DISTRICT OF COLUMBIA COURT OF APPEALS

Appeal No: 24-cv-58

Daisy Dixon	)
	) Civil Action below
on behalf of the General Public of the District of Columbia	) 2022-CAB-003969-B
Plaintiff/Appellant,	)
	)
v.	)
John Paul Mitchell Systems, Defendant/Appellee	)
	)

APPEAL FROM FINAL JUDGMENT

OPENING BRIEF OF PLAINTIFF/APPELLANT DAISY DIXON

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STATEMENT OF JURISDICTION

Plaintiff-Appellant Daisy Dixon ("Dixon" or "Appellant"), by and through her counsel, individually and on behalf of the General Public of the District of Columbia, files this appeal from the final judgment of the trial court dated January 2nd, 2024 dismissing the action on the motion to dismiss in favor of John Paul Mitchell Systems, Defendant-Appellee herein ("JPMS" or "Appellee"). Pursuant to D.C. Code § 11-721 (a)(1) (2001), Dixon filed a Notice of Appeal on January 17th 2024 Pursuant to D.C. Code § 11-721 (a)(1) (2001), Dixon now files this appeal.

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

(a) Whether the trial court erred in finding that *Mostofi v. Mohtaram, Inc.*, No. 2011 CA 163 B, 2013, D.C. Super. LEXIS 12 (D.C. Sup. Ct. Nov. 12, 2013), is inapplicable on the criteria for establishing tester standing because *Mostofi* "was silent on the interpretation of D.C. Code § 28-3905 (k)(1)(B)" (Order at 6.), and in finding that plaintiff therefore cannot rely on it for that purpose. The trial court reasoned that unlike the plaintiff in *Mostofi*, who 'tested the contents' of the extra virgin olive oil at issue in that case, in this case, according to the trial court, the plaintiff has not – unlike Mostofi – "pled facts supporting a finding that she conducted any testing or evaluation of the Product itself" (Order at 7).

(b) Whether the trial court erred in finding that Plaintiff "has not proffered that she purchased the Product for purposes of conducting independent testing" (*Id*).

(c) Whether the trial court erred in rejecting Plaintiff's position that "[t]he statute does not on its face require that a plaintiff have tested the bottle she purchased in order to have standing, contrary to Defendant's assertion" (*Id.* at 8).

(d) Whether the trial court erred in stating that "Plaintiff does not allege that she conducted any . . . evaluation of the Product or demonstrated any capacity to test the product to determine its benzene content" (*Id.* at 9).

(e) Whether the trial court erred in granting Defendant's motion to dismiss on the grounds that Plaintiff has not satisfied the criteria for standing at this stage of the litigation under D.C. Code §28-3905 (k)(1)(B) by purchasing a sample of the Product and relying on testing by UC Davis showing impermissible contamination of the Product, but without herself yet testing the sample she purchased.

(f) Whether the trial court erred in ruling that "*Mostofi* is silent on the interpretation of D.C. Code §28-3905(k)(1)(B) as it applies to *tester* standing under the CPPA" (Id. at 7, emphasis in original).

(g) Whether the trial court erred in its ruling on the criteria for standing – that the plaintiff have tested the sample she purchased, even in market circumstances where some but not all samples of the Product may not be contaminated.

STATEMENT OF THE CASE

On 10th of July 2023, Plaintiff filed this case in DC Superior Court alleging violations of the DC Consumer Protection Act and breach of warranty in the sale of dry shampoo which a national forensic firm had tested and found random samples containing a carcinogen, benzene. Two day later, Appellant filed an Amended Complaint. On September 27th, 2023, JPMS moved to dismiss the case, alleging primarily that the Plaintiff had failed to perform "testing," which, JPMS alleged, the DC Consumer Protection required the Plaintiff to perform on the product. Plaintiff responded primarily that because the claim was that had the DC general public known of random incidents of benzene appearance in the

product, they would not have purchased the product. Therefore, testing by the plaintiff was not relevant: Whether testing on one product produced a positive or negative response, had the report indicating random presence been disclosed, the DC general public would have been deterred.

On January 2nd 2024, Judge McKenna dismissed the complaint, on the grounds Plaintiff lacked standing because she had to test or evaluate the product prior to filing the complaint.

STATEMENTS OF THE FACTS

A. The Facts as Alleged in the Amended Complaint.

1. Plaintiff-Appellant Daisy Dixon is a resident of the District of Columbia. App 12.
2. Defendant-Appellee JPMS is a California corporation with a principal place of business in Santa Clarita, California. JPMS is an American manufacturer of hair care products and styling tools through several brands including Paul Mitchell, which it sells online and in stores throughout the United States. JPMS manufactures, markets, advertises, labels, distributes, and sells its dry shampoo, including the Products. *Id.*

B. The Dixon Purchase

3. On March 31st, 2023, Plaintiff Dixon purchased a 4.7 oz. bottle of the Product through "Beauty Care Choices" for $30.95. App 13-14.

C. Product Testing

4. Dry shampoo products are considered cosmetics that are regulated by the FDA. App 21
5. On October 31, 2022, Valisure, an analytical pharmacy and consumer protection organization located in New Haven, Connecticut, petitioned the FDA to address dangerous levels of benzene in dry shampoos based upon rigorous testing the organization had conducted on a number of dry shampoo products. App 21. For all of the products tested, Valisure utilized standard, accepted methods of gas chromatography-mass spectrometry

("GC-MS") methods of measurement to determine the levels of benzene. *Id.* Further, Valisure had two brands – which it had previously tested using GC-MS along with the other brands – tested for the presence of benzene by Syft Technologies at its mobile lab in San Francisco using Syft's SIFT-MS mass spectrometry technology. *Id.*

6. Syft Technologies describes itself as "The world leader in real-time, direct injection mass spectrometry." APP 21. Syft was founded in 2002 and has over 150 professionals in 7 countries. Syft is considered the world leader in real-time, direct injection mass spectrometry with more than 20 years of SIFT-MS expertise. Syft instruments support a broad range of industries worldwide including semiconductor manufacturing, pharma and CDMOs, environmental protection, automotive, food, flavor and fragrance, and many more." *See* syft.com/about/. *Id.*

7. In its petition, Valisure explains that the SYFT-MS technology yields more accurate results than the standard, accepted GC-MS measurement technology, in that the latter typically understates the benzene concentration found in tested samples. Thus, Valisure states,

> Although GC-MS is an industry standard approach and was utilized by Valisure in this Petition, the sample preparation required in GC-MS analysis may allow some benzene to escape detection and, therefore, potentially underestimate the amount of contamination. By contrast, SIFT-MS does not require sample preparation, thereby enabling real-time quantitative analysis of dry shampoo spray directly, allowing the investigation of real-world conditions and the potential risks consumers are exposed to with these kinds of contaminated products. (App 22)

8. In the petition, Valisure also explains certain refinements of its CG-MS testing that it undertook – prior to the testing detailed in the petition – to prevent earlier identified breakdown of suspected analytes resulting from higher GC over temperatures, as follows:

> [. . .] Valisure has noted in previous FDA Citizen Petitions that some GC-MS methodologies can lead ingredients to break down into suspected

> analyte due to elevated GC oven temperatures. Valisure identified such a situation in its September 13, 2019 FDA Citizen Petition regarding the drug ranitidine, and Valisure therefore developed modifications to the existing methodologies to lower temperature and prevent degradation. The GC-MS methodologies described in this petition utilized body temperature (37°C) for oven incubation. 40°C has been previously used for benzene analysis from liquid pharmaceuticals and beverages, and reduced false positive results compared with higher-temperature incubation. (App 22)

9. The GC-MS benzene testing detailed in Valisure's October 31st, 2022 petition was performed in the First Quarter of 2022. *Id.*

10. Using this GC-MS measurement, Valisure "analyzed 148 unique batches [lots] from 34 brands of dry shampoo products." Valsisure found that certain dry shampoo products, including some of the Products, contain benzene, with values up to 158 parts per million ("ppm"). *Id.*

11. In its petition, Valisure first shows data from the GC-MS analysis of benzene by directly sampling contaminated air after spraying dry shampoo products, which suggests the potential for short- and long-term inhalation exposure to high levels of benzene. App at Cite The presence of this known human carcinogen in dry shampoo products that are regularly used indoors and in large volumes makes this finding especially troubling. App 23

12. Among other GC-MS results showing benzene in the Defendant's dry shampoos in particular (among other dry shampoos), Valisure found concentrations in the JPMS Brunette Dry Shampoo variety purchased by Ms. Dixon's first spray of 2.88 and 2.15 ppm, which exceed the 2 ppm previously described permissible level. Also on first spray analysis, Valisure found three samples of the Product to contain 2.2, 2.9 and 35 ppm benzene, respectively (App 23).

13. As noted above, in addition, Valisure sought confirmation of its GC-MS results through

testing of two dry shampoo brands.[1] To be clear, Valisure had previously tested the same bottles of these brands using GC-MS technology. Valisure did so because of the alleged loss of analyte in GC-MS testing process. Thus, Valisure explains,

> Although there are observed inconsistencies in dry shampoo products, the comparison of the SIFT-MS to GC-MS analysis of the same bottles with subsequent sprays and other bottles of the same brand, suggests that the GC-MS method described in this Petition may significantly underestimate the concentrations of benzene in such aerosol products. The SIFT-MS direct analysis system that eliminates sample prep appears to detect benzene in these aerosol products at approximately 10 – 50 times higher concentrations. *Id.*

14. In particular, Syft found a benzene concentration of 345 ppm for Demert's Not Your Mother's (NYM) dry shampoo upon first spray SYFT-MS testing. This contrasted with an average benzene concentration of 35.31 ppm using GC-MS measurement of first spray testing for 26 analyzed NYM bottles, and with an average concentration of 20.11 ppm using GC-MS measurement of subsequent spray testing for the 26 bottles. Similarly Syft found a benzene concentration of 67 ppm for Batiste's dry shampoo upon first spray SYFT-MS testing. This contrasted with an average benzene concentration of 1.46 ppm using GC-MS upon first spray testing for 27 bottles. Thus, for each brand the Syft results were markedly higher than the GC-MS results. App 23.

D. Benzene Carcinogenicity

15. Benzene is used primarily in the chemical and pharmaceutical industries, as a starting material and intermediate in the synthesis of numerous chemicals, and in gasoline. The major United States source of benzene is petroleum. The health hazards of benzene have been recognized for over 100 years. App 24.

[1].

16. According to the National Toxicology Program ("NTP"), benzene is "known to be a human carcinogen based on sufficient evidence of carcinogenicity from studies in humans." App at cite. Benzene has also been "found to be carcinogenic to humans" by the International Agency for Research on Cancer ("IARC"). Benzene was "[f]irst evaluated by IARC in 1974 . . . and was found to be carcinogenic to humans (Group 1), a finding that has stood since that time." As noted by the IARC:

> In the current evaluation, the Working Group again confirmed the carcinogenicity of benzene based on sufficient evidence of carcinogenicity in humans, sufficient evidence of carcinogenicity in experimental animals, and strong mechanistic evidence. . . . In particular, benzene is metabolically activated to electrophilic metabolites; induces oxidative stress and associated oxidative damage to DNA; is genotoxic; alters DNA repair or causes genomic instability; is immunosuppressive; alters cell proliferation, cell death, or nutrient supply; and modulates receptor-mediated effects.

App 24-25.

17. The Centers for Disease Control and Prevention ("CDC") states that the Department of Health and Human Services has determined that benzene causes cancer in humans. App at cite. The World Health Organization ("WHO") and the IARC have classified benzene as a Group 1 compound, thereby defining it as "carcinogenic to humans." App 25.

18. The FDA currently recognizes the high danger of this compound and lists it as a "Class 1 solvent" that "should not be employed in the manufacture of drug substances, excipients, and drug products because of their unacceptable toxicity. . . However, if their use is unavoidable in order to produce a drug product with a significant therapeutic advance, then their levels should be restricted" and benzene is restricted under such guidance to 2 ppm. App 25.

19. The National Institute for Occupational Safety and Health ("NIOSH") recommends

protective equipment be worn by workers expecting to be exposed to benzene at concentrations of 0.1 ppm and defines "inhalation, skin absorption, ingestion, skin and/or eye contact" as exposure routes. App 25-26.

20. As previously stated, the subject Products are considered cosmetics, which the Federal Food, Drug, and Cosmetic Act defines by their intended use, as "articles intended to be rubbed, poured, sprinkled, or sprayed on, introduced into, or otherwise applied to the human body . . . for cleansing, beautifying, promoting attractiveness, or altering the appearance[.]" Federal Food, Drug, and Cosmetic Act 21 U.S. Code § 201(i). "Cosmetic companies have a legal responsibility for the safety of their products and ingredients." App 26.
21. The Products are not drugs and contain no active pharmaceutical ingredient for therapeutic purposes. App at cite Thus, *any* amount of benzene is unacceptable and should not be employed in the manufacture of the Products. App 26.
22. The Plaintiff alleges Defendant's failure to control for benzene contamination and minimized notification of the importance and risks of benzene in its adulterated Products constitute unfair and deceptive conduct. App 28.
23. The manufacture of any misbranded or adulterated cosmetic is prohibited under federal law and District of Columbia law. *Id.*
24. The introduction into commerce of any misbranded or adulterated cosmetic is similarly prohibited. *Id.*
25. The receipt in interstate commerce of any adulterated or misbranded cosmetic is also unlawful. *Id.*
26. Among the ways a cosmetic may be adulterated are:

> If it consists in whole or in part of any filthy, putrid, or decomposed substance; . . whereby it may have been rendered injurious to health.

App 27.

27. The Complaint alleged that Defendant did not disclose that benzene, a known human carcinogen, is present in the Product purchased by Plaintiff. As a result of benzene contamination in the Products, they are considered adulterated and misbranded. The FDA instructs that there is no safe level of benzene, and thus it "should not be employed in the manufacture of drug substances, excipients, and drug products because of [its] unacceptable toxicity." *Id.*

28. The Complaint further alleged that Defendant advertised and sold the Products without any labeling to indicate to consumers that these products contain benzene, as indicated in the image at App 15 which is illustrative of the labels on that and other Defendant's dry shampoo products purchased by the DC General Public. Plaintiff noted that the labeling on the back of the bottle contains "Warnings," none of which are for the presence of a carcinogenic ingredient.

29. The Complaint contends that the potential presence of benezene in the product renders them worthless. App 27.

E. The Court's Dismissal of the Action

30. The Trial Court first contended that the scope of D.C. Code Section 28-3905(k)(1), the representative action statute setting forth "tester standing" was modified after the decision in Grayson v. AT&T Corp., 15 A.3d 218 (D.C. 2011). App 38.

31. In particular, the Trial Court took note of the 2012 Report of the City Council which resulted in additional provisions for non-profit and public interest organizations other than

individual standing. App 39. The Trial Court noted phrases of the legislative history of the Report that, the Trial Court evidently believed, required the plaintiff in a Representative Action to engage in testing:

> 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) authorized these individuals to bring an action on their own behalf, for the good or service they purchase or receive 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.'

App 39 (emphasis by trial court).

32. The Trial Court contended that the above indicated that the Plaintiff had to actually test the purchased product in order to have standing. *Id.*

33. Further, the Trial Court contended the fact that the plaintiff in *Mostfi* had actually testing the products he purchased (even if that was not mentioned in the opinion) distinguished that case.

> Plaintiff's reliance on Mostofi and interpretation of tester standing is otherwise misplaced. First, Defendant correctly points out that the *Mostofi* defendant did not raise the issue of whether such specific testing was required and that as a result, *Mostofi* is silent on the interpretation of D.C. Code § 28-3905 (k)(1)(B) as it applies to tester standing under the CPPA. Second, the plaintiff in *Mostofi* alleged that he conducted independent testing in the complaint. . . . Plaintiff here has not proffered that she purchased the Product for purposes of conducting independent testing or has in fact engaged in any testing of the Product purchased. Therefore, *Mostofi* is not applicable, as Plaintiff has not pled facts supporting a finding that she conducted any testing or evaluation of the Product herself, unscientific or otherwise.

App 40 (cleaned up).

34. Next, the Trial Court referenced Praxis Project v. Coca- Cola Co., No. 2017 CA 004801 B, 2019 D.C. Super. LEXIS 17 (D.C. Super. Ct. Oct. 1, 2019), in which two pastors and a non-profit health advocate organization— alleged that a soft drink manufacturer made false, deceptive, and misleading representations about the nutritional content of sugar-sweetened beverages in violation of the CPPA. The plaintiffs alleged in their complaint that they purchased defendant's sugar-sweetened beverages for the purposes of evaluating and testing the products sugar content and potential effects on blood sugar. Id. at *4. The Court found that the plaintiffs lacked standing under D.C. Code § 28-3905 (k)(1) in the absence of any showing that the plaintiffs engaged in testing of the product "in any way that relates to the allegations of misleading statements in advertising at issue here." Id. at *22. In reaching this conclusion, the Court found the Praxis plaintiffs' claims that they evaluated the product by viewing the alleged misrepresentations on the packaging, such was insufficient to constitute evaluation:

> According to the 2012 DCCPPA Amendment Committee Report, "tester standing" was created to allow consumers who offer to purchase, or actually purchase, products or services with the intent of determining whether those products or services are what they claim to be, to file suits against untruthful merchants. . . . The report states that "consumers need not actually have been misled by a misrepresentation regarding a consumer good or service to have suffered an injury-in-fact giving rise to an actionable claim." Id. at 4. The report further states that 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.

App 40.

35. Citing this language, Judge McKenna concluded that "although the D.C. Council noted that the 2012 amendments were to help actual testers avoid running afoul of notions of "manufactured standing," "where no relevant testing or evaluation was actually done, the

assertion of standing based on testing in this case fails as to all Plaintiffs." App 40-41.

36. As to the Appellant's reliance on the Committee report, the court stressed its belief that "science or physical testing of the product" was necessary, citing the above-referenced section of the Committee Report which made reference to testing only:

> . . . Plaintiff's reliance is misplaced as she conflates the lack of any requirement that she be actually misled by a misrepresentation with a lack of testing and ignores the ultimate conclusion that a plaintiff must conduct some sort of actual scientific or physical testing or evaluation of the product to assert standing pursuant to D.C. Code § 28-3905 (k)(1)(B). Here, Plaintiff relies entirely on test results reported by an independent third-party and has not shown that the Product she purchased even came from the same batch tested. Plaintiff does not allege that she conducted any additional testing or evaluation of the Product or demonstrate any capacity to test the Product to determine its benzene content. For these reasons, Plaintiff fails to demonstrate tester standing under the CPPA in Counts I and II of her Complaint.

SUMMARY OF ARGUMENT

This court has de novo review over the trial court's ruling. The Trial Court failed to take into account the broad interpretation of the DC Consumer Protection Act, a remedial statute, when it ruled that the plaintiff herein had to perform scientific testing on the product at issue, a dry shampoo that an independent firm had tested and found unlawful levels of a carcinogen in random samples. It erred as the case law interpreting the law of representative actions has denied motions to dismiss when the plaintiff did no such scientific testing. The Trial Court misread the language "test"or "evaluate" to mean that testing had to be done regardless of the circumstances. It disregarded a companion Superior Court case that ruled reliance on third-party testing was sufficient to survive a motion to dismiss. In so doing, it had to invoke documents on which said case did not mention to reach its conclusion.

Further, the Trial Court erred in interpreting a second Superior Court case that found testing by consumer examination of a product inadequate as requiring scientific testing in this case. That second

case relied on the legislative history of amendments to the Act which make it clear that no scientific testing is necessary.

Also, cases from other jurisdictions have come to similar conclusions.

Finally, the Trial Court's ruling displaces the DC Rules of Civil Procedure which require expert reports to be produced only after discovery.

ARGUMENT

I. Standard of Review

This court reviews de novo the trial court's dismissal of the complaint pursuant to Rule 12(b)(6). *See, e.g., Darrow v. Dillingham & Murphy*, LLP, 902 A.2d 135, 137 (D.C.2006) (citing *Wallace v. Skadden, Arps, Slate, Meagher & Flom*, 715 A.2d 873, 877 (D.C.1998)). In reviewing the complaint, the court must accept its factual allegations and construe them in a light most favorable to the non-moving party. *Jordan Keys & Jessamy, LLP v. St. Paul Fire & Marine Ins. Co.*, 870 A.2d 58, 62 (D.C.2005). However, "[f]actual allegations must be enough to raise a right to relief above the speculative level...." *Bell Atlantic Corp. v. Twombly*, ___ U.S. ___, ___, 127 S.Ct. 1955, 1965, 167 L.Ed.2d 929 (2007). Furthermore, dismissal under Rule 12(b)(6) is appropriate where the complaint fails to allege the elements of a legally viable claim. *See Jordan Keys & Jessamy*, 870 A.2d at 62 (affirming dismissal for failure to state a claim; "We agree with the trial judge that Jordan Keys' amended complaint, viewed in the light most favorable to the pleader, does not allege the elements of an implied-in-fact contract."); *Taylor v. FDIC*, 328 U.S.App.D.C. 52, 60, 132 F.3d 753, 761 (1997) ("Dismissal under Rule 12(b)(6) is proper when, taking the material allegations of the complaint as admitted, and construing them in plaintiffs' favor, the court finds that the plaintiffs have failed to allege all the material elements of their cause of action.") (citations omitted)). To be sure, "complaints need

not plead law or match facts to every element of a legal theory," *Krieger v. Fadely*, 341 U.S.App. D.C. 163, 165, 211 F.3d 134, 136 (2000) (internal quotation marks and citation omitted), but "the pleader must set forth sufficient information to outline the legal elements of a viable claim for relief or to permit inferences to be drawn from the complaint that indicate that these elements exist." 5B CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE: CIVIL 3D § 1357, at 683 (2004). *See In re Plywood Antitrust Litigation*, 655 F.2d 627, 641 (5th Cir.1981) ("Despite the liberality of modern rules of pleading, a complaint still must contain either direct or inferential allegations respecting all the material elements necessary to sustain a recovery under some viable legal theory.").

This court also reviews de novo questions of statutory construction. *Robert Siegel, Inc. v. District of Columbia*, 892 A.2d 387, 393 (D.C.2006) (*quoting Richardson v. Easterling*, 878 A.2d 1212, 1216 n. 5 (D.C.2005) (question of statutory construction is a "quintessential issue of law subject to de novo review")). "Where, as here, a regulation is legislative in character, the rules of construction applicable to statutes should be used in determining its meaning." *EDM & Associates, Inc. v. GEM Cellular*, 597 A.2d 384, 388 (D.C. 1991). "The primary and general rule of statutory construction is that the intent of the lawmaker is to be found in the language that he has used." *Jeffrey v. United States*, 892 A.2d 1122, 1128 (D.C.2006) (*quoting Peoples Drug Stores, Inc. v. District of Columbia*, 470 A.2d 751, 753 (D.C. 1983) (en banc)). This court has held that "[a] cornerstone of statutory interpretation is the rule that a court `will not look beyond the plain meaning of a statute when the language is unambiguous and does not produce an absurd result.'" *J. Frog, Ltd. v. Fleming*, 598 A.2d 735, 738 (D.C.1991) (quoting Gibson v. Johnson, 492 A.2d 574, 577 (D.C.1985) (citation omitted)).

II. The Trial Court Erred In Holding that The Plaintiff Had Not Plead A DCCPA Deception

A. The Trial Court Failed to Consider the Broad Judicial Interpretation of The District of Columbia Consumer Protection Procedures Act ("CPPA"), DC Code 28-3901 et seq., and in particular the representative actions described therein

D.C. Code § 28-3901 et seq., prohibits unfair or deceptive trade practices. The prohibited trade practices include, in relevant part, actions that:

> (a) represent that goods or services have a source, sponsorship, approval, certification, accessories, characteristics, ingredients, uses, benefits, or quantities that they do not have;
> (b) represent that goods have characteristics, uses, or benefits that they do not have;
> (d) represent that goods or services are of particular standard, quality, grade, style, or model, if in fact they are of another;
> (e) misrepresent as to a material fact which has a tendency to mislead;
> (f) fail to state a material fact if such failure tends to mislead;
> (f-1) use innuendo or ambiguity as to a material fact, which has a tendency to mislead;
> (h) advertise or offer goods or services without the intent to sell them or without the intent to sell them as advertised or offered; and
> (x) sell consumer goods in a condition or manner not consistent with that warranted by operation of sections 28:2-312 through 318 of the District of Columbia Code, Official Code, or by operation or requirement of federal law.

The CPPA provides for treble damages, or $1,500 per violation, whichever is greater, as well as reasonable attorneys' fees, punitive damages, an injunction against the unlawful trade practice, "additional relief as may be necessary to restore the consumer money or property . . . which may have been acquired by means of the unlawful trade practice," and "any other relief the court deems proper." D.C. Code § 28-3905 (k)(1).

Additionally, the enforcement provisions of the CPPA are broadly construed. Thus, for instance, as one court has stated, "the CPPA's extensive enforcement mechanisms apply not only to the unlawful trade practices proscribed by § 3904, but [also] to all other statutory and common law prohibitions." *Osbourne v. Capital City Mortgage Corp.,* 727 A.2d 322, 325-26 (D.C. 1999).

The District of Columbia City Council made clear that the CPPA "shall be construed and

applied liberally to promote its purpose . . . [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." D.C. Code § 28-3901(c). "In fact, the CPPA does not require much by way of pleading to state a claim . . . [a]ll that is required is an affirmative or implied misrepresentation that a reasonable consumer would deem misleading." *McMullen v. Synchrony Bank*, 164 F. Supp. 3d 77, 94-95 (D.D.C. 2016) (quotations and citations omitted).

III. The Trial Erred In Assuming That Appellant Had To Perform Testing

A. The Case Law Interpreting Section 3905(k)(1) Makes It Clear That Either Testing or Evaluation Is Permissible, and That, In The Appropriate Circumstances, Evaluation By A Layperson or His Counsel of the Underlying Facts is All That is Necessary

The purchase by Ms. Dixon described above, see Statement of Fact ("SOF") 3, is all that is necessary to give the plaintiff standing to be the Representative in this action. D.C. Code § 28-3905 (k) (2001) (whose 2000 amendments replaced the word "consumer" with "individual":

> (k)(1) An individual may, on behalf of that individual, or on behalf of both the individual and the general public, bring an action seeking relief from the use of a trade practice in violation of a law of the District when that trade practice involves consumer goods or services that the individual purchased or received <u>in order to test or evaluate qualities</u> pertaining to use for personal, household, or family purposes:
>
> The remedies available include:
>
> > (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.

(emphasis added).

The basis for the Plaintiff's standing and the manifestation of the alleged injury in fact is similar to that in *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 371 (1982). In *Havens,* a national housing rights organization had a black and a white applicant submit identical resumes to an apartment complex for housing. The purpose of the applications was not to obtain housing; instead, the purpose was to determine whether or not the apartment complex was engaged in racial discrimination. The housing complex approved the application of the white applicant but denied the application of the black one.

The *Havens* court held that the black applicant had standing to sue for damages, even though he never had any intention of moving into the apartment. In short, the Court determined that § 804(d) of the Fair Housing Act "established an enforceable right to truthful information concerning the availability of housing," id. at 373, and thus, plaintiffs were injured in fact and had standing to sue because of "deprivation of information about housing availability." *Id.*

In *Molovinsky v.* Fair *Employment Council*, 683 A.2d 142 (1996), the DC Court of Appeals upheld the theory of tester liability. In *Molovinsky*, in response to complaints that a prospective employer, Executive Suites, was violating the rights of a Mr. Henderson by harassing him during a job application violating Mr. Henderson's rights under DC law, the DC Fair Employment Commission designed a gender discrimination program and arranged four testers, two men and a woman to pose as job seekers and visit Executive Suite. *Id* at 145.

As each tester had the same experience as Mr. Molovinsky, the FEC sued Executive Suites, alleging violation of the employment laws. The jury awarded damages verdicts, including punitives, for not just Mr. Henderson, but also the individual testers. *Id* at 145.

Citing *Havens*, the DC Court of Appeals upheld the standing of the plaintiffs to bring suit, even though they had engaged in the interviews for the sole purpose of investigating whether or not unlawful

activity was taking place.

Consistent with the above precedent, in *Grayson v. AT & T Corp.*, 15 A. 3d 219 (DC 2011) a former employee of a telecommunications firm was aware that the firm was failing to escheat unused funds on prepaid telephone calling cards to the District of Columbia, as required by law. *Id* at 249-252.

In order to have standing to sue the company to cease this practice (again, with full awareness the product was 'defective", and with no intention of using the product), the *Grayson* plaintiff purchased such telecommunications card. *Id.*

The DC Court of Appeals, invoking the *Havens* ruling, upheld the standing of said purchaser of prepaid telephone calling card to sue for alleged violations of the CPPA. Consistent with *Havens*, the Court so ruled even though, as noted above, the plaintiff was an industry insider who knew when he purchased the product that it had the defects at issue. *Id.*

Further, the DC City Council had suspended funding of enforcement by the DC Attorney General's Office of the CPPA. *Id.* at 240. Therefore, the liberal standing requirements conferred by *Grayson* on private plaintiffs are consistent with the intent of the DC City Council to "provide public interest organizations and private attorneys the ability to seek injunctive relief and disgorgement of ill-gotten gains in the public interest". *Id.* at 240.

Most significantly, in *Grayson*, the plaintiff's sole testing or evaluation was his prior industry involvement working for one of the defendants, where he learned that the Defendant had been violating DC law by failing to escheat unused funds on the prepaid telecommunications cards to the District of Columbia. *Id*. The *Grayson* Court did not require any testing, scientific or otherwise, for Mr. Grayson's claim to survive a motion to dismiss. Instead, it relied on his representations that he observed the unlawful activity while employed by the Defendant as sufficient to "evaluate" the Plaintiff's claim.

Contrary to the claims of the Trial Court, the Committee Report (the "Report"), *supra*, is perfectly consistent with this conclusion of the *Grayson* Court.

The Committee Report, cited in detail above, was intended to *expand* Representative Actions after *Grayson* making it clear that non profit organizations could bring actions, whether or not an individual member had been injured. *See* D.C. Council, Report on Bill 19-0581 at 4-5 (November 28, 2012). As noted above, the Committee Report states that "consumers need not actually have been misled by a misrepresentation regarding a consumer good or service to have suffered an injury-in-fact giving rise to an actionable claim." *Id* at 4. The Report further states that "[l]ike the testers in *Havens* and *Molovinsky*, D.C. consumers must be allowed to offer to purchase, or actually purchase, products or services with the intent of determining whether those products or services are what they claim to be." *Id.* at 5. This could include testing *or* evaluation. The former would have to be performed by an expert; the latter could be performed by either an expert or a layperson.

Post *Grayson* case law has largely followed its mandate. *See Julian Ford v. ChartOne, Inc*., 908 A.2d 72, 83 (D.C. 2006) (holding that the definition of consumer transaction under D.C. Code § 28-3901(a)(7) includes "consumer purchases of business opportunities, and purchase of medical records for a lawsuit qualifies as purchasing a business opportunity") (emphasis added); *accord*, *Mostofi v. Mohtaram, Inc.*, 2013 D.C. Super. LEXIS 12 (November 12, 2013), in which a resident of Maryland bringing a CPPA §3905 (k)(1) action bypassed supermarkets in Maryland to purchase extra virgin olive oil ("EVOO") in the District of Columbia was held to have standing "to test whether that EVOO was "true extra virgin olive oil"), with the Court noting:

> Ultimately, neither the intent of Plaintiff nor whether he 'manufactured' standing are dispositive of the question. No precedent establishes that the Court must apply a 'good faith' standard to the actions of a plaintiff in order to find that the standing requirement has been met. Further, Plaintiff . . . does not need to demonstrate that he suffered any physical, emotional,

> or monetary injury; an actual or immediate statutory violation is sufficient to establish an injury-in-fact. . . . The motivations of the plaintiff in *Julian Ford* are similar to Plaintiff; both bought a good for the purpose of advancing litigation. At the very least, Plaintiff qualifies as a consumer that engaged in a consumer transaction for the purchase of a business opportunity as defined in Julian Ford . . . In the alternative, Plaintiff bought a bottle of Pompeian for personal consumption or to test that bottle, which does not disqualify Plaintiff under ….. D.C. Code § 28-3901(a)(7).
> . . . .
> If there is a genuine dispute of material fact whether Defendant misrepresented and sold EVOO of Italian origin, the harm would not be self-inflicted upon Plaintiff's purchase of Pompeian; rather the harm of an unlawful trade practice occurred once Defendant offered to sell that bottle of Pompeian in its store."

Id. at *7 (emphasis added, internal citations omitted).

In short, § 3905 (k)(1 does not require reliance on the part of the plaintiff. More significantly, for the instant case, the language of the statute references purchases to "test" OR to "evaluate". The intent of the City Council in offering these terms in the disjunctive means EITHER ONE ALONE is sufficient.[2]

Consistent with the approach, this Court has previously taken the same expansive approach as described above when confronted with federal challenges to §3905(k)(1) actions. Notably, in *Robins v. Spokeo, Inc.*, 578 U.S. 330 (2016), the Supreme Court ruled that not every plaintiff who has suffered a statutory violation (in that case, based on a data breach) has Article III standing. The D.C. Court of Appeals, however, has rejected any interpretation of *Spokeo* that would undercut the Court's seminal proposition from *Havens Realty Corp. v. Coleman*, *supra*, that a plaintiff whose statutory rights are

[2] The facts of the *Grayson* case, set forth above, demonstrate clearly that "testing" is not necessary for evaluation. The Grayson Plaintiff, an industry insider, was fully aware, before he purchased the product, that the telecommunications firms were not escheating unused funds to the District.. He clearly performed little evaluation and no testing to reach this conclusion.

violated via testing a product or service has Article III standing. *See Moeller v. District of Columbia*, 253 A.3d 165, n. 5 (D.C. 2021) (distinguishing *Spokeo* from *Havens* and rejecting any impact from *Spokeo* on "tester" standing under the DCCPPA).[3]

B. The Trial Court Misread The Mostofi Case to Require Actual Testing By the Plaintiff

The trial court erred in finding that *Mostofi. Supra,* is inapplicable on the criteria for establishing tester standing. The court reasoned that *Mostofi* "was silent on the interpretation of D.C. Code § 28-3905 (k)(1)(B)" (Order at 6) and the plaintiff therefore cannot rely on it for that purpose. The trial court further reasoned that unlike the plaintiff in *Mostofi*, who 'tested the contents' of the extra virgin olive oil. In this case the plaintiff has not – unlike Mostofi – "pled facts supporting a finding that she conducted any testing or evaluation of the Product itself" App 40. To the contrary, however:

(1) The court in *Mostofi* made no mention whatsoever of testing by the plaintiff himself of the olive oil and any conclusion on that basis that it was not extra virgin;

(2) The court instead discussed in detail plaintiff's reliance on UC Davis testing findings that relevant brands did not satisfy the extra virgin standard, and the plaintiff's reliance on them.

(3) The court then found that the plaintiff satisfied the standing requirement on the motion

[3] *See also Animal Legal Defense Fund v. Hormel*, 258 A.3d 174 (D.C. 2021) (holding that CPPA amendment regarding non-profits replaced Article III standing requirement with certain statutory requirements); *Center For Inquiry Inc. v. Walmart, Inc*., 283 A.3d 109, 118 (D.C. 2022) ("Moreover, because the CPPA is a remedial statute, it must "be construed and applied liberally to promote its purpose," *citing Saucier v. Countrywide Home Loans*, 64 A.3d 428, 442 (D.C. 2013) ("[c]onstruing the Act to include allegedly misleading product placement within its scope is consistent with our recognition of the statute's remedial goals")); *Sizer v. Lopez Velasquez*, 270 A. 3d 299 (D.C. 2022) (noting 2019 DCCPPA amendments apply to landlord-tenant relationship); *CA Harrison Companies LLC v. Evans*, 266 A.3d 979 (D.C. 2022) (affirming broad construction of term "home improvement contractor" for DCCPPA provision requiring disgorgement of any funds paid to such firm lacking a proper DC license); *Franken v. Dist. Hosp. Partners*, 225 A.2d 999 (D.C. 2020) (overruling trial court and holding "plaintiff consumer need not allege or prove intentional misrepresentations to claims made under D.C. Code § 38-3904(a) and (d)").

for summary judgment, and thus implicitly based that conclusion on the plaintiff's purchase of the product and his reliance on the UC Davis test results showing impurity in the product – that is, tester standing;

(4) In other words, the court implicitly found that the testing by UC Davis and the plaintiff's reliance on it sufficed for tester standing on the part of the plaintiff; and

(5) To conclude otherwise, when the Court expressly ruled on standing, would accept as reasonable the view that the Court would find standing yet without even mentioning any purported testing by the plaintiff himself of the olive oil as the basis for that finding, whereas the Court discussed at some length the UC Davis results and the plaintiff's reliance on them;

(6) The extensive discussion of the UC Davis testing would therefore have been superfluous were it not therefore in fact the basis for the finding of tester standing; and

(7) The foregoing is a clear basis for reliance on *Mostofi* for tester standing, where Plaintiff-Appellant relied on the testing by Valisure.

Mostofi clearly establishes that Plaintiff satisfies tester standing under the Act. There, the plaintiff purchased one bottle of Pompeian extra virgin olive oil (EVOO) after learning of University of California at Davis testing showing that certain brands of Pompeian violated international and FDA EVOO standards. On allegations under the CPPA very similar to those herein, including that he made the purchase for purposes of testing in comparison with the UC Davis studies, but without yet having his bottle tested, the Court found that his purchase as a consumer within the meaning of the Act sufficed to confer standing.

The Court in *Mostofi* explained that whether the plaintiff bought the bottle for testing or evaluation, or for personal consumption, is immaterial on the question of standing. *Id.* And just as

Mostofi's suit was based on the prior findings of UC Davis, so Plaintiff's action herein is based on the prior findings of Valisure. Further, the Court stated in *Mostofi*, "Plaintiff does not need to demonstrate that he suffered any physical, emotional, or monetary injury; an actual or immediate statutory violation is sufficient to establish an injury-in-fact." *Id.* at *8. There was no evidence stated in the decision that the plaintiff, in relying on the UC Davis testing findings that relevant brands violated that standard, knew whether the contents of the particular bottle he bought violated the federal standard, yet the Court was satisfied that even without that, the plaintiff had standing.

Similarly, in *Henning v. Luxury Brand Partners, LLC*, No. 22-cv-07011, 2023 WL 3555998 (N.D. Cal., May 11, 2023), a California federal district court addressed challenges to the plaintiff's standing to assert violations of California's consumer protection law by a seller of dry shampoo allegedly containing benzene. The plaintiff alleged that she would not have purchased the products or would have paid less for them "had she known that the Products contained or risked containing benzene." *Id.*, No. 22-cv-07011 at 5. The plaintiff also alleged that Valisure found benzene in all of the batches of the defendant's products that it tested (as here with Valisure's testing of Defendant's Product). On these allegations, dismissing the defendant's motion as to standing, the Court found that the "Plaintiff plausibly alleged the risk of benzene and that she would not have purchased the Products had she known about the risk. This is sufficient to plead standing based on economic injury." *Id.*[4]

[4] The trial court erred in ruling that "*Mostofi* is silent on the interpretation of D.C. Code §28-3905(k)(1)(B) as it applies to *tester* standing under the CPPA" (Id. at 7, emphasis in original) – which Plaintiff disputes. Contrary to the trial court:

(i) The *Mostofi* court made no mention, as the basis for its conclusion of standing, of Mostofi's allegation in the complaint that he "tasted the contents of the Pompeian bottle of EVOO he purchased . . . and immediately noticed that the oil tasted unlike true EVOO" *Mostofi* at *2, but discussed at some length the UC Davis test results and Mostofi's reliance on them.

C. The Trial Court Erroneously Relied On The Praxis Court's Ruling To Determine That Scientific Testing Is Necessary

The Trial Court's reliance on the *Praxis* Court's ruling was misplaced. In *Praxis*, *supra,* the Court held that the plaintiffs failed to show tester standing under the CPPA, based the consumers' personal inspection of the products' labeling and alleged misrepresentations.[5] This holding does not support the Defendant's contention that a plaintiff must actually test the particular sample of the product that she purchased in order to have standing.

As the *Praxis* court stated, contrary to the trial court's "ultimate conclusion," "tester standing was created to allow consumers who offer to purchase, or actually purchase, products or services *with the intent of determining whether those products or services are what they claim to be*, to file suits against untruthful merchants" (quoting Committee Report at *8).

Consistent with the clear legislative intent behind the statute, as reiterated by the Superior Court in *Praxis*, Dixon "bought the Product to test or evaluate it, within the meaning of the statute," as stated in the Opposition to the Motion to Dismiss, and thus satisfied the statute for purposes of standing.

D. The Trial Court Erroneously Found Plaintiff's Reliance on the Committee Report "Unwarranted" and Further that The CPPA requires a Tester Plaintiff to Have Tested The Actual Bottle She Purchased

The Plaintiff-Appellant stated that "[t]he statute does not on its face require that a plaintiff have tested the bottle she purchased in order to have standing." (Id. at 8.) The trial court erred in rejecting this position, given the following:

- (i) The court found Plaintiff's reliance on the Committee Report "unwarranted." According to the

[5] The Court then found standing on the grounds the *Praxis* Plaintiffs had alternatively plead actual fraud in the purchases at issue and did not dismiss the case. Therefore, the analysis as to evaluation was not immediately appealable.

Report however, tester standing was created to allow consumers who offer to purchase, or actually purchase, products or services with the intent of determining whether those products or services are what they claim to be, to file suits against untruthful merchants. See, *Praxis, supra at* *21-22,

- (ii) The court stated that by that 'unwarrranted reliance', Plaintiff "conflates the lack of any requirement that she be actually misled by a misrepresentation with a lack of testing and ignores the ultimate conclusion that a plaintiff must conduct some sort of actual scientific or physical testing or evaluation of the product to assert standing pursuant to D.C. Code §28-3905 (k)(1)(B)" (Id. at 8-9).
- (iii) No case from either D.C. Superior or Court of Appeals has previously denied tester standing to a plaintiff in analogous circumstances, where, as in the instant case, a manufacturer's product is not necessarily uniformly contaminated or non-conforming with the manufacturer's representations, and the plaintiff relies for tester standing on recent, prior independent testing showing some samples of the same product to be contaminated.
- (iv) Cases in other jurisdictions, alleging similar consumer protection law violations by manufacturers of dry shampoo, further support Plaintiff's argument for standing herein. For instance, in *Bojko v. Pierre Fabre USA Inc.*, No. 22 C 6728 (N.D. Ill., E.D. June 27, 2023), the Court denied the defendant's motion to dismiss for lack of standing (while granting the motion on other grounds) on the rationale that plaintiffs' allegations went beyond a mere risk that the products they purchased contained benzene. No mere risk of contamination would suffice for standing but instead, the Court reasoned, the critical fact was that a majority of the samples tested contained benzene, and the plaintiffs alleged that benzene exposure in any amount is dangerous. "These [t]allegations," the Court found, "'nudge' [the plaintiffs'] claim that the Products they purchased were defective 'across the line from conceivable to plausible'." *Bojko*, No. 22 c 6728 at 6 (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 54, 570 (2007)). And notably, as here with Dixon, the plaintiffs did not allege that the actual bottle of the product they

purchased contained benzene. Instead, Plaintiff-Appellant here, as in *Bojko*, contends that because the three lots tested contained benzene, the reasonable consumer, had she known of the contamination, would not have purchased the product.

E. The Trial Court Erred In Failing To Address the Plaintiff 's Contention That Any Expert Testing Should be Due At The Time of Plaintiff's 26(b)(4) Statement.

In the affirmation attached to Plaintiff's Complaint, the undersigned stated that he would supplement the plaintiff's case with expert testing in accordance with the scheduling order and Rule 26(b)(4).. Further, in the Opposition to Motion to Dismiss, Plaintiff stated "Defendant contends that Plaintiff's position – that at this stage of the litigation, she need not yet have tested or evaluated the specific bottle of Product that she purchased in order to have standing – is "contrary to the statute." *Id* at 6.

The trial court ignored these representations, in effect ruling testing or evaluation must be disclosed at the filing of the complaint. This contradicts the scheduling practices of the DC Superior Court, which have specific deadlines for when expert reports are due. Perversely, the Court's imposition of such requirements at the time of the filing of the complaint narrowly, not broadly, construes, those provisions of the CPPA permitting representative actions, making them more difficult to bring than a typical CPPA case. Therefore, such a requirement should only be as part of Plaintiff's expert report.

Even further, the specific language of Section 3905 (k)(1) that the "plaintiff" purchase the product to "test" or "evalute" is consistent with this reasoning. Clearly, the plaintiff cannot perform any testing; that must be done by an expert, typically retained by counsel. Further, any "evaluation" performed by a single plaintiff (i.e. that the plaintiff considered the packaging deceptive, or the product did not do what the manufacturer represented it would) would be the target of defense motions

to strike as anecdotal evidence. The reasonable conclusion is that the City Council inserted the words "test" and "evaluate" as part of Section 3905(k)(1) to distinguish the individual doing the purchasing from a consumer, who need not perform these functions.

CONCLUSION

For these reasons, this Court should reverse the Trial Court's ruling and remand with instructions the Trial Court should reinstate the case and discovery should commence.

Respectfully Submitted

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CERTIFICATE OF SERVICE

I hereby certify that that I filed the foregoing brief via the Court of Appeals' efiling system, and confirmed that the system indicated a copy had been efiled with:

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Today

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