title 28 of the District of Columbia Code to revise the definition of consumer, add additional unlawful trade practices, and authorize

non-profit organizations, consumers, public interest organizations, consumer testers to sue under the act, and recognizes the right to truthful information.

Section 2: Establishes a Unit Pricing Act in Chapter 53 of Title 28 of the District of Columbia Code that creates a Unit Pricing requirement for the District of Columbia.

Section 3: Fiscal Impact Statement. Standard Council language.

Section 4: Effective Date. Establishes the effective date by stating the standard 30-day Congressional review language.

VI. IMPACT ON EXISTING LAW

B19-0581 will impact existing law by amending Chapter 39 of Title 28 of the District of Columbia Code to amend the definitions, standing, and unlawful practices provisions.

VII. COMMITTEE ACTION

On November 28, 2012, in an additional Committee meeting, the Committee on Public Services and Consumer Affairs met to consider Bill 19-581, the "Consumer Protection Amendment Act of 2012". The meeting was called to order in room 120 at 12:17 p.m., and Bill 19-581 was the second matter on the agenda. After the determination of a quorum, with Chairperson Alexander, Councilmembers Bowsers, Cheh, and Graham, and Chairman Mendelson present, Chairperson Alexander presented the committee print and report. Councilmember Graham made a motion to add back in language located on page 2, lines 21-23 and page 3, lines 1-2 from the committee print draft that had been removed. Councilmember Graham and Chairperson Mendelson voted "aye," and Chairperson Alexander, Councilmember Bowser, and Councilmember Cheh voted "no." Chairperson Alexander subsequently moved the committee print and report for a vote with leave for the staff to make necessary technical and editorial changes. Both the committee print and report were unanimously approved. The meeting was adjourned at 1:30 p.m.

VIII. ATTACHMENTS

1. B19-0581 as introduced.
2. Hearing Notice and Witness List.
3. Testimony.
5. Committee Print of B19-0581.
5. Fiscal Impact Statement.

Councilmember Mary M. Cheh

A BILL

IN THE COUNCIL OF THE DISTRICT OF COLUMBIA

Councilmember Mary M. Cheh introduced the following bill, which was referred to the Committee on _____.

To amend title 28 of the District of Columbia Code to revise the definition of consumer; to prohibit the willful use of falsehood, innuendo, or ambiguity; to prohibit representing that a transaction confers rights that it does not; to prohibit unfair business practices; to explicitly authorize non-profit organizations to bring suit under the District's consumer protection statute; to create a right of action for non-profits organizations whose public interest activities have been perceptibly impaired; and to create a unit pricing requirement for consumer commodities.

BE IT ENACTED BY THE COUNCIL OF THE DISTRICT OF COLUMBIA, That this act may be cited as the "Consumer Protection Amendment Act of 2011".

TITLE I. Consumer Protection Amendment Act.

Sec. 101. Short Title.

This title may be cited as the "District of Columbia Consumer Protection Procedures Amendment Act of 2011".

Sec. 102. Chapter 39 of title 28 is amended as follows:

(a) Section 3901 is amended as follows:

(1) Paragraph (2) is amended by striking the phrase "without exception, which is primarily for personal, household, or family use;" and inserting the phrase

"without exception, which is distributed in commerce and which is normally used for personal, household, or family purposes; consumer goods or services include those which consumers normally use for personal, household or family use, even if those products are used both for personal and commercial purposes;" in its place.

(2) A new paragraph (14) is added to read as follows:

"(14) "Non-profit" means an organization or institution that is exempt from federal income tax under the provisions of 26 U.S.C.S. § 501(c)(3), (4), (5), (10), (11), (19), or (20), and that meets the requirements of subchapter I of Chapter 3 of Title 29.".

(b) Section 3904 is amended as follows:

(1) By adding a new subsection (f-1) to read as follows:

"(f-1) Use innuendo or ambiguity as to a materials fact, which has a tendency to mislead;".

(2) By adding a new subsection (r)(6) to read as follows:

"(6) Representing that a transaction confers or involves rights, remedies, or obligations which it does not have or involve, or which are prohibited by law;".

(3) By adding a new subsection (ii) to read as follows:

"(ii) Engage in any unfair business act or practice, which occurs when the practice:

"(1) Offends established public policy or when the practice is immoral, unethical, oppressive, unscrupulous, or substantially injurious to consumers, and the practice is not outweighed by countervailing benefits to consumers; or

"(2) Threatens an incipient violation of an antitrust law, or violates the policy or spirit of one of those laws because its effects are comparable to or the same as a violation of the law, or otherwise significantly threatens or harms competition.".

(c) Section 3905(k) is amended to read as follows:

"(k)(1)(A) A person, including a corporation, may bring an action under this chapter seeking relief from the use by any person of a trade practice in violation of a law of the District.

"(B) A non-profit may bring an action under this chapter on behalf of its members or the general public if it can demonstrate that a particular member of the non-profit or of the general public would have had standing, regardless of whether or not the organization itself has suffered or would suffer an injury in fact.

"(C) A non-profit may bring an action under this chapter on its own behalf if it can establish that its public interest activities have been perceptibly impaired. The term "perceptibly impaired" shall include diversion of resources and interference with institutional efforts.

"(2) Any claim under this chapter shall be brought in the Superior Court of the District of Columbia and may recover or obtain the following remedies:

"(A) Treble damages, or $ 1,500 per violation, whichever is greater, payable to the consumer;

"(B) Reasonable attorney's fees;

"(C) Punitive damages;

"(D) An injunction against the use of the unlawful trade practice;

"(E) In representative actions, additional relief as may be necessary to restore to the consumer money or property, real or personal, which may have been acquired by means of the unlawful trade practice; or

"(F) Any other relief which the court deems proper.".

TITLE II. Unit Pricing Act.

Sec. 201. Short Title.

This title may be cited as the "Unit Pricing Protection Act of 2011".

Sec. 202. Definitions.

For the purposes of this title, the term:

(1) "Combination packages" shall mean a package intended for retail sale, containing two or more individual packages or units of dissimilar commodities.

(2) "Commodity" shall mean any food, drug, cosmetic, or other article, product, or commodity of any kind or class which is:

(A) Customarily produced for sale at retail for consumption by individuals for purposes of personal care or in the performance of services ordinarily performed in or around the household; and

(B) Usually consumed or expended in the course of that use or performance other than by wear or deterioration from use.

(3) "Person" shall mean both plural and the singular and includes individuals, partnerships, corporations, companies, societies, and associations.

(4) "Unit Price" or "unit pricing" shall mean the retail price of an item expressed in dollars and cents per unit.

(5) "Variety packages" shall mean package intended for retail sale, containing two or more individual packages or units of similar, but not identical, commodities. Commodities that are generically the same, but that differ in weight, measure, volume, appearance, or quality, are considered similar but not identical.

Sec. 203. Application.

Except for random and uniform weight packages that clearly state the unit, each person who sells, offers, or displays for sale a consumer commodity at retail shall provide the unit price information in the manner prescribed herein.

204. Terms for Unit Pricing.

The declaration of the unit price of a particular commodity in all package sizes offered for sale in a retail establishment shall be uniformly and consistently expressed in terms of:

(a) Price per kilogram or 100 grams, or price per pound or ounce, if the net quantity of contents of the commodity is in terms of weight.

(b) Price per liter or 100 milliliters, or price per dry quart or dry pint, if the net quantity of contents of the commodity is in terms of dry measure or volume.

(c) Price per liter or 100 milliliters, or price per gallon, quart, pint, or fluid ounce, if the net quantity of contents of the commodity is in terms of liquid volume.

(d) Price per individual unit or multiple units if the net quantity of contents of the commodity is in terms of count.

(e) Price per square meter, square decimeter, or square centimeter, or price per square yard, square foot, or square inch, if the net quantity of contents of the commodity is in terms of area.

Sec. 205. Exemptions.

The following categories of commodities shall be exempt from this act:

(1) Commodities packaged in quantities of less than 28 grams (1 ounce) or 29 milliliters (1 fluid ounce) or when the total retail price is 50 cents or less.

(2) When only one brand of a particular commodity in only one size is offered for sale in a particular retail establishment.

(3) Variety packages; and

(4) Combination Packages.

Sec. 206. Pricing.

(a) The unit price shall be to the nearest cent when a dollar or more. If the unit price is under a dollar, it shall be listed:

(1) To the tenth of a cent, or

(2) To the whole cent.

(b) The retail establishment shall have the option of using (a)(1) or (2), but shall not implement both methods.

(c) The retail establishment shall accurately and consistently use the same method of rounding up or down to compute the price to the whole cent.

Sec. 207. Presentation of Price.

(a) In any retail establishment in which the unit price information is provided in accordance with the provisions of this act, that information may be displayed by means of a sign that offers the unit price for one or more brands and/or sizes of a given commodity, by means of a sticker, stamp, sign, label, or tag affixed to the shelf upon which the

commodity is displayed, or by means of a sticker, stamp, sign, label, or tag affixed to the consumer commodity.

(b) Where a sign providing unit price information for one or more sizes or brands of a given commodity is used, that sign shall be displayed clearly and in a non-deceptive manner in a central location as close as practical to all items to which the sign refers.

(c) If a single sign or tag includes the unit price information for more than one brand or size of a given commodity, the following information shall be provided:

(1) The identity and the brand name of the commodity.

(2) The quantity of the packaged commodity; provided, that more than one package size per brand is displayed.

(3) The total retail sales price.

(4) The price per appropriate unit, in accordance with section 203.

Sec. 208. Uniformity.

(a) If different brands or package sizes of the same consumer commodity are expressed in more than one unit of measure, the retail establishment shall unit price the items consistently.

(b) When metric units appear on the consumer commodity in addition to other units of measure, the retail establishment may include both units of measure on any stamps, tags, labels, signs, or lists.

Sec. 209. Civil penalties.

Any person who violates any provision of this act, or any regulation promulgated pursuant to this act, may be assessed a civil penalty not to exceed $500 for each violation.

Sec. 210. Rules.

The Mayor may issue rules to effectuate the provisions of the act.

Sec. 211. Effective Date.

This title shall take effect on January 1, 2013.

Sec. 301. Fiscal impact statement.

The Council adopts the fiscal impact statement in the committee report as the fiscal impact statement required by section 602(c)(3) of the District of Columbia Home Rule Act, approved December 24, 1973 (87 Stat. 813; D.C. Official Code § 1-206.02(c)(3)).

Sec. 401. Effective date.

This act shall take effect following approval by the Mayor (or in the event of veto by the Mayor, action by the Council to override the veto), a 30-day period of Congressional review as provided in section 602(c)(1) of the District of Columbia Home Rule Act, approved December 24, 1973 (87 Stat. 813; D.C. Official Code § 1-206.02(c)(1)), and publication in the District of Columbia Register.

Council of the District of Columbia
Committee on Public Services and Consumer Affairs
Notice of Public Hearing

1350 Pennsylvania Ave., N.W., Suite 6 Washington, D.C. 20004

COUNCILMEMBER YVETTE M. ALEXANDER, CHAIRPERSON
COMMITTEE ON PUBLIC SERVICES AND CONSUMER AFFAIRS ANNOUNCES A PUBLIC HEARING

on

Bill 19-0581, the "Consumer Protection Amendment Act of 2011"

on

Thursday, October 11, 2012
10:00 a.m., Room 120, John A. Wilson Building
1350 Pennsylvania Avenue, N.W.
Washington, D.C. 20004

Councilmember Yvette M. Alexander, Chairperson of the Committee on Public Services and Consumer Affairs, announces a public hearing on Bill 19-0581, the "Consumer Protection Amendment Act of 2011". The public hearing will be held at 10:00 a.m. on Thursday, October 11, 2012 in Room 120 of the John A. Wilson Building.

The stated purpose of Bill 19-0581 is to prohibit the willful use of falsehood, innuendo, or ambiguity; to prohibit representing that a transaction confers rights that it does not; to prohibit unfair business practices; to explicitly authorize non-profit organizations to bring suit under the District's consumer protection statute; to create a right of action for non-profit organizations whose public interest activities have been perceptibly impaired; and to create a unit pricing requirement for consumer commodities.

Those who wish to testify should contact Melanie Williamson, Legislative Counsel, at (202) 741-2112 or via e-mail at mwilliamson@dccouncil.us, and provide their name, address, telephone number, organizational affiliation and title (if any) by close of business, Tuesday, October 9, 2012. Persons wishing to testify are encouraged, but not required, to submit 15 copies of written testimony. If submitted by the close of business on Tuesday, October 9, 2012, the testimony will be distributed to Councilmembers before the hearing. Witnesses should limit their testimony to four minutes; less time will be allowed if there are a large number of witnesses.

If you are unable to testify at the hearing, written statements are encouraged and will be made a part of the official record. Copies of written statements should be submitted either to Ms. Williamson or to Ms. Nyasha Smith, Secretary to the Council, Room 5 of the Wilson Building, 1350 Pennsylvania Avenue, N.W. Washington, D.C. 20004. The record will close at 5:30 p.m. on Thursday, October 25, 2012.

COUNCIL OF THE DISTRICT OF COLUMBIA
PUBLIC HEARING
COMMITTEE ON PUBLIC SERVICES AND CONSUMER AFFAIRS
Witness List
1350 Pennsylvania Avenue, N.W., Washington, D.C. 20004

COUNCILMEMBER YVETTE M. ALEXANDER, CHAIRPERSON
COMMITTEE ON PUBLIC SERVICES AND CONSUMER AFFAIRS ANNOUNCES A PUBLIC HEARING

on

Bill 19-0581, the "Consumer Protection Amendment Act of 2011"

on

Thursday, October 11, 2012
10:00 a.m., Room 120, John A. Wilson Building
1350 Pennsylvania Avenue, N.W.
Washington, D.C. 20004

Witness List

Public Witnesses

1.	Michael Sindram	Public Witness
2.	Sally Greenberg	Executive Director, National Consumers League
3.	George Slover	Member, Steering Committee, Antitrust and Consumer Law Section of the District of Columbia Bar
4.	Jonathan K. Tycko	Attorney, Tycko & Zavareei LLP

Executive Witnesses

5.	Bennett Rushkoff	Chief, Public Advocacy Section, Public Interest Division, Office of the Attorney General

1. **Landlord-Tenant: The CPPA Should Provide Tenants with a Means for Challenging Unfair and Deceptive Practices in the Context of Landlord-Tenant Relations.**

We suggest that the CPPA be amended to make clear that it applies to unfair and deceptive practices in the landlord-tenant context, just like any other consumer transaction. At present, the Act specifically forbids the District from enforcing CPPA violations in the context of landlord-tenant relations. *See* D.C. Code § 28-3903(c). The D.C. Court of Appeals has interpreted this provision to make the CPPA wholly inapplicable in the landlord-tenant context, even where the enforcing party is not the District but rather a private, injured person. *See Gomez v. Independence Mgmt.*, 967 A.2d 1276 (2009).

As a result of this limitation, tenants have been without any meaningful way to challenge a host of unlawful trade practices by their landlords. For example, it is common practice for some landlords to impose illegal charges and fees on tenant accounts, including excessive late fees, attorney's fees (prohibited by law), court costs (also prohibited by law, absent a judgment), and unwarranted charges for repairs. It is also common for landlords to include illegal clauses in their standard leases, including provisions waiving the right to a jury trial or obligating the tenant to pay legal fees. The other CPPA exemptions involve transactions that are either adequately covered by a different comprehensive scheme (like utility regulation) or that involve delicate constitutional issues (like religious freedom or free speech). Those rationales do not apply to deceptive and unfair charges and fees, because the existing substantive and procedural law in landlord-tenant cases does not provide tenants with an effective remedy.

As the law currently stands, a tenant's only way of challenging these practices is to refuse to pay the charges or fees, thereby prompting a lawsuit for eviction. This is a risky strategy that places the tenant's housing needlessly and unfairly in jeopardy. And many tenants, understandably, are simply unwilling to gamble with their homes in this way. Instead of fighting, they elect to pay these illegal charges and fees simply to keep their accounts in good standing.

A substantial number of other jurisdictions, including Massachusetts, New Jersey, New York, North Carolina, Vermont, Washington, and Wisconsin, allow parties to apply their consumer protection statutes to landlord-tenant relationships. There is no reason the District should be different.

Recommendation: To remedy this gap in the law, we suggest an amendment to the statute that simply strikes § 28-3903(c)(2)(A), which has been interpreted as prohibiting application of the CPPA to landlord-tenant relations.

2. **Standing: The CPPA Should Proactively Prevent Consumer Injuries by Allowing Non-profit Organizations to Seek Injunctive Relief to Protect Consumers from Unfair and Deceptive Practices.**

We support Councilmember Cheh's proposal to amend the law to explicitly authorize non-profit organizations to sue under the District's CPPA, as the Council intended to do when it enacted the CPPA. In *Grayson v. AT&T Corp.*, 15 A.3d 219, 237 (D.C. 2011), the D.C. Court of Appeals concluded that the language of the CPPA was not clear enough to override the Court's customary reliance on the standing rules applicable to federal courts under Article III of the Constitution. We think that some minor changes to the language of the pending bill would help achieve the Council's stated intent and thus provide an opportunity to stop unfair and deceptive practices before consumers are hurt.

CENTER FOR
Science IN THE
Public Interest
The nonprofit publisher of
Nutrition Action Healthletter

October 9, 2012

Yvette Alexander
Chair
Committee on Public Services & Consumer Affairs
Office of Ward 7
1350 Pennsylvania Avenue, NW Suite 6
Washington, DC 20004

Re: Testimony on the Consumer Protection Amendment Act of 2011
(Bill 19-0581)

Dear Ms. Alexander:

The Center for Science in the Public Interest ("CSPI") submits written testimony in support of The Consumer Protection Amendment Act of 2011 (Bill 19-0581).

Statement of Interest

CSPI is a national non-profit consumer advocacy organization dedicated to advocating for government policies and corporate practices that promote healthy diets, prevent deceptive marketing practices, and ensure that science is used to promote the public welfare. CSPI's Litigation Project, a non-profit law firm, was created in 2004, when consumer protection at the federal level by the FDA, FTC, and USDA was at a low point. To fill the void left by the inactive government agencies, we use state and federal courts to protect the public's welfare. CSPI's Litigation Project provides experienced lawyers to represent plaintiffs in a variety of state and federal lawsuits that champion consumer rights and consumer protections. CSPI's Litigation Project has obtained many binding settlements resulting in honest labeling of ingredients and halting deceptive marketing. Litigation, or the threat of litigation, has spurred many companies to change their marketing practices, including removing artificial trans fats from their foods and reducing the marketing of junk foods to kids. Litigation has thus effectuated real, positive change by resulting in outcomes that incrementally improve the public's health and welfare.

***Grayson v. AT&T Corp.*:[1] Misapprehension of the Intent of D.C.'s Consumer Protection Procedures Act ("DC CPPA")**

The District of Columbia Court of Appeals' decision in *Grayson* effectively rewrote the DC CPPA by inserting into the law a standing requirement that the Council never intended. The Consumer Protection Act of 2000 specifically allowed public interest organizations to bring suit, in the public interest, for injunctive relief and disgorgement of illegal proceeds associated with illegal

[1] 15 A.3d 219 (D.C. 2011) (en banc).

trade practices. Contrary to the express intent of the Council, the D.C. Court of Appeals decision in *Grayson* found that the Council did not intend to eliminate the standing requirement, that a plaintiff suffer injury-in-fact, in order to state a claim under the DC CPPA. In so holding, the D.C. Court of Appeals countermanded the clear decision of the Council to extend standing in consumer protection cases to representative plaintiffs, such as non-profit advocacy organizations. The decision thus effectively (and erroneously) impairs the ability of organizations that use litigation, or the threat of litigation, to vigorously defend consumer rights from challenging corporate misbehavior in court.

The Consumer Protection Amendment Act of 2011 would aid in consumer protection by clarifying the Council's intent to eliminate the court-imposed requirement that a plaintiff suffer injury-in-fact to have standing to bring a claim under the DC CPPA. The Amendment explicitly and unequivocally provides that a non-profit may bring an action on behalf of its members or the general public in one of two ways. A non-profit can file suit if it demonstrates that a particular member of the non-profit or of the general public would have had standing, regardless of whether or not the organization itself has suffered or would suffer an injury-in-fact.[2] Alternatively, the Act also provides that a non-profit can file suit if it can establish that its public interest activities have been perceptibly impaired (e.g., the diversion of resources and interference with institutional efforts).[3] These important, even essential, amendments will better able non-profit advocacy organizations to do the important work of consumer protection — work that is often one of the first to be cut during government budgetary downsizing.

As the law stands now, consumers only have recourse after suffering an injury-in-fact — after they have already suffered injury. Because of the court decision, there is now no mechanism by which ongoing illegal trade practices can be stopped before harm to a consumer. Often the injury-in-fact in consumer cases is the cost of a consumer good – usually no more than a small monetary sum (e.g., the cost of a food or supplement in lawsuits brought by CSPI). A lone consumer is less likely to act. Non-profits frequently receive complaints from members or the public, and see patterns of deceptive marketing through continued monitoring of the marketplace. Also, nonprofits are better equipped and able than individuals to correct wrongs perpetrated on the American public by overzealous corporate entities.

An example of the DC CPPA's current interpretation impairing public interest activities is *Center for Science in the Public Interest v. Burger King Corp.*[4] In *Burger King*, CSPI filed suit on behalf of itself, its D.C. members, and on behalf of the interests of the general public to stop Burger King's use of trans fats in its products – which CSPI alleged was a public health hazard and a misrepresentation in violation of D.C. CPPA. Extending the holding in *Grayson* to non-profits, the Court of Appeals dismissed the lawsuit, thus summarily silencing CSPI's voice and chilling its future advocacy efforts. In a second case,

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[2] Proposed amendment, section 3905(k)(1)(B).
[3] Proposed amendment, section 3905(k)(1)(C).
[4] Civil Case No. 07-1092 (RJL), Memorandum Opinion, (February 19, 2008).

CSPI v. MillerCoors[5], CSPI was forced to agree to dismiss because of the direct effect of *Grayson*.

Non-profit advocacy organizations dedicated to working for the consumer interest, and the public good, are uniquely positioned to provide necessary protections to D.C. consumers and to act where and when government may not. **Passage of** the Consumer Protection Amendment Act of 2011 would clarify the Council's intent and thus enable non-profit advocacy organizations to continue their work to protect consumer rights and effectuate change where governmental entities might not.

Conclusion

For the foregoing reasons, CSPI wholeheartedly supports The Consumer Protection Amendment Act of 2011 and urges its passing.

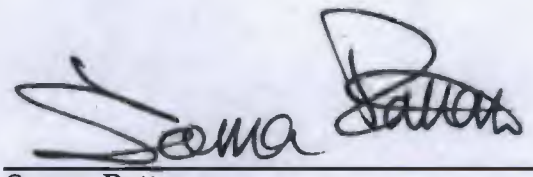
Respectfully submitted,

Michael F. Jacobson, Ph.D.
Executive Director

Stephen Gardner
Director of Litigation

Seema Rattan
Assistant Director of Litigation

By:



Seema Rattan

[5] Civil Case No. 2008-CA-006605 B, Unopposed Motion to Dismiss with Prejudice, (March 2, 2011), and Order of Dismissal with Prejudice, (March 11, 2011).

DISTRICT OF COLUMBIA BAR
Antitrust and Consumer Law Section

The Consumer Protection Act Amendment of 2011
http://dcclims1.dccouncil.us/images/00001/20111116102513.pdf

Report with Recommendations, Prepared for Submission as Testimony For the Hearing Scheduled For October 11, 2012: **COMMITTEE ON PUBLIC SERVICES AND CONSUMER AFFAIRS PUBLIC HEARING on Bill 19-0581, the "Consumer Protection Amendment Act of 2011"**

by the Antitrust and Consumer Law Section of the D.C. Bar

Steering Committee: Don A. Resnikoff, Tracy D. Rezvani, Co-Chairs

Principal Authors: Tracy D. Rezvani, Don Resnikoff, George Slover, Wendy Weinberg

STANDARD DISCLAIMER

The views expressed herein represent only those of the Antitrust and Consumer Law Section of the District of Columbia Bar and not those of the D.C. Bar or its Board of Governors.[1]

Introduction

As explained in the Notice of Hearing, the stated purpose of Bill 19-0581 is [1] to prohibit the willful use of falsehood, innuendo, or ambiguity; to prohibit representing that a transaction confers rights that it does not; and to prohibit unfair business practices; [2] to explicitly authorize non-profit organizations to bring suit under the District's consumer protection statute; to create a right of action for non-profit organizations whose public interest activities have been perceptibly impaired; and [3] to create a unit pricing requirement for consumer commodities.

The Section offers comments on all three parts of the proposed legislation.

Standing for Nonprofit Organizations

We support the proposal to explicitly authorize non-profit organizations to bring suit under the District's consumer protection statute and to create a right of action for non-profit organizations. We agree that it is important to solidify the ability of non-profits to bring

[1] The Section's steering committee was presented with a copy of the legislation and this proposed public statement. A vote was taken on September 24, 2012. The statement was adopted without dissent on a vote if six-to-zero with three abstentions.

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representative actions under the Consumer Protection Procedures Act. Non-profits bring unique perspective and insights to consumer protection through their representation of the populations that they serve. They generally seek to advance the public welfare and may be able to bring actions on sensitive issues when it is politically difficult for an Attorney General to do so. Since they are not motivated by profit, they also have the ability to bring actions that may address a substantial harm, but that would not necessarily bring sufficient monetary return to individual plaintiffs or their attorneys to make private suit practical or realistic.

The D.C. Consumer Protection Act of 2000 included an amendment to the CPPA to allow non-profit public interest organizations and the private bar to bring litigation in the public interest. The District of Columbia Court of Appeals in *Grayson v. AT&T Corp.*[2] imposed the prudential requirement on the *individual* plaintiffs in that case that they must suffer an injury-in-fact to have standing to bring a claim. While the *Grayson* decision did not discuss litigation brought by non-profit public interest organizations, the decision has had a chilling impact on litigation by non-profits.

The proposed bill more clearly defines the statutory authorization for suits to be brought by non-profit organizations acting as private attorneys general. Pursuant to the legislation, such suits may proceed in D.C. Superior Court. Section 3901(a)(14) defines "non-profit organization" in relation to federal non-profit law under 26 U.S.C. § 501(c).

Relevant language of the proposed legislation includes the following:

(B) A non-profit may bring an action under this chapter on behalf of its members or the general public if it can demonstrate that a particular member of the non-profit or of the general public would have had standing, regardless of whether or not the organization itself has suffered or would suffer an injury in fact.

(C) A non-profit may bring an action under this chapter on its own behalf if it can establish that its public interest activities have been perceptibly impaired. The term "perceptibly impaired" shall include diversion of resources and interference with institutional efforts.

We understand that the two provisions are disjunctive and not conjunctive, meaning that they provide a nonprofit two separate, independent avenues for a private right of action for non-profit organizations under the statute.

While the local D.C. courts are not Constitutional courts, they do have authority to determine prudential standing requirements with regard to non-profit organizations.

[2] 15 A.3d 319 (D.C. 2011) (en banc).

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We do not think that imposition by the D.C. Courts of prudential standing limits on suits by individuals is a reason to oppose the legislation. We view the legislation as avoiding what we regard as inappropriate application of standing requirements articulated in *Grayson*. As such, we expect that non-profits can draw complaints that serve the public interest and where possible, include legally sufficient standing allegations. But the overarching point, and our reason for supporting the proposed legislation, is that in light of the case law with regard to standing and remedies, we think the proposed Act will appropriately facilitate enforcement actions by non-profits that will be of significant benefit to the public.

In summary, we anticipate that the proposed D.C. legislation that permits and encourages non-profits to bring cases in the public interest will confer a substantial public benefit in the form of useful consumer protection and other litigation. The need for non-profits to act as private attorneys general is great in D.C., where administrative enforcement of the consumer laws by D.C. government has been eliminated, and consumer enforcement by the Attorney General's office has been curtailed.

Unit pricing requirement for consumer commodities.

Unit pricing provides the price of goods based on cost per unit of measure, making it easier for consumers to compare prices. It is calculated by dividing the price of the product by an accepted unit of measurement depending on the type of product (e.g., grams, liters). The proposed language is based on a model act created by the National Conference of Weights and Measures and is supported by the Department of Commerce's National Institute of Standards and Technology.[3] It should be noted that many industry trade associations worked with NIST to create the model act.

We understand that as of August 2011, there are nineteen states and two territories that have adopted unit pricing,[4] including Maryland.[5] We have spoken with an official in the Division of Consumer Protection of Maryland's Office of the Attorney General, who informed us that there have been no enforcement actions within the state since its enactment of a similar law. This suggests that unit pricing laws are easily implemented, that compliance is easy to maintain, and that the law will not materially impact resources at the District of Columbia's Office of the Attorney General.

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[3] National Institute of Standards and Technology, NIST Handbook 130: Uniform Law and Regulations in the Areas of Legal Metrology and Engine Fuel Quality as Adopted by the 96th National Conference on Weights and Measures 2011, at 135-40 (2012), *available at* http://www.nist.gov/pml/wmd/pubs/upload/2012-h130-final2.pdf.

[4] National Institute of Standards and Technology, NIST Handbook 130: Uniform Law and Regulations in the Areas of Legal Metrology and Engine Fuel Quality as Adopted by the 96th National Conference on Weights and Measures 2011, at 10-13 (2012), *available at* http://www.nist.gov/pml/wmd/pubs/upload/2012-h130-final2.pdf.

[5] Md. Code Ann., Com. Law § 14-101 to -107.

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Unit pricing allows customers to compare value between different brands, different sized packages, different package types, and different products. It allows consumers to identify the best value and use one consistent measure to sort through various package sizes, brands, and substitute products. It also provides a better indicator of the price premium being charged for a brand—a premium that may be perceived by consumers as an indicator of higher quality. Unit pricing places the focus on the pricing of the product rather than the brand name. It also helps reduce any incentive among sellers to use excessive packaging as a means of making quantity appear larger than it is.

Unit pricing also benefits retailers by promoting sales and private label products, and reducing pricing errors. With a uniform unit pricing system, consumers can also compare prices of the same product between stores. This will benefit businesses by providing a way to showcase that they have the lowest prices and best value. Unit pricing is consistent with the premise of the federal Fair Packaging and Labeling Act, that informed consumers are a crucial component of the market.[6] Unit pricing enables consumers to make a more educated purchase decision and promotes healthy competition among businesses.

Creating a uniform system for unit pricing eliminates inconsistencies that arise through voluntary use. Many stores voluntarily provide unit pricing, but this is done in an inconsistent manner, including using different units of measurement for similar products, or selectively providing unit pricing, for only certain brands in a product category. This can mislead consumers when they compare products, or compare prices between stores. Instituting a uniform unit pricing system will eliminate this confusion by mandating consistent and accurate labels for all products and stores.

Legislative provisions prohibiting unfair business practices

The amendment also proposes additions of specific language to the D.C. CPPA to harmonize it with consumer statutes in the federal system and in other states. For example, the amendment clarifies the definition of "consumer" when used as an adjective and brings it in line with the definition under the Magnuson-Moss Warranty Act.[7] Additionally, there are several proposed additions to section 3904 that are designed to provide improved protections for consumers:

- 3904(f-1) Use innuendo or ambiguity as to a material fact, which has a tendency to mislead

Proposed new section 3904(f-1) borrows language from the Kansas Consumer Protection Act and is similar to language found in the Hawaii Uniform Deceptive Trade

[6] 15 U.S.C. § 1451 (2006).
[7] 15 U.S.C. § 2301(1) (2006).

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Practices Act. This prevents businesses from mischaracterizing their goods or services and preying on consumers who are expecting to receive something different. Kansas courts clarify that the intent needed is the intent to engage in the act, not the intent to violate the statute.[8]

- 3904(r)(6) Representing that a transaction confers or involves rights, remedies, or obligations which it does not have or involve, or which are prohibited by law

Proposed new section 3904(r)(6) adds an additional factor for courts to consider in determining whether a term or provision is unconscionable. This language is similar to language found in the consumer protection statutes of Alaska, California, Tennessee, Texas, and Guam. The proposed addition strengthens consumers' ability to receive the benefit of the bargain, and disincentivizes merchants from attempting to trick consumers into believing they are going to receive something different than what is actually being provided. It also prevents merchants from including terms that cannot come into effect because they are prohibited by law. This subsection allows courts to evaluate transactions to determine whether the merchant represented that the deal contained terms that will not take effect.

- 3904(ii) Engage in any unfair business act or practice, which occurs when the practice: (1) Offends established public policy or when the practice is immoral, unethical, oppressive, unscrupulous, or substantially injurious to consumers, and the practice is not outweighed by countervailing benefits to consumers; or (2) Threatens an incipient violation of an antitrust law, or violates the policy or spirit of one of those laws because its effects are comparable to or the same as a violation of the law, or otherwise significantly threatens or harms competition.

Proposed new section 3904(ii) seeks to prohibit merchants from engaging in unfair acts or practices, which are defined as occurring in two circumstances. Paragraph (1) prohibits acts that offend established public policy, or are immoral, unethical, oppressive, unscrupulous, or substantially injurious to consumers. This language originates with an FTC rule prohibiting certain advertisements that neither violate laws nor are deceptive but nonetheless are unfair.[9] The language has been adopted by courts in analyzing consumer statutes in Hawaii,[10] Louisiana,[11] Massachusetts,[12] and North Carolina[13] as a way to define an unfair trade practices. Oklahoma uses the phrase to

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[8] *York v. InTrust Bank, N.A.*, 962 P.2d 405, 421 (Kan. 1998).

[9] 29 Fed. Reg. 8324, 8355 (July 2, 1964); *see FTC v. Sperry & Hutchinson Co.*, 405 U.S. 233, 244 n.5 (U.S. 1972).

[10] *Balthazar v. Verizon Haw., Inc.*, 123 P.3d 194, 202 (Haw. 2005).

[11] *Monroe Med. Clinic, Inc. v. Hosp. Corp. of Am.*, 622 So.2d 760, 781 (La. Ct. App. 1993).

[12] *Mass. Farm Bureau Fed'n, Inc. v. Blue Cross of Mass., Inc.*, 532 N.E.2d 660, 664 (Mass. 1989).

[13] *John v. Phoenix Mut. Life Ins. Co.*, 266 S.E.2d 610, 621 (N.C. 1980).

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statutorily define an unfair trade practice.[14] The proposed bill also contains a provision that these prohibited practices must not be outweighed by countervailing benefits to consumers. This produces a balancing effect in which only those practices that have an ultimate negative impact on consumers are prohibited.[15]

Paragraph (2) prohibits unfair competition amongst merchants, in light of the negative impact anticompetitive conduct has on consumers. The prohibition applies not only to antitrust violations, but also to practices that otherwise significantly harm or threaten to harm competition. These practices harm consumers by undermining competitive markets. This language originated in California case law that interpreted the state's Unfair Competition Law.[16]

Conclusion

The Antitrust and Consumer Law Section of the District of Columbia Bar encourages the passing of this bill *in toto*.

[14] Okla. Stat. tit. 15, § 752(14).
[15] *Camacho v. Auto. Club of S. Cal.*, 48 Cal. Rptr. 3d 770, 779 (Ct. App. 2006).
[16] *Cel-Tech Commc'ns, Inc. v. L.A.Cellular Tel. Co.*, 973 P.2d 527, 544 (Cal. 1999).

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Statement of Bennett Rushkoff
Chief, Public Advocacy Section
Office of the Attorney General for the District of Columbia

Before the Committee on Public Services and Consumer Affairs
Yvette M. Alexander, Chairperson
Regarding Bill 19-581:
Consumer Protection Amendment Act of 2011

Office of the Attorney General
District of Columbia

October 11, 2012

10:00 a.m., Room 120
John A. Wilson Building
1350 Pennsylvania Avenue, NW
Washington, D.C.

Good morning Chairman Alexander, and members and staff of the Committee on Public Services and Consumer Affairs. I am Bennett Rushkoff, Chief of the Public Advocacy Section in the Office of the Attorney General (OAG) for the District of Columbia. On behalf of the Executive, I am pleased to offer testimony today on Bill 19-581, the Consumer Protection Amendment Act of 2011.

Through the Public Advocacy Section, the OAG is responsible for enforcement of the District's primary consumer protection law – the Consumer Protection Procedures Act (CPPA). This is carried out through investigations of suspected violations and filings of actions in D.C. Superior Court. The CPPA authorizes the OAG to seek court injunctions and to recover civil penalties and consumer restitution. In addition, the CPPA allows consumers to bring lawsuits on behalf of themselves and the general public to stop unlawful trade practices, including violations of the debt collection law. Consumers can recover $1,500 per violation, plus punitive damages and attorney's fees.

Title I of the bill offers a number of amendments intended to strengthen the CPPA. Title II of the bill would provide the District with its own unit pricing law.

We do support the pro-consumer intent behind the bill. Periodic review and amendment of the CPPA is necessary if the law is to fulfill its purpose of

"assur[ing] that a just mechanism exists to remedy all improper trade practices and deter the continuing use of such practices."[1]

However, the Executive cannot support Bill 19-581 in its current form. Many of the provisions of Bill 19-581, while well intended, do not add significantly to the consumer protections in the existing law and risk making the law unnecessarily vague and confusing, and thus subject to unnecessary collateral litigation. We lay these various problems in the bill out in detail below. The Executive is willing to work with the Committee and stakeholders on amendments to the CPPA that would provide additional protections for consumers.

Section 102(a)

The CPPA applies generally to "consumer goods and services," and the term "consumer" is defined broadly in the current law.[2] Section 102(a)(1) of Bill 19-581 would amend the definition of "consumer" to describe anything

> without exception, which is distributed in commerce and which is normally used for personal, household, or family purposes; consumer goods and services include those which consumers normally use for personal, household or family use, even if those products are used both for personal and commercial purposes;

The apparent intention of the amendment is to clarify that the definition of "consumer" applies even to goods and services that are not used *exclusively* for

[1] D.C. Code § 28-3901(b)(1).

[2] *See* D.C. Official Code § 28-3901(a)(2). "Consumer" means a person who does or would purchase, lease (from), or receive consumer goods or services, including a co-obligor or surety, or a person who does or would provide the economic demand for a trade practice; as an adjective, "consumer" describes anything, without exception, which is primarily for personal, household, or family use.

"personal, household, or family purposes." However, the amendment would introduce unnecessary ambiguity in the area of business-to-business transactions.

Right now, it is clear that the CPPA does not apply to business-to-business transactions in the ordinary course because it applies only to a good or service that is or would be purchased "primarily for personal, household, or family use." The proposed amendment would have the CPPA apply to a good or service that is "distributed in commerce and which is normally used for personal, household, or family use." Arguably, the amendment would expand the CPPA's coverage to include any business-to-business transaction that involves goods that are normally used by consumers, such as a transaction involving a wholesaler's supply of goods to a retail store.

Section 102(b)(1)

The heart of the CPPA is a list of 35 unlawful trade practices.[3] These include some very broad proscriptions, including one making it a CPPA violation for a merchant to "misrepresent as to a material fact which has tendency to mislead," and another making it a CPPA violation for a merchant to "fail to state a material fact if such failure tends to mislead."[4]

Section 102(b)(1) of Bill 19-581 would introduce a new unlawful trade practice: the "[u]se of innuendo or ambiguity as to a material[] fact, which has a

[3] *See* D.C. Official Code § 28-3904.
[4] *See* D.C. Official Code § 28-3904(e) and (f).

tendency to mislead." This amendment is not needed. The misleading use of "innuendo or ambiguity" necessarily involves a misleading failure to state a material fact, and a misleading failure to state a material fact is already a violation of the CPPA. Indeed, the misleading use of "innuendo or ambiguity" is a classic example of a misleading failure to state a material fact. Almost invariably, when a "failure to state a material fact" is misleading, it is because there has been an express or implied representation that must be qualified or clarified to avoid misleading consumers.

Section 102(b)(2)

The CPPA's list of unlawful trade practices includes "mak[ing] or enforc[ing] unconscionable terms or provisions of sales or leases."[5] Five factors, among others, are to be considered in determining whether a term or provision is unconscionable. Each of these factors involves considerations other than whether there has been the kind of deception that would mislead a reasonable consumer. For example, a term or provision is more likely to be found unconscionable if there is a "gross disparity" between the price charged by the merchant and the market value received by the consumer.[6] The idea behind unconscionability is that there are some transactions that, even if presented to consumers in a non-misleading

[5] *See* D.C. Code § 28-3904(r).
[6] *See* D.C. Code § 28-3904(r)(3).

manner, are so unbalanced in favor of the merchant, and so unfair to consumers, that they do not belong in the marketplace.

Section 102(b)(2) of Bill 19-581 would introduce a new factor to be used in applying the prohibition of "unconscionable terms or provisions"; whether there is a representation that the "transaction confers or involves rights, remedies, or obligations which it does not have or involve, or which are prohibited by law." Unlike the existing unconscionability factors, this factor would require consideration of whether the merchant had made a misleading representation. This amendment is confusing and would be counter-productive. By blurring the distinction between violations based on misleading statements or omissions, and violations based on unconscionable terms or provisions, this proposed language would undermine the idea that unconscionability does not require a showing that what the merchant did was objectively misleading in any way.

Section 102(b)(3)

Section 102(b)(3) of Bill 19-581 would make it a violation of the CPPA to engage in an "unfair" business practice, including a practice that is (1) "immoral" or "unethical" and (2) "not outweighed by countervailing benefits to consumers." We believe that a general unfairness standard would introduce too much uncertainty if it were added to the CPPA's list of unlawful trade practices. We can agree that merchants should not engage in "immoral" or "unethical" practices. However, a general prohibition against "immoral" or "unethical" conduct is too

vague and it would not provide merchants with adequate guidance as to what is expected of them. This proposed amendment does not belong in the CPPA.[7]

In addition, Section 102(b)(3) of Bill 19-581 would make it a violation of the CPPA to violate "the policy or spirit" of an antitrust law. Once again, the proposed language is too vague and the Council should not amend the CPPA to include such language. Merchants are responsible for complying with the antitrust laws, and the laws themselves are construed in light of the policies behind them. Merchants cannot be expected to comply with the "policy or spirit" behind an antitrust law.

Section 102(c)

Section 102(c) of Bill 19-581 would give certain non-profit organizations standing to bring CPPA actions (i) on behalf of their members, (ii) on their own behalf when a trade practice has "perceptibly impaired" the organizations' public interest activities, or (iii) on behalf of the general public.

To have standing to bring a claim in court, a party must normally allege that it has suffered, or is in imminent risk of suffering, a concrete injury-in-fact. In federal courts, "injury-in-fact" is treated as a constitutional requirement that cannot be changed by statute. Two of the three prongs in Section 102(c) articulate established variations of this traditional standing requirement. As the first prong

[7] The general unfairness standard proposed by Section 102(b)(3) of Bill 19-581 might belong in a law that authorized a specialized agency to conduct rulemakings in the area of trade regulation, including rulemakings outlawing specific business practices determined to be "immoral" or "unethical." However, as previously stated, it does not belong in the CPPA.

asserts, there situations in which membership organizations may assert legal claims based on injuries to their members, as opposed to injuries to the organizations themselves.[8] In addition, as the second prong asserts, a public interest organization generally has standing to oppose an unlawful practice that has "perceptibly impaired" the organization's activities, even if the unlawful practice is directed only at the population served by the organization.[9]

What I am calling the "third prong" of Section 102(c) appears to respond to a recent decision of the D.C. Court of Appeals, *Grayson v. AT&T Corp.*,[10] which held that the CPPA – notwithstanding its broad language granting a private right of action to a "person" who is "acting for the interests of itself, its members, or the general public" – should not be construed as dispensing with normal standing requirements. This prong would authorize a nonprofit organization – without any showing of injury to itself or its members – to bring an action on behalf of the general public if the nonprofit can show that a member of the general public would have standing to bring the action.

Expanding standing to sue under the CPPA in the way contemplated by Bill 19-581 is unnecessary and could lead to extended litigation over whether the D.C. courts should alter their usual standing requirements. In its *Grayson* decision, the Court of Appeals stated: "Regardless of the words used in different cases to

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[8] *See Hunt v. Washington State Apple Advertising Comm'n*, 432 U.S. 333 (1977) (discussing "associational standing").
[9] *See Havens Realty Corp. v. Coleman*, 455 U.S. 363 (1982).
[10] 15 A.3d 219 (2011).

articulate our standing requirement . . . we have said since the creation of the current District of Columbia court system that we will follow the federal constitutional standing requirement."[11] The "constitutional standing requirement" to which the Court referred includes injury or threatened injury to the plaintiff. Therefore, by dispensing with normal standing requirements when certain nonprofit organizations bring CPPA cases on behalf of the general public, Bill 19-581 would compel the Court of Appeals to confront the issue of whether to (1) follow the law and depart from the so-called "constitutional standing requirement," or (2) adhere to the standing requirement and strike down the "third prong" of Section 102(c).

The expansion of standing under the CPPA is unnecessary because a public interest organization need not bring a suit on its own behalf in order to advocate on behalf of the general public. Instead, the organization can offer pro bono legal representation to a member of the general public who is injured-in-fact and therefore meets the normal standing requirement. Under the CPPA, as presently written, that member of the public can bring an action not only on his or her own behalf, but also on behalf of the general public. By representing such a plaintiff, a public interest organization can become a legal advocate on behalf of the general public and can seek injunctive relief and consumer restitution on behalf of a wide group of affected consumers.

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[11] *Id.* at 235.

Finally, we note that Bill 19-581 would limit special nonprofit-organization standing to those nonprofits to that are organized under District law and exempt from federal income tax under one of several IRS Code provisions, such as section 501(c)(3). It is not clear what interest is served by limiting standing in this way. Whether or not a nonprofit organization can be an effective advocate on behalf of its members, its own public interest activities, or consumers generally depends not on whether it is organized under District law or is exempt from federal taxation. Indeed, there is nothing to prevent an anti-consumer organization that pursues what it sees as the public interest to organize under District law and achieve 501(c)(3) status with the IRS. Rather than try to define in advance the general types of organization that will effectively advocate in the interests of consumers in a CPPA case, the bill could authorize the court to make a factual determination as to whether the particular organizational plaintiff before the court is adequately representing the organization's members or the public.

Unit Pricing Act

Title II of Bill 19-581 deals with the Unit Pricing Act. Unit pricing is of substantial value to many consumers. By statutorily prescribing a set of common standards for unit pricing, the proposed Unit Pricing Act would help to ensure that consumers are able to understand the unit prices displayed in retail stores and make informed comparisons between the prices being charged for different brands or sizes.

Bill 19-581proposes a Unit Pricing Act that closely tracks the Uniform Unit Pricing Regulation adopted by The National Conference on Weights and Measures, a copy of which is attached to this testimony.

A section of the proposed Unit Pricing Act in Bill 19-581 that does *not* closely track the corresponding part of the Uniform Regulation is the "Application" section. The Application section [Sec. 203] of the proposed Unit Pricing Act states that "each person who sells, offers, or displays for sale a consumer commodity at retail shall provide the unit price information in the manner prescribed herein." By contrast, the Uniform Regulation's Application section makes clear that the unit-pricing standards in the Uniform Regulation apply only to stores that are *voluntarily* providing unit-pricing for their goods.

Just as unit pricing can be valuable to consumers, it can be quite costly for a retailer, especially a low-tech retailer that sells a relatively small volume of consumer goods. For some retailers, requiring the use of unit pricing could greatly increase their cost of doing business in D.C. If the Council decides to make unit pricing mandatory, it should consider making exceptions for small, family-run businesses. For example, the State of Maryland makes unit pricing mandatory as a general rule, but exempts certain categories of retailers, such as a retailer that "[d]uring the preceding calendar year, sold a gross volume of consumer commodities of less than $750,000" or a retailer that "[i]s owned and operated by

not more than one individual and the members of his immediate family."[12] The Council may want to consider a similar approach.

Thank you, Councilmember Alexander, for providing me with the opportunity to present the views of the Executive on Bill 19-581. You should be commended for your continuing interest in seeing that the CPPA comes ever closer to fulfilling its stated purpose of ridding the District of Columbia of all unlawful trade practices. As previously stated, while the Executive cannot support the bill in its current form, we are willing to work with you and stakeholders on a viable alternative. I would be happy to answer any questions.

[12] *See* MD Code, Commercial Law, § 14-102.

NATIONAL CONSUMERS LEAGUE
1701 K Street, NW Suite 1200 Washington DC 20006
Main: (202) 835-3323 Fax: (202) 835-0747 www.nclnet.org

Re: Testimony of Sally Greenberg, Executive Director, National Consumers League,

RE: The Consumer Protection Amendment Act of 2011 *Bill 19-0581 (2011)*

October 11, 2012

Committee on Public Services & Consumer Affairs
Chairperson Yvette Alexander
1350 Pennsylvania Avenue, NW Suite 6
Washington, DC 20004

Dear Chairperson Alexander:

The National Consumers League submits the following statement in support of the Act.

Statement Of Interest

The National Consumers League ("NCL"), founded in 1899, is the nation's oldest consumer organization. The mission of the NCL is to promote fairness and economic justice for consumers and workers in the United States and abroad. The NCL is a non-profit advocacy group which provides government, businesses, and other organizations with the individual's perspective on concerns including, *inter alia*, child labor, workers rights, and other work place issues. The NCL appears before legislatures, administrative agencies, and the courts across the country, advocating the enactment and vigorous enforcement of laws that effectively protect consumers and employees. The NCL also educates the public in ways to avoid fraud in the marketplace through its National Fraud Center and seeks to increase awareness of and mobilize public resistance to unsavory, anti-consumer behavior. For more than 100 years the NCL has worked to promote a fair

marketplace for workers and consumers. This was the reason for the NCL's founding in 1899 and still guides it into its second century.

The Existing Enforcement Structure

Under the existing enforcement structure, consumer protection is provided by three types of entities:

1) the Office of the Attorney General,
2) the private bar, and
3) public interest organizations.

Note, the consumer protection enforcement authority and budget of the Department of Consumer and Regulatory Affairs (DCRA) has been suspended since 1994 as a cost-saving measure.

Shortfalls in the Existing System

The NCL believes the following are shortcomings in the existing system for consumer protection enforcement which supports the passage The Consumer Protection Amendment Act of 2011:

- Suspension of DCRA's authority removed an important mechanism for halting unlawful trade practices,
- The Consumer Fund §28-3911 (Act 19-98, § 9003(a)) in 2011 which received monies from private and public enforcement actions for future enforcement actions by the OAG, was eliminated.
- The D.C. Court of Appeals decision in *Grayson v. AT&T Corp.*[1] prevents nonprofit organizations without traditional Article III standing from bringing suit on behalf of the general public to halt the continued use of unlawful trade practices, leaving a gap in enforcement which previously existed from the 2000 Amendments.
- There is no regulation governing unit pricing in retail stores, leaving consumers without sufficient information to make informed purchases

Introduction

The Consumer Protection Amendment Act of 2011[2] is designed to strengthen protections given to consumers through the creation of additional illegal trade practices, the granting of standing to nonprofit organizations (without traditional Article III standing) to act on behalf of the general public, and the introduction of unit pricing.

Brief History of Consumer Enforcement in the District of Columbia

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[1] 15 A.3d 319 (D.C. 2011) (en banc).
[2] B19-581 (2011).

The DCRA Office of Compliance was established by statute in 1976 as the District's "principal consumer protection agency."[3]

The D.C. Council suspended DCRA enforcement of the Consumer Protection Procedures Act in 1994.[4] This was renewed in 1998[5] and 2000.[6] As of 2010, the DCRA's Office of Consumer Protection has been discontinued due to these budgetary shortfalls. The NCL believes that the long-term deprivation of enforcement resources from the DCRA, coupled with the elimination of the Consumer Fund, has financially impacted public enforcement of consumer protection laws. As a result of this budgetary suspension, the CPPA is mainly enforced through private actions once a consumer has already suffered some type of injury. This has left consumers with private remedial actions as their only recourse. Without any significant proactive enforcement, consumers are largely left without protections from illegal trade practices until it is too late.

The private enforcement mechanism currently in place has many shortfalls that do not adequately protect consumers and is not a substitute for DCRA or OAG enforcement. The current system does not allow consumers to pursue injunctive relief from practices that are ongoing but have not resulted in injury yet or from practices that have harmed others but not the plaintiff. The Court of Appeals' decision in *Grayson* established that the only persons that can bring suit to halt illegal trade practices are those who have already suffered an injury-in-fact.

Standing for Nonprofit Organizations

The D.C. Council passed the Consumer Protection Act of 2000, which included an amendment to the CPPA to allow public interest organizations and the private bar to bring suit for injunctive relief and disgorgement of illegal proceeds in the public interest. Despite the clear language of the statute, and its legislative history, the District of Columbia Court of Appeals in *Grayson* held that the amendment did not reveal an explicit intent of the D.C. Council to eliminate the requirement that the plaintiff suffer an injury-in-fact to enjoy standing to bring a claim. The court examined the legislative and drafting history of the amendments and determined that the D.C. Council did not clearly signal its intent to overturn the prudential standing requirements the Court had previously adopted. This bill clearly seeks to provide such clarity.

The amendment to section 3905(k)(1)(B) and (C) here expresses the clear intent of the Council to grant nonprofit organizations standing under the CPPA without the need to suffer an injury-in-fact to itself or its members and to legislatively and partially overrule *Grayson*. This is a necessary step because budget cuts have left the CPPA with

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[3] D.C. Code § 28-3902(a) (2012).

[4] Multiyear Budget Spending Reduction and Support Emergency Act of 1994, Act 10-389, § 808, 42 D.C. Reg. 229-30 (Jan. 13, 1995).

[5] Consumer Protection Amendment Act of 1998, Act 12-399, § 1403 (suspending enforcement through 2000).

[6] Consumer Protection Act of 2000, Act 13-375, § 1402 (suspending enforcement through 2002).

diminished funding for government enforcement. This amendment seeks to fill that void by authorizing nonprofits groups to pursue cases that normally would be prosecuted by the DCRA or OAG. The U.S. District Court for the District of Columbia held that the National Consumers League (NCL) bringing suit as a private attorney general on behalf of the general public did not have Article III standing when it could not allege an individualized injury to itself or when it lacked organizational standing.[7] While the case was remanded back to D.C. Superior Court where standing was initially found, *Grayson* later mandated the suit's dismissal prior to a resolution on the merits.

This stands in sharp contrast to a matter NCL prosecuted and resolved *prior to* the Court of Appeals' issuance of *Grayson*. The NCL, brought suit on behalf of the general public against Kellogg Company for false advertising in relation to allegedly false health claims made on its cereal boxes.[8] This litigation resulted in a settlement agreement whereby Kellogg donated $200,000 to food based charities and programs and 8,000 cases of cereal (or approximately 100,000 boxes) to local D.C. food banks and charities.[9] In Ward 7 alone, this settlement benefited the following charities with food initiatives: Nehemiah's Food Pantry, First National Baptist Church, Incarnation Church St. Vincent; Pennsylvania Baptist Church and Food & Clothing Center of Ward 7. Actions like this demonstrate the beneficial nature of permitting private attorney general claims to be prosecuted by nonprofit organizations.

This amendment explicitly allows suits brought by nonprofit organizations, when acting as private attorneys general, to proceed in D.C. Superior Court and provide necessary protections to the District's consumers. Section 3901(a)(14) defines nonprofit organizations in relation to federal nonprofit law under 26 U.S.C. § 501(c). Other D.C. law regarding nonprofits reference federal law and there is no definition of nonprofits under the D.C. Code.[10] This ensures that the organizations allowed to bring suit without an injury-in-fact are doing so for the public benefit.

Clarifying the Definition of Consumer and Consumer Goods or Services

The amendment clarifies the definition of consumer when used as an adjective and brings it in line with the definition of consumer under the Magnusson-Moss Warranty Act.[11] That act similarly defines a consumer product as "any tangible personal property which is distributed in commerce and which is normally used for personal, family, or household purposes."[12] Thus, the change seeks to include property that is not

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[7] *The Nat'l Consumers League v. Gen. Mills, Inc.*, 680 F. Supp. 2d 132, 134-36 (D.D.C. 2010).

[8] *The Nat'l Consumers League v. Kellogg Company*, No. 2009 CA005211 B (D.C. Super. Ct.)

[9] The allegedly false statements were also halted by other litigation.

[10] *See, e.g.*, D.C. Code §§ 2-1210.01(7), 42-2801(8), 42-3601(1), 47-3505(a), 47-857.11(1), § 51-103(h). The sections on incorporated nonprofits and unincorporated nonprofits associations do not contain a definition of a nonprofit. *See* D.C. Code §§ 29-101.02, 29-1102(5).

[11] 15 U.S.C. § 2301(1) (2006).

[12] *Id.* The language also mirrors the U.C.C. definition of consumer goods, defined as "goods that are used or bought for use primarily for personal, household, or family purposes." D.C. Code § 28:9-102(a)(23).

used *exclusively* for personal, family, or household purposes. This eliminates the unintended consequence that consumer goods or services, which are typically used for consumer purposes, could fail to qualify for protections under the CPPA because of use for commercial purposes.

Additions to Unlawful Trade Practices

There are several proposed additions to section 3904 that are designed to provide improved protections for consumers against unscrupulous business practices:

"(f-1) Use innuendo or ambiguity as to a materials fact, which has a tendency to mislead"

Section 3904(f-1) prohibits the willful use in written representations of falsehood, innuendo, or ambiguity as to a material fact. This language is borrowed from the Kansas Consumer Protection Act[13] and is similar to the Hawai'i Uniform Deceptive Trade Practices Act.[14] This prevents businesses from mischaracterizing their goods or services and preying on consumers who are expecting to receive something different. Kansas courts clarify that the intent needed is intent to engage in the act, not intent to violate the statute.[15]

Representing that a transaction confers or involves rights, remedies, or obligations which it does not have or involve, or which are prohibited by law"

Section 3904(r)(6) adds an additional factor for courts to consider in determining whether a term or provision is unconscionable. This language is similar to language found in the consumer protection statutes of Alaska,[16] California,[17] Tennessee,[18] Texas,[19] and Guam.[20] This strengthens consumers' ability to receive the benefit of the bargain and disincentivizes merchants from attempting to trick consumers into believing they are going to receive something different than they are providing. It also prevents merchants from including terms that cannot come into effect because they are prohibited by law. Taken together, this subsection allows courts to police transactions to determine whether the merchant represented that the deal contained terms that will not take effect.

"(ii) Engage in any unfair business act or practice, which occurs when the practice: (1) Offends established public policy or when the practice is immoral, unethical, oppressive, unscrupulous, or substantially injurious to consumers, and the practice is not outweighed by countervailing benefits to consumers; or (2) Threatens an incipient

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[13] Kan. Stat. Ann. § 50-626(b)(2).

[14] HRS § 481A–3(a)(12) (catchall clause stating that "any other conduct which similarly creates a likelihood of confusion or of misunderstanding" is a deceptive trade practice).

[15] *York v. InTrust Bank, N.A.*, 962 P.2d 405, 421 (Kan. 1998).

[16] Alaska Stat. § 45.50.471(b)(14).

[17] Cal. Civ. Code § 1770(a)(14)

[18] Tenn. Code Ann. § 47-18-104(b)(12).

[19] Tex. Bus. & Com. Code Ann. § 17.46(b)(12).

[20] 5 Guam Code Ann. § 32201(b)(12).

violation of an antitrust law, or violates the policy or spirit of one of those laws because its effects are comparable to or the same as a violation of the law, or otherwise significantly threatens or harms competition."

Section 3904(ff) prohibits merchants from engaging in unfair acts or practices, which are defined as occurring in two circumstances. Subsection (1) prohibits acts that offend established public policy, or are immoral, unethical, oppressive, unscrupulous, or substantially injurious to consumers. This language originates with an FTC rule prohibiting certain advertisements that neither violate laws nor are deceptive but nonetheless are unfair.[21] The language has been adopted by courts in analyzing consumer statutes in Hawaii,[22] Louisiana,[23] Massachusetts,[24] and North Carolina[25] as a way to define an unfair trade practices. Oklahoma uses the phrase to statutorily define an unfair trade practice.[26] The proposed bill also contains a provision that these prohibited practices must not be outweighed by countervailing benefits to consumers. This produces a balancing effect in which only those practices that have an ultimate negative impact on consumers are prohibited.[27]

Subsection (2) polices unfair competition amongst merchants because of the negative impact they have on consumers. This subsection also applies to practices that otherwise significantly harm or threaten to harm competition. Taken together, these practices harm consumers by undermining competitive markets. This language originated in California case law that interpreted the state's Unfair Competition Law.[28]

Unit Pricing

Unit pricing provides the price of goods based on cost per unit of measure. It is calculated by dividing the price of the product by an accepted unit of measurement depending on the type of product (e.g., grams, liters) and provides an intensive price. The proposed language is based off a model act created by the National Conference of Weights and Measures and is supported by the Department of Commerce's National Institute of Standards and Technology.[29] Three quarters of all grocery shoppers rely on unit pricing to make comparisons, according to the Food Marketing Institute, an industry trade association. It should be noted that many industry trade associations worked with NIST to create the model act.

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[21] 29 Fed. Reg. 8324, 8355 (July 2, 1964); *see FTC v. Sperry & Hutchinson Co.*, 405 U.S. 233, 244 n.5 (U.S. 1972).

[22] *Balthazar v. Verizon Haw., Inc.*, 123 P.3d 194, 202 (Haw. 2005).

[23] *Monroe Med. Clinic, Inc. v. Hosp. Corp. of Am.*, 622 So.2d 760, 781 (La. Ct. App. 1993).

[24] *Mass. Farm Bureau Fed'n, Inc. v. Blue Cross of Mass., Inc.*, 532 N.E.2d 660, 664 (Mass. 1989).

[25] *John v. Phoenix Mut. Life Ins. Co.*, 266 S.E.2d 610, 621 (N.C. 1980).

[26] Okla. Stat. tit. 15, § 752(14).

[27] *Camacho v. Auto. Club of S. Cal.*, 48 Cal. Rptr. 3d 770, 779 (Ct. App. 2006).

[28] *Cel-Tech Commc'ns, Inc. v. L.A.Cellular Tel. Co.*, 973 P.2d 527, 544 (Cal. 1999).

[29] National Institute of Standards and Technology, NIST Handbook 130: Uniform Law and Regulations in the Areas of Legal Metrology and Engine Fuel Quality as Adopted by the 96th National Conference on Weights and Measures 2011, at 135-40 (2012), *available at* http://www.nist.gov/pml/wmd/pubs/upload/2012-h130-final2.pdf.

As of August 2011, there are nineteen states and two territories that have adopted unit pricing.[30] This includes D.C.'s sister jurisdiction Maryland.[31] We have spoken with a member of the Division of Consumer Protection of Maryland's Office of the Attorney General and found that there have been no enforcement actions within the state since its introduction of a similar law. This demonstrates that unit pricing laws are easily implemented and compliance is easy to maintain.

Unit pricing allows customers to compare value between different brands, different sized packages, different package types, and different products.[32] It allows consumers to identify the best value and use one consistent measure to sort through various package sizes, brands, and substitute products. It also provides an indicator of relative quality among different brands. Unit pricing places the focus on the pricing of the product rather than the brand name. It also reduces the need for excessive packaging that can prove deceptive.

Unit pricing also benefits retailers by promoting sales and private label products, which are often less costly than a brand name product, and helps reduce pricing errors. With a uniform unit pricing system consumers can also compare prices of the same product between stores. This will benefit businesses by providing a way to showcase that they have the lowest prices and best value. Unit pricing is consistent with the goals of the federal Fair Packaging and Labeling Act that informed consumers are a crucial component of the market.[33] Unit pricing provides information to consumers that allow them to make a more educated purchase decision and promotes healthy competition among businesses.

Creating a uniform system for unit pricing eliminates inconsistencies that arise through voluntary use. Many stores voluntarily provide unit pricing, but this is done in an inconsistent manner, including using different units of measurement for similar products or only selectively providing unit pricing for only certain brands in product category. A survey done by NCL found that unit pricing is not done uniformly in D.C.[34] Among the seven stores surveyed that had voluntarily provide unit pricing, NCL found that each store had a different labeling system, there was wide variation in the units used, and many pricing calculations were incorrect. This can mislead consumers when comparing products or if they compare prices between stores. Instituting a uniform unit

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[30] National Institute of Standards and Technology, NIST Handbook 130: Uniform Law and Regulations in the Areas of Legal Metrology and Engine Fuel Quality as Adopted by the 96th National Conference on Weights and Measures 2011, at 10-13 (2012), *available at* http://www.nist.gov/pml/wmd/pubs/upload/2012-h130-final2.pdf.

[31] Md. Code Ann., Com. Law § 14-101 to -107.

[32] *See* Hans R. Isakson & Alex R. Maurizi, *The Consumer Economics of Unit Pricing*, 10 J. Marketing Res. 277 (1973); Vincent-Wayne Mitchell et al., *Consumer Awareness, Understanding and Usage of Unit Pricing*, 14 Brit. J. Mgmt. 173 (2003); Kent B. Monroe & Peter J. LaPlace, *What Are the Benefits of Unit Pricing?*, J. Marketing, July 1972, at 16.

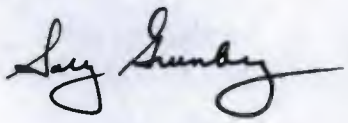
[33] 15 U.S.C. § 1451 (2006).

[34] National Consumers League, *The Case for Unit Pricing: Benefits of Reliable, Standard Food Labeling*.

pricing system will eliminate this confusion by mandating consistent and accurate labels for all products and stores.

CONCLUSION

For these reasons, the NCL supports The Consumer Protection Amendment Act of 2011 and urges its passage.



Sally Greenberg
Executive Director
National Consumers League

Legal Counsel
for the Elderly

Public Hearing on B19-581: Consumer Protection Amendment Act of 2011
October 11, 2012
Committee on Public Services and Consumer Affairs
Councilmember Yvette Alexander, Chairperson

Testimony of Jennifer L. Berger and Amy R. Mix, Esq. of
AARP Legal Counsel for the Elderly

Legal Counsel for the Elderly (LCE) is a non-profit provider of legal services to D.C. residents aged 60 plus, and an affiliate of AARP. For over 35 years, LCE has championed the dignity and rights of Washington, D.C.'s elderly residents by providing free legal and social work services to those in need. LCE's staff and volunteers assist more than 5,000 elders each year. Twenty percent of LCE's cases involve housing advocacy to preserve affordable housing among the District's most vulnerable residents.

LCE's Consumer Fraud and Abuse Prevention Unit assists with foreclosure prevention that results from predatory lending, foreclosure rescue scams, and mortgage and/or real property tax arrears. LCE's Alternatives to Landlord/Tenant Court for the Elderly Project is a social work/legal collaborative that seeks to vindicate tenants' rights to habitable and affordable housing. District agencies (Superior Court, Office on Aging social services network, and Department of Housing and Community Development) refer District elders to LCE to prevent loss of their most valuable and often sole assets: their homes.

LCE supports Public Hearing on B19-581: Consumer Protection Amendment Act of 2011 but recommends certain changes to ensure full protection for elderly consumers and tenants. A more vibrant, protective consumer protective statute is necessary to protect District residents from all unscrupulous business practices, including those of housing providers.

I. Non-profit organizations should be able to vindicate the interests of the populations they serve by bringing suit under the District's consumer protection statute.

Legal Counsel for the Elderly provides direct service to individuals and represents individuals, or classes of individuals, whose housing rights have been impaired. That said, we support the right of non-profit organizations to be able to sue for injunctive relief to stop an unfair or deceptive practice prior to one of our clients suffering injury from those practices. Non-profit standing to protect the public from deceptive trade practices supports judicial economy, as it prevents massive amounts of individual litigation on the same issue by stemming wrongs before they occur. In turn, and optimistically, businesses benefit from learning early that their trade practices are illegal, and thereby preventing further legal liability.

LCE is a co-signatory to the letter The Legal Aid Society of DC submitted on the standing issue. As such, we incorporate by reference the technical suggestions in the October 5, 2012 letter, to enhance the language of B19-581.

II. B19-581 should be amended to strike the preclusion of the CPPA applying to landlord/tenant relations.

The DC Court of Appeals case, *Gomez v. Independence Management of Delaware, Inc.*, 967 A.2d 1276 (2009) holds that the Council did not intend to create a private right of action under the CPPA in the realm of L-T relations. Moreover, the CPPA is explicit in 29-3903(c)(2)(A) that the DCRA may not "apply the provisions of Section 28-3905 to landlord-tenant relations." This is troubling, as the Rental Housing Act does not cover all deceptive practices a landlord could engage in, nor have as expansive remedies as the CPPA.

Several other states, including Maryland[1], Massachusetts[2], New Jersey[3], New York[4], North Carolina[5], Vermont[6] and Wisconsin[7], allow parties to apply their consumer protection statutes to landlord-tenant relationships. The District, which otherwise has other tenant protections should similarly protect tenants under the CPPA. As is, the Rental Housing Act does not provide protections for all tenant/housing provider transactions, which opens the door to housing provider abuses.

A. The Rental Housing Act only protects tenants from certain, limited housing provider practices.

D.C. Code §§ 42-3501.01 et seq. prescribes that a tenant can file a petition under the following circumstances: illegal rent increase (lack of housing provider registration with the RAD; a larger rent increase than allowed; lack of proper rent increase notice 30 days before the rent increase; lack of filing the proper rent increase forms with the RAD; or an increase taken while the unit is not in substantial compliance with the housing regulations); services and facilities elimination or reduction; retaliation; an improper notice to vacate; security deposit overcharge, or failure to return the deposit, with interest; and interference with tenant association right to organize.

Many of the elderly tenants LCE serves complain of illegal charges by their housing providers that are not related to rent. For instance, one tenant, a Ward 7 resident, was sued in Landlord/Tenant Court for forty different late fees when the lease agreement did not provide for late fees. The landlord dismissed the eviction action but was never penalized for the erroneous late fees, because the Small Claims Court dismissed the CPPA suit for lack of tenant standing to sue. There was no recourse for this tenant to sue the landlord for wasting her time in court, and as a result a similar case of erroneous late fees arose two years later. This tenant is willing to

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1 Maryland Commercial Law Title 13 – Consumer Protection Act; 13-301 Unfair or Deceptive Trade Practices
2 Massachusetts General Laws Part I, Title XV, Chapter 93A §1
3 N.J.S.A. 56:8-2l; applied to Landlord-Tenant relationships by 49 Prospect Street Tenants Association v. Sheva Gardens Inc., 547 A.2d 1134 (N.J. Super. Ct. App. Div. 1988)
4 N.Y. GBS. LAW Article 22-A § 349
5N.C. Gen. Stat. §75-1 The NC Court of Appeals has held that Residential rental agreements fall within Chapter 75 because 'the rental of residential housing is' considered commerce pursuant to N.C. Gen.Stat. § 75-1.1. Love v. Pressley, 34 N.C.App. 503, 516, 239 S.E.2d 574, 583 (1977), cert. denied, 294 N.C. 441, 241 S.E.2d 843 (1978).
6 Vermont Statutes Annotated Title 9 Chapter 63.
7 Wis. Stat. 100.20(5); Wis. Stat. § 704.95.

speak with Council further about how stressful and time-consuming her court experience was, and just asked that her name and telephone number not be in this public document.

Housing providers should not get special preference over other business people, as leases are contracts and housing providers businesspeople just as in any other consumer transaction. Given the age and limitations of LCE's clients, erroneous fees, and ensuing erroneous law suits, are a severe hardship. A robust CPPA, that includes the landlord/tenant relationship, is critical to remedy this evil.

B. The Rental Housing Act has limited remedies compared with the CPPA.

Under the Rental Housing Act, relief is limited to rent refunds, treble damages and attorney's fees. Treble damages are only available in instances of bad faith. Under the CPPA, however, in addition to damages of the greater of $1500 per violation or treble damages, consumers can get reasonable attorney's fees, punitive damages, injunctive relief, and restoration of money or property. *See* DC Code 28-3905(k)(1).

Conclusion.

As advocates for elderly tenants and consumers, we support a strong consumer protection statute that enables tenants to vindicate their rights under the CPPA. We welcome the opportunity to meet with your staff and tenant/consumer advocates to discuss our suggestions and concerns more fully. I may be reached at (202) 434-2155 if you would like to speak with LCE or get the contact information for the Ward 7 resident referenced in the testimony. Thank you for recognizing the importance of a robust consumer protection statute to District of Columbia residents.

Sincerely,

Jennifer L. Berger
Supervising Attorney
Alternatives to Landlord/Tenant Court for the Elderly Project

Amy R. Mix
Supervising Attorney
Consumer Fraud and Abuse Unit

STATEMENT OF

JONATHAN K. TYCKO
TYCKO & ZAVAREEI LLP
2000 L STREET, N.W., SUITE 808
WASHINGTON, DC 20036
(202) 973-0900

SUBMITTED TO THE COMMITTEE ON PUBLIC SERVICES AND CONSUMER AFFAIRS
OF THE COUNCIL OF THE DISTRICT OF COLUMBIA

IN CONNECTION WITH

THE PUBLIC HEARING ON
BILL 19-0581, "THE CONSUMER PROTECTION AMENDMENT ACT OF 2011"

OCTOBER 11, 2012

CHAIRPERSON ALEXANDER AND MEMBERS OF THE COMMITTEE:

My name is Jonathan K. Tycko. I have been a practicing attorney for approximately 20 years, the great majority of that spent in the area of civil litigation. I received my law degree from Columbia Law School in 1992, spent two years as a law clerk for a federal judge, and then joined a large firm here in the District of Columbia. For the past 10 years, I have been a partner with the law firm of Tycko & Zavareei LLP, a firm that focuses on complex civil litigation. Thank you for this opportunity to address the Committee on the important issue of reforming the District of Columbia Consumer Protections Procedure Act (the "CPPA"), currently codified at D.C. Code §§ 28-3901-3913.

Our law firm has represented plaintiffs in various matters under the CPPA. This statute plays a crucial role in the policing of unlawful trade practices in the District of Columbia, especially in a day and age when government enforcers have limited resources with which to pursue consumer protection cases.

I believe that the proposed amendments to the CPPA are important and are steps in the right direction. I would also ask this committee to consider one additional change to the bill. Specifically, I would urge the council to enshrine the right of D.C. consumers to bring actions under the CPPA based upon purchases of goods and services used for "testing" their characteristics. So-called "tester standing" has a solid pedigree in our nation's jurisprudence and is a necessity in many consumer protection actions.

I will address each of these issues in turn.

1. The Changes Proposed by the Consumer Protection Amendment Act of 2011 Are Necessary

The Consumer Protection Amendment Act of 2011 will strengthen protections given to consumers by explicitly granting standing to nonprofit organizations to act on behalf of the

general public, by clarifying the types of purchases covered by the CPPA, and by improving the scope of the protections afforded by the CPPA.

a. Standing for Nonprofit Organizations

The amendment to section 28-3905(k)(2) would grant non-profit organizations (as defined under 26 U.S.C. § 501(c)) standing under the CPPA. This amendment would allow suits brought by nonprofit organizations, when acting as private attorneys general, to proceed in D.C. Superior Court. Nonprofit, public interest organizations provide an important consumer protection function. Among other things, such organizations may have direct contact with members of the public, and may therefore become aware of issues of concern. Public interest organizations may have the resources and the technical expertise to understand certain forms of difficult-to-understand consumer fraud. Allowing organizations themselves to bring private actions will provide necessary protections to the District's consumers.

Nonprofit organizations will thereby be relieved of the additional burden of enlisting a specific member to serve as a plaintiff in a private action. In many cases this is a difficult obstacle, as many of an organization's members prefer anonymity or are concerned about personally participating in the rigors of private litigation, even if they support the goals of the litigation.

Importantly, however, the amendments do not jettison Article III standing requirements of a "distinct and palpable injury," in the words of the *Grayson* court. *Grayson v. AT&T*, 15 A.3d. 218, 234 (D.C. 2011). Indeed, non-profit organizational standing is limited to situations where the organization "can demonstrate that a particular member of the non-profit or of the general public *would have had standing*[.]" This proposed amendment to the CPPA in many way mirrors the requirements of "associational standing," a doctrine that has been recognized by

both the United States Supreme Court and the District of Columbia Court of Appeals. *See, e.g.*, *UAW v. Brock*, 477 U.S. 274, 290 (1986); *Friends of Tilden Park, Inc. v. District of Columbia*, 806 A.2d 1201, 1207 (D.C. 2002). Accordingly, this amendment builds upon a form of standing that has already been determined by the courts to satisfy constitutional requirements.

With this important protection, the amendments strike a prudent balance—allowing nonprofit organizations to do the important work of discerning and acting on consumer fraud, while also demanding something akin to Article III standing.

b. Clarifying the Definition of Consumer and Consumer Goods or Services

The amendment seeks to include goods and services that—while not used *exclusively* for personal, family, or household purposes—could fail to qualify for protections under the current CPPA because of partial use for commercial purposes. This helpful amendment eliminates the unintended consequence that consumer goods or services, which are typically used for consumer purposes, could be excluded from CPPA coverage simply because they were purchased by a small business owner or were subject to a mixed use by a consumer. For example, if a taxi driver (one of D.C.'s independent businessmen and women) purchases a cell phone for both personal use, and for taking calls from potential customers, this purchase would be covered under the amended CPPA but potentially not covered by the current version of the Act.

c. Improvements To Scope of Protections

There are several proposed additions to Section 3904 that are designed to provide improved protections for consumers against unscrupulous business practices:

(i) The proposed Section 3904(f-1) prohibits the willful use in written representations of falsehood, innuendo, or ambiguity as to a material fact. This prevents businesses from mischaracterizing their goods or services and preying on

consumers who are expecting to receive something different. As is well-known, marketing and branding is a sophisticated science these days. Products or marketing materials may be designed to mislead consumers without stating outright untruths. This amendment would ensure such deceptive tactics would fall under the ambit of the CPPA.

(ii) The proposed Section 3904(r)(6) adds an additional factor for courts to consider in determining whether a term or provision of a bargain is unconscionable. This language is similar to language found in one of the consumer protection statutes of California. Accordingly, there is a significant amount of case law that makes use of, and interprets, similar language. *See, e.g.*, *Cel-Tech Communications, Inc. v. L.A.Cellular Tel. Co.*, 973 P.2d 527, 544 (Cal. 1999). Simply put, this amendment makes it illegal for a merchant or services provider to mislead or deceive consumers, even if the merchant or services provider does not make an outright misrepresentation. It also prevents merchants from including terms in a bargain that cannot actually come into effect because they are prohibited by law.

(iii) The proposed Section 3904(ff) prohibits merchants from engaging in unfair acts or practices, which are defined as occurring in two circumstances. Subsection (1) prohibits acts that offend established public policy, or are immoral, unethical, oppressive, unscrupulous, or substantially injurious to consumers. This language tracks an existing FTC rule prohibiting certain advertisements that neither violate laws nor are deceptive but nonetheless are unfair. 29 Fed. Reg. 8324, 8355 (July 2, 1964); 16 C.F.R. 408. The proposed bill also contains a provision that these prohibited practices must not be outweighed by countervailing benefits to

consumers. This produces a balancing test, to be applied by judges and juries, in which only those practices that have an ultimate negative impact on consumers are prohibited. Subsection (2) polices unfair competition amongst merchants because of the negative impact they have on consumers. This subsection also applies to practices that otherwise significantly harm or threaten to harm competition. Taken together, these practices harm consumers by undermining competitive markets.

2. The CPPA Should Be Amended To Ensure That Products or Services Purchased By Consumers For the Purpose of Testing Form a Valid Basis for a Claim

There are many instances in which a consumer is required to purchase a product or service in order to determine whether or not it is, in fact, what it claims to be. In terms of consumer products, this includes a product that claims to have certain characteristics that are not discernable to the human senses. For example, if a consumer believed a gas station in the District of Columbia was selling gasoline as "91 Octane" when in fact it was a lower grade of gas, the consumer would likely have to purchase gasoline and have it analyzed by a competent lab in order to confirm his suspicions. This is also true for many food products. Similarly, in the realm of consumer services, a consumer may need to make use of (or attempt to make use of) the services in order to determine whether the services are being appropriately offered. Such "testing"—again, necessary to conclude whether or not the product or service is what is claims to be, or otherwise violates the CPPA—should not preclude a consumer from turning to the CPPA for a remedy.

Such "tester standing" has a long and storied history in our nation's civil rights jurisprudence. In *Havens Realty v. Coleman*, 455 US 363 (1982), the Supreme Court upheld the standing of an organization seeking to enforce nondiscrimination laws of title VIII of the Civil

Rights Act of 1968, the Fair Housing Act, 42 U.S.C.§ 3604, when that organization sent "testers" into a housing complex inquiring about rental properties. While the white tester was told units were available, the black tester, with the same qualifications as the white tester, was told otherwise. Neither tester, it should be noted, intended to actually rent units—in fact, the black tester applied with the expectation of being denied. *Id.* at 366-369. In affirming the statutory injury of the black tester, the *Havens* court determined that the Fair Housing Act conferred standing to plaintiff via his statutory right to truthful information in the context of housing accomodations. *See also FEC v. Atkins*, 524 US 11 (1998) (prudential standing is satisfied when the injury asserted by a plaintiff "arguably [falls] within the zone of interests to be protected or regulated by the statute . . . in question"). And as the D.C. Court of Appeals has held with regard to a D.C. civil right statute, "the statutory violation and accompanying injury *exist without respect to the testers' intentions in initiating the encounters*." *Molovinsky v. Fair Employment Council of Greater Washington, Inc.*, 683 A.2d 142, 146 (D.C. 1996) (analyzing D.C. Human Rights Act).

Like the testers in *Havens* and *Molovinsky,* D.C. consumers must be allowed to offer to purchase, or actually purchase, products or services with the intent of determining whether those products or services are what they claim to be. Obviously, if the product or service provided is sufficient and is not accompanied with deceptive practices, the test would not have been injured—and would therefore not have standing to file suit under the CPPA. But if the product or service turns out to have been sold in violation of the CPPA, a D.C. consumer's right to be free from improper trade practices has been compromised. And that should be enough to provide standing in a CPPA action.

The D.C. Court of Appeals has never directly addressed this issue, although it has suggested that perhaps tester standing is enough. In *Ford v. ChartOne*, 908 A.2d 72, 83 (D.C. 2006) the Court of Appeals held that a person who had purchased his medical records for the purpose of future litigation had engaged in a "consumer transaction" under the CPPA because pursuing compensation for injuries was a personal motive. *Ford* recognized that as long as a "consumer" (as opposed to a businessman) makes the relevant purchase, such a purchase is covered by the CPPA. *See also Adam A. Weschler & Son, Inc. v. Klank*, 561 A.2d 1003, 1005 (D.C.1989). In *dicta*, that court, focusing on the difference between retail and wholesale purchasers, stated that if a "purchaser is not engaged in the regular business of purchasing this type of goods or service and reselling it" then the transaction would qualify for coverage under the CPPA.

While courts interpreting the CPPA have allowed "tester standing" to proceed in some cases, we are aware of at least one ruling in D.C. Superior court that has rejected such tester standing, and other D.C. rulings—including *Grayson*—could be misconstrued to prohibit tester standing. Specifically, defendants can and have argued that certain cases hold there is no standing when an injury is "self-inflicted." *See, e.g., Petro-Chem Processing, Inc. v. E.P.A.*, 866 F.2d 433, 438 (D.C. Cir. 1989); *Nat'l Family Planning & Reprod. Health Ass'n, Inc. v. Gonzales*, 468 F.3d 826, 831 (D.C. Cir. 2006). These cases are each distinguishable (and indeed, neither address the tester standing at issue here), but they nonetheless can and have been used to attempt to convince courts that a plaintiff who purchases a product or service for testing is somehow "at fault" for any harm he suffers as a result of that purchase, and thus lacks standing. In addition, this uncertainty about tester standing has, I believe, dissuaded consumers and their attorneys from bringing worthy consumer protection suits under the CPPA.

We therefore suggest that the proposed amendments to Sec. 102. Chapter 39 of title 28 be further amended as indicated by the highlighted language:

> Section 3901, Paragraph (2) is amended by striking the phrase "without exception, which is primarily for personal, household, or family use;" and inserting the phrase
>
> "without exception, which is distributed in commerce and which is normally used for personal, household, or family purposes; consumer goods or services include those which consumers normally use for personal, household or family use, even if those products are used both for personal and commercial purposes; **consumer goods or services include those which are purchased or acquired for purposes of evaluating the characteristics of a consumer good or service**" in its place.

The CPPA already does not require that a consumer show "reliance" or damages for a viable claim under the CPPA. As stated in the statute, a violation of the CPPA occurs "whether or not any consumer is in fact misled, deceived or damaged thereby[.]" D.C. Code 28-3904. *See also Shaw v. Marriott*, 605 F.3d 1039 (D.C. Cir. 2010). Therefore, the minor amendment we propose would only have the effect of foreclosing any effort by potential wrongdoers to argue that a consumer was not truly a "consumer" if she "suspected" she would be the victim of a deceptive trade practice before engaging in a consumer transaction. That argument, if allowed to be successful, would (and has) foreclosed viable CPPA claims, and the consumers of the District of Columbia are worse off because of it.

CONCLUSION

For these reasons, I support the Consumer Protection Amendment Act of 2011 and urge its passage with the additional amendment discussed herein.

I thank the Chairperson and members of the Committee for their consideration of my statement.

Committee Print
Committee on Public services and Consumer Affairs
Wednesday, November 28, 2012

A BILL

IN THE COUNCIL OF THE DISTRICT OF COLUMBIA

To amend Title 28 of the District of Columbia Code to revise the definition of consumer; to prohibit the willful use of falsehood, innuendo, or ambiguity; to prohibit representing that a transaction confers rights that it does not; to provide explicit new authorization for non-profit organizations and public interest organizations to bring suit under the District's consumer protection statute; to recognize a right of action for consumers that purchase goods and services for the purpose of testing and evaluating those goods and services; and to establish a unit pricing requirement for consumer commodities.

BE IT ENACTED BY THE COUNCIL OF THE DISTRICT OF COLUMBIA, That this act may be cited as the "Consumer Protection Amendment Act of 2012".

Sec. 1. Chapter 39 of Title 28 of the District of Columbia Code is amended as follows:

(a) Section 28-3901(a) is amended as follows:

(1) Paragraph (2) is amended to read as follows:

"(2) "consumer" means:

"(A) when used as a noun, a person who, other than for purposes of resale, does or would purchase, lease (as lessee), or receive consumer goods or services, including as a co-obligor or surety, or does or would otherwise provide the economic demand for a trade practice;

"(B) when used as an adjective, describes anything, without exception, that:

"(i) a person does or would purchase, lease (as lessee), or receive and normally use for personal, household, or family purposes; or

"(ii) a person, acting on behalf of the general public, or on behalf of any of its members, purchases or receives in order to test or evaluate qualities pertaining to personal, household, or family purposes.".

(2) A new paragraph (14) is added to read as follows:

"(14) "non-profit organization" means a person who:

"(A) is not an individual; and

"(B) is neither organized nor operating, in whole or in significant part, for profit.".

(3) A new paragraph (15) is added to read as follows:

"(15) "public interest organization" means a non-profit organization that is organized and operating, in whole or in part, for the purpose of promoting interests or rights of consumers.".

(b) Section 3901(c) is amended to read as follows:

"(c) This chapter shall be construed and applied liberally to promote its purpose. This chapter establishes an enforceable right to truthful information from merchants about consumer goods and services that are or would be purchased, leased, or received in the District of Columbia.".

(c) Section 28-3905(k)(1) is amended to read as follows:

"(A) A consumer may bring an action seeking relief from a trade practice in violation of a law of the District when that trade practice involves consumer goods or services that the consumer purchased, leased (as lessee), or received.

"(B) An individual may, on behalf of that individual's interests, or on behalf of the interests of both the individual and the general public, bring an action seeking relief from the use of by any person of a trade practice in violation of a law of the District when that trade practice involves consumer goods or services that the individual purchased or received in order to test or evaluate qualities pertaining to use for personal, household, or family purposes.

"(C) A non-profit organization may, on behalf of its own interests or on behalf of the interests of any of its members, or on behalf of any such interests and the interests of the general public, bring an action seeking relief from the use of a trade practice in violation of a law of the District involving consumer goods or services, including, but not limited to, a violation involving consumer goods or services that the organization purchased or received in order to test or evaluate qualities pertaining to use for personal, household, or family purposes.

"(D)(i) Subject to clause (ii), a public interest organization may, on behalf of the interests of a consumer or a class of consumers, bring an action seeking relief from the use by any person of a trade practice in violation of a law of the District, if the consumer or class could bring an action under subparagraph (A) for relief from such use by such person of such trade practice.

"(ii) An action brought under clause (i) shall be dismissed if the court determines that the public interest organization does not have sufficient nexus to the interests involved of the consumer or class to adequately represent those interests."

(d) Section 28-3904 is amended as follows:

(1) By adding a new subsection (f-1) to read as follows:

"(f-1) Use innuendo or ambiguity as to a material fact, which has a tendency to mislead;".

(2) By adding a new subsection (e-1) to read as follows:

"(e-1) Representing that a transaction confers or involves rights, remedies, or obligations which it does not have or involve, or which are prohibited by law;".

(e) Section 29-3905(k)(2) is amended to read as follows:

"(2) Any claim under this chapter shall be brought in the Superior Court of the District of Columbia and may recover or obtain the following remedies:

"(A) Treble damages, or $1,500 per violation, whichever is greater, payable to the consumer;

"(B) Reasonable attorney's fees;

"(C) Punitive damages;

"(D) An injunction against the use of the unlawful trade practice;

"(E) In representative actions, additional relief as may be necessary to restore to the consumer money or property, real or personal, which may have been acquired by means of the unlawful trade practice; or

"(F) Any other relief which the court deems proper.".

Sec. 2. A new Chapter 52 is added to Title 28 to read as follows:

"CHAPTER 52. Unit Pricing Requirement.

"§29-5201. Short Title. This chapter may be cited as the Unit Pricing Requirement Act of 2012.

"§29-5202. Definitions.

"For the purposes of this title, the term:

"(a) "Combination packages" shall mean a package intended for retail sale, containing two or more individual packages or units of dissimilar commodities.

"(b) "Commodity" shall mean any food, drug, cosmetic, or other article, product, or commodity of any kind or class which is:

"(1) Customarily produced for sale at retail for consumption by individuals for purposes of personal care or in the performance of services ordinarily performed in or around the household; and

"(2) Usually consumed or expended in the course of that use or performance other than by wear or deterioration from use.

"(c) "Person" shall mean both plural and the singular and includes individuals, partnerships, corporations, companies, societies, and associations.

"(d) "Unit Price" or "unit pricing" shall mean the retail price of an item expressed in dollars and cents per unit.

"(e) "Variety packages" shall mean package intended for retail sale, containing two or more individual packages or units of similar, but not identical, commodities. Commodities that are generically the same, but that differ in weight, measure, volume, appearance, or quality, are considered similar but not identical.

"§29-5203. Application.

"Except for random and uniform weight packages that clearly state the unit, each person who sells, offers, or displays for sale a consumer commodity at retail shall provide the unit price information in the manner prescribed herein.

"§29-5204. Terms for Unit Pricing.

"The declaration of the unit price of a particular commodity in all package sizes offered for sale in a retail establishment shall be uniformly and consistently expressed in terms of:

"(a) Price per kilogram or 100 grams, or price per pound or ounce, if the net quantity of contents of the commodity is in terms of weight.

"(b) Price per liter or 100 milliliters, or price per dry quart or dry pint, if the net quantity of contents of the commodity is in terms of dry measure or volume.

"(c) Price per liter or 100 milliliters, or price per gallon, quart, pint, or fluid ounce, if the net quantity of contents of the commodity is in terms of liquid volume.

"(d) Price per individual unit or multiple units if the net quantity of contents of the commodity is in terms of count.

"(e) Price per square meter, square decimeter, or square centimeter, or price per square yard, square foot, or square inch, if the net quantity of contents of the commodity is in terms of area.

"§29-5205. Exemptions.

"This subtitle does not apply to:

"(a) Prepackaged food which contains separately identifiable items that are separated by physical division within the package;

"(b) Any item sold only by prescription;

"(c) Any item subject to the packaging or labeling requirements of the federal Bureau of Alcohol, Tobacco and Firearms or to any pricing requirements under federal law;

"(d) Any item actually being sold through a vending machine;

"(e) Any item delivered directly to a retail sales agency without passing through warehousing or other inventory facility used by the agency;

"(f) Commodities packaged in quantities of less than 28 grams (1 ounce) or 29 milliliters (1 fluid ounce) or when the total retail price is 50 cents or less;

"(g) When only one brand of a particular commodity in only one size is offered for sale in a particular retail establishment;

"(h) Variety packages;

"(i) Combination Packages;

"(j) A person with less than a gross volume of sales of consumer commodities in excess of $ 30,000,000, and to whom at least one of the following applies:

"(1) During the preceding calendar year, sold a gross volume of consumer commodities of less than $ 750,000;

"(2) Is not part of a company which consists of ten or more sales agencies in or out of the District of Columbia;

"(3) Derives less than 15 percent of its total revenues from consumer commodities subject to this Chapter; or

"(4) Is owned and operated by not more than one individual and the members of the person's immediate family.

"§29-5206. Pricing.

"(a) The unit price shall be to the nearest cent when a dollar or more. If the unit price is under a dollar, it shall be listed:

"(1) To the tenth of a cent, or

"(2) To the whole cent.

"(b) The retail establishment shall have the option of using (a)(1) or (2), but shall not implement both methods.

"(c) The retail establishment shall accurately and consistently use the same method of rounding up or down to compute the price to the whole cent.

"§29-5207. Presentation of Price.

"(a) In any retail establishment in which the unit price information is provided in accordance with the provisions of this act, that information may be displayed by means of a sign that offers the unit price for one or more brands and/or sizes of a given commodity, by means of a sticker, stamp, sign, label, or tag affixed to the shelf upon which the commodity is displayed, or by means of a sticker, stamp, sign, label, or tag affixed to the consumer commodity.

"(b) Where a sign providing unit price information for one or more sizes or brands of a given commodity is used, that sign shall be displayed clearly and in a non-deceptive manner in a central location as close as practical to all items to which the sign refers.

"(c) If a single sign or tag includes the unit price information for more than one brand or size of a given commodity, the following information shall be provided:

"(1) The identity and the brand name of the commodity.

"(2) The quantity of the packaged commodity; provided, that more than one package size per brand is displayed.

"(3) The total retail sales price.

"(4) The price per appropriate unit, in accordance with section 203.

"§29-5208. Uniformity.

"(a) If different brands or package sizes of the same consumer commodity are expressed in more than one unit of measure, the retail establishment shall unit price the items consistently.

"(b) When metric units appear on the consumer commodity in addition to other units of measure, the retail establishment may include both units of measure on any stamps, tags, labels, signs, or lists.

"§29-5209. Civil penalties.

"Any person who violates any provision of this act, or any regulation promulgated pursuant to this act, may be assessed a civil penalty not to exceed $500 for each violation.

"§29-5210. Rules.

"The Mayor may issue rules to effectuate the provisions of this act."

Sec. 3. Fiscal impact statement.

The Council adopts the fiscal impact statement in the committee report as the fiscal impact statement required by section 602(c)(3) of the District of Columbia Home Rule Act, approved December 24, 1973 (87 Stat. 813; D.C. Official Code § 1-206.02(c)(3)).

Sec. 4. Effective date.

This act shall take effect following approval by the Mayor (or in the event of veto by the Mayor, action by the Council to override the veto), a 30-day period of Congressional review as provided in section 602(c)(1) of the District of Columbia Home Rule Act, approved December 24, 1973 (87 Stat. 813; D.C. Official Code § 1-206.02(c)(1)), and publication in the District of Columbia Register.

Government of the District of Columbia
Office of the Chief Financial Officer

Natwar M. Gandhi
Chief Financial Officer

MEMORANDUM

TO:	**The Honorable Philip H. Mendelson** **Chairman, Council of the District of Columbia**
FROM:	**Natwar M. Gandhi** **Chief Financial Officer**
DATE:	**November 20, 2012**
SUBJECT:	**Fiscal Impact Statement – "Consumer Protection Amendment Act of 2011"**
REFERENCE:	**Bill 19-581 – Draft Committee Print as Shared with the Office of Revenue Analysis on November 7, 2012**

Conclusion

Funds are sufficient in the FY 2013 through FY 2016 budget and financial plan to implement the bill.

Background

The bill expands current consumer protection laws by broadening definitions, adding specific rights for non-profits, and creating a unit pricing requirement at retail establishments for most consumer commodities.

The definition of consumer[1] is expanded by the bill to include persons who buy items for commercial purposes, not just family or household use. The bill also broadens the types of business practices considered unlawful,[2] including:

1) Transactions in which ambiguity, innuendo or falsehood are purposefully utilized to obfuscate facts;
2) Leases or property sales that imply conferring rights that are prohibited by law;
3) Practices that are unethical, unfair, harm competition, or offend established public policy.

The bill creates a right of action for non-profit organizations to bring suit under the District's consumer protection statutes[3] on their own behalf, or if their public interest activities have been impaired. It also establishes jurisdiction for these claims and remedies for damages.

[1] As defined in D.C. Official Code § 28-3901(a)(2).
[2] D.C. Official Code § 28-3904 describes unlawful business practices.

Title II of the bill is called the Unit Pricing Protection Act of 2011. This section requires retailers to clearly and consistently present unit pricing[4] information for most household products[5] in a manner related to the contents of the commodity. For example, a product sold by the pound must have the cost per pound displayed by a retailer next to[6] the total cost of the product.

Financial Plan Impact

Funds are sufficient in the FY 2013 through FY 2016 budget and financial plan to implement the bill. The bill does not require District agencies to expand the scope of their current enforcement roles. It merely adds to the list of consumer protection violations that may be prosecuted at the discretion of the Office of the Attorney General.

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[3] D.C. Official Code Title 28, Subtitle II, Chapter 39.
[4] Unit price is the retail price expressed as dollars and cents per unit of measure. Examples of unit measure include weight, size, or number of units in a package.
[5] Exemptions are permitted for: items less than an ounce, items costing less than 50 cents, items with only one size offered for sale, and variety or combination packages in which multiple (dissimilar) products are grouped. Other exemptions are made depending on the type of retail establishment.
[6] A retailer may choose to tag each product or shelf, or display a summary sign with unit pricing information for one or more sizes or brands of a commodity.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was filed electronically on April 22, 2024. Notice of this filing will be sent to the following parties by operation of the Court's electronic filing system to all counsel of record:

K&L GATES
Brian D. Koosed (D.C. Bar No. 1034733)
1601 K Street NW
Washington, DC 20006
Tel: (202) 778-9000
brian.koosed@klgates.com

Attorney for Defendant-Appellee

/s/ Kim E. Richman
Kim E. Richman

Attorney for Plaintiff-Appellant