No. 24-CV-0058

District of Columbia Court of Appeals

DAISY DIXON,
Appellant

v.

JOHN PAUL MITCHELL SYSTEMS,
Appellee

On Appeal from the Superior Court of the District of Columbia
Case No. 2023-CAB-004140

BRIEF OF APPELLEE JOHN PAUL MITCHELL SYSTEMS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

Rules

STATEMENT OF THE PARTIES

In the Superior Court of the District of Columbia, the parties and their counsel were as follows:

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Pursuant to Rule 26.1, Appellee John Paul Mitchell Systems states that it has no parent corporation and that no publicly held corporation owns 10% or more of its stock.

STATEMENT OF JURISDICTION

Appellant, Daisy Dixon's ("Ms. Dixon") appeal arose from the final order of the Superior Court of the District of Columbia, dated January 2, 2024, in the matter styled *Dixon v. John Paul Mitchell Systems*, Case No. 2023-CAB-004140, which dismissed Ms. Dixon's Amended Complaint in its entirety.

STATEMENT OF THE ISSUE PRESENTED FOR REVIEW

The sole issue presented for review by Ms. Dixon's appeal is:

Whether the Superior Court of the District of Columbia correctly dismissed Ms. Dixon's claims brought under the District of Columbia Consumer Protection Procedures Act for lack of standing.

All of the "issues" identified by Ms. Dixon, and attendant arguments, are subparts of the above single issue.

Ms. Dixon's Amended Complaint also contained claims under the District of Columbia Commercial Code. Ms. Dixon has not argued any error by the Superior Court with respect to its dismissal of Ms. Dixon's claims under the Commercial Code, waiving any such arguments. *See Hoff v. Rein*, 110 A.3d 561, 564 n.8 (D.C. 2015) (holding that appellant's "fail[ure] to challenge the trial court's ruling with respect to the retaliation claim" waived any such challenge). Given Ms. Dixon's failure to assign any error to the court's dismissal of her claims under the Commercial Code, JPMS has included in its brief only material that is relevant to Ms. Dixon's claims under the Consumer Protection Procedures Act. In the event that Ms. Dixon attempts to raise issues in her reply brief that concern her claims under the Commercial Code, JPMS reserves, and does not waive, the right to assert arguments, and factual bases therefor, regarding those claims.

STATEMENT OF THE CASE

Ms. Dixon brought this action alleging that John Paul Mitchell Systems ("JPMS") violated the District of Columbia Consumer Protection Procedures Act ("CPPA"). Ms. Dixon alleged that two unspecified and random lots of one line of JPMS's shampoo products were tested by a third-party and found to contain the allegedly harmful substance benzene. A year after that test occurred, Ms. Dixon purchased a bottle of the same variety ("Product at Issue") of those unspecified and random lots of the JPMS product. Ms. Dixon claimed that the unrelated alleged testing of unspecified and random lots of the JPMS product by a third-party, a year prior to her purchase of the Product at Issue, was sufficient to confer upon her "tester standing" under the CPPA.

Ms. Dixon did not allege that the Product at Issue: (1) bore any connection to the unspecified and random lots of the JPMS product, except that it was of the same variety of JPMS product; (2) was defective, adulterated, and/or contaminated with benzene; or (3) caused Ms. Dixon any damage from use of the product. Most importantly, Ms. Dixon did not test or evaluate the Product at Issue in any way.

JPMS filed a motion to dismiss Ms. Dixon's claims under Rules 12(b)(1) and 12(b)(6) of the Superior Court Rules of Civil Procedure for lack of standing and failure to state a claim, respectively. Specifically, JPMS argued that Ms. Dixon had failed to establish her claimed "tester standing" because she had

failed to test or evaluate the Product at Issue in any way and had failed to establish any of the traditional elements of standing.

The Superior Court of the District of Columbia granted JPMS's motion and dismissed Ms. Dixon's claims, ruling that Ms. Dixon failed to demonstrate tester standing to assert claims under the CPPA because she did not test or evaluate the Product at Issue. Ms. Dixon has appealed that ruling.

STATEMENT OF THE RELEVANT FACTS

I. Ms. Dixon's Allegations

Ms. Dixon has alleged that, in the first quarter of 2022, a third-party entity, not a party to this matter, "Valisure" tested two lots of John Paul Mitchell Invisiblewear Dry Shampoo ("Tested Lots") which allegedly contained more than the U.S. Food and Drug Administration's ("FDA") permissible levels of benzene for drug products.[1] Appendix ("App.") at 8, ¶ 4; *id.* at 21-22, ¶¶ 38, 40-41. Over a year later, on March 31, 2023, Ms. Dixon allegedly purchased the Product at Issue, a single bottle of Paul Mitchell Invisiblewear Dry Shampoo. *Id.* at 13, ¶ 15.

[1] Ms. Dixon has not alleged that the Product at Issue or the Tested Lots are a drug product, which they are not. App. at 7-33, *passim*. The Valisure petition, relied upon by Ms. Dixon, explicitly states that the FDA has ***not*** set standards for benzene in cosmetic products, as opposed to drugs, and the harm to consumers in the context of dry shampoos has not been established. Valisure Citizen Petition on Benzene in Dry Shampoo Products ("Valisure Petition") at 4, 10, 22, available at https://assets-global.website-files.com/6215052733f8bb8fea016220/6360f7f49903987d8f4f4309_Valisure%20FDA%20Citizen%20Petition%20on%20Benzene%20in%20Dry%20Shampoo%20Products_103122.pdf (last accessed on Sept. 25, 2024)

Ms. Dixon did not purchase the Product at Issue from a store located in the District of Columbia. Rather, she ordered the Product at Issue from a store in California and had it shipped to her address in the District of Columbia. *Id.* at 13-15, ¶ 15.

Ms. Dixon did not allege that any amount of the Tested Lots reached the District of Columbia. App. at 7-33, *passim*. Ms. Dixon did not allege that the Product at Issue contained shampoo product from the Tested Lots. *Id.* In fact, Ms. Dixon conceded that she ***cannot*** allege that the Product at Issue came from the Tested Lots. *Id.* at 11, ¶ 5. Ms. Dixon did not allege ***any*** connection or relation between the specific Product at Issue and the Tested Lots, except that they were both Paul Mitchell Invisiblewear Dry Shampoo. *Id.*

Further, Ms. Dixon did not allege that the specific Product at Issue was defective, adulterated, and/or contaminated with benzene. App. at 7-33, *passim.* Ms. Dixon did not allege that she suffered any damages from the use of the Product at Issue. *Id.* Most importantly for purposes of this appeal, Ms. Dixon did not test or evaluate the Product at Issue in any way. *Id.*

Ms. Dixon made no attempt to allege the factors of traditional standing. *Id.* Rather, Ms. Dixon specifically claimed to possess "tester standing" under the CPPA. *Id.* at 13-20, ¶¶ 15-33. Ms. Dixon used this alleged standing to assert three counts: (1) violation of the CPPA under Section 28-3904(x), *id.* at 29-30;

(2) violation of the CPPA under "various" subsections, *id.* at 30; and (3) violations of the District of Columbia Commercial Code,[2] *id.* at 31.[3]

II. The Superior Court's Dismissal of Ms. Dixon's Claims

In response to Ms. Dixon's claims, JPMS filed a motion to dismiss under Rules 12(b)(1) and 12(b)(6) of the Superior Court Rules of Civil Procedure. JPMS argued that Ms. Dixon failed to allege: (1) that the Product at Issue was from either of the Tested Lots; (2) that Ms. Dixon tested or evaluated the Product at Issue in any way; or (3) that the Product at Issue actually contained benzene. *See* App. at 35. JPMS further argued that, to qualify for tester standing, Ms. Dixon must have actually tested the Product at Issue, and mere awareness of testing completed on a similar but otherwise unrelated product by an independent third-party does not

[2] As noted above, Ms. Dixon has not alleged any error by the Superior Court with respect to its dismissal of her claims under the Commercial Code.

[3] Two months prior to initiating this action, Ms. Dixon, represented by the same counsel, filed a complaint nearly identical to the original complaint in this matter, alleging the same three causes of action, and claiming "tester standing" on the basis of the same benzene testing completed by Valisure, against Church & Dwight Co., Inc., for a different brand and type of dry shampoo, a particular bottle of which she had ordered from outside the District of Columbia and had delivered to her. *See* Complaint and Demand for Jury Trial, *Dixon v. Church & Dwight*, No. 2023-CAB-002766 (D.C. Super. Ct. May 8, 2023). Ms. Dixon dismissed that matter with prejudice by agreement. *See* Stipulation of Dismissal with Prejudice, *Dixon v. Church & Dwight*, No. 2023-CAB-002766 (D.C. Super. Ct. June 1, 2023).

suffice. *Id.* at 35-36. JPMS also argued that Ms. Dixon failed to establish traditional standing to assert her claims as well. *Id.* at 36.

On January 2, 2024, the Superior Court of the District of Columbia granted JPMS's motion to dismiss and dismissed Ms. Dixon's claims. App. at 43. In dismissing Ms. Dixon's claims, the Superior Court considered D.C. Code § 28-3905(k)(1)(B), the language of the CPPA that authorizes tester standing. *Id.* at 35. The Superior Court also considered the D.C. Council Committee Report issued in connection with the 2012 amendment to the CPPA that explicitly expanded statutory standing under the CPPA to include "tester standing." *Id.* at 35, 41-42. As the Superior Court stated: "The viability of [Ms. Dixon's CPPA claims] depend[s] on Plaintiff establishing tester standing." *Id.* at 38.

The Superior Court noted that D.C. Code § 28-3905(k)(1)(B) had been amended in response to this court's decision in *Grayson v. AT&T Corp.*, 15 A.3d 219 (D.C. 2011) (en banc), which ruled that "without a clear expression of an intent by the Council to eliminate our constitutional standing requirement, we conclude that a lawsuit under the CPPA does not relieve a plaintiff of the requirement to show a concrete injury-in-fact to himself." App. at 38[4] (quoting

[4] Page 38 of the Appendix submitted by Ms. Dixon differs from the text of the Superior Court's Order in at least one instance, reflecting that the Order contained the typographical error "post-Grayso^" when in fact, the Order did not contain this error and reflected, partially italicized "post-*Grayson*." *See* Order at 5, *Dixon v.*

Grayson v. AT&T Corp., 15 A.3d 219, 244 (D.C. 2011) (en banc)). The Superior Court found that

> [t]he revisions to D.C. Code §28-3905(k)(1)[B] were designed ". . . ***to recognize a right of action for consumers that purchase products for the purpose of testing and evaluating those products***."

Id. at 39 (quoting Consumer Protection Act of 2012, Report on Bill 19-0581 at 4 (Nov. 28, 2012) ("Report on Bill 19-0581")). Specifically, the Superior Court found that "[t]he legislative history sets clear parameters for tester standing under the CPPA" by providing a right of action for "***consumers who act as product or service testers***." *Id*.

The Superior Court also considered the post-amendment cases of *Mostofi v. Mohtaram, Inc.*, No. 2011 CA 163 B, 2013 D.C. Super. LEXIS 12 (D.C. Sup. Ct., Nov.12, 2013), and *Praxis Project v. Coca-Cola Co.*, No. 2017 CA 004801 B, 2019 D.C. Super. LEXIS 17 (D.C. Super. Ct. Oct. 1, 2019). App. at 39-42. The Superior Court concluded that

> [Ms. Dixon] here has not proffered that she purchased the Product [at Issue] for purposes of conducting independent testing or has in fact engaged in any testing of the Product [at Issue] purchased. Therefore, *Mostofi* is not applicable, as [Ms. Dixon] has not pled facts supporting a finding that she conducted any testing or evaluation of the Product [at Issue] herself, unscientific or otherwise.

John Paul Mitchell Syss., Case No. 2023-CAB-004140 (D.C. Super. Ct. Jan. 2, 2024).

Id. at 40. With respect to *Praxis*, the more recent trial court ruling interpreting tester standing under the CPPA, the Superior Court concluded that:

> [Ms. Dixon'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).

Id. at 41-42 (emphasis added). Ultimately, the Superior Court concluded that Ms. Dixon lacked tester standing under the CPPA, explaining:

> [Ms. Dixon] relies entirely on test results reported by an independent third-party and has not shown that the Product [at Issue] she purchased even came from the same batch tested. [Ms. Dixon] does not allege that she conducted any additional testing or evaluation of the Product [at Issue] or demonstrate any capacity to test the Product [at Issue] to determine its benzene content. For these reasons, [Ms. Dixon] fails to demonstrate tester standing under the CPPA in Counts I and II of her Complaint.

Id. at 42.

SUMMARY OF ARGUMENT

Standing is a threshold requirement that must be demonstrated by all civil plaintiffs in the District of Columbia prior to consideration of the merits in any civil action. The Council of the District of Columbia's post-*Grayson* amendments to the CPPA did not eliminate this court's constitutional or prudential standing requirements. Even if those amendments eliminated this court's constitutional

standing requirements, they did not eliminate this court's prudential standing requirements.

D.C. Code § 28-3905(k)(1)(B) sets forth the basis upon which a consumer may obtain standing to pursue claims by purchasing or receiving a product and testing that product to evaluate whether a merchant has violated the CPPA. Under the plain language and natural meaning of D.C. Code § 28-3905(k)(1)(B), to qualify for such "tester standing," a tester plaintiff must, therefore, actually test the product purchased from which the claim under the CPPA arises. The legislative history of D.C. Code § 28-3905(k)(1)(B) requires the same conclusion.

Here, Ms. Dixon has not established her satisfaction of any traditional constitutional elements of standing. Ms. Dixon has also not established any right to "tester standing" as contemplated by D.C. Code § 28-3905(k)(1)(B) because she failed to conduct any test or evaluation whatsoever of the Product at Issue that she allegedly purchased. Ms. Dixon's proposed construction of "tester standing"– whereby she need not have tested the Product at Issue and need only be *aware* of testing completed on a similar variety of product, but not the Product at Issue– disregards the constitutional and prudential standing requirements of this court and yields irrational and unreasonable results that are beyond the Council's intent.

The Superior Court correctly: (1) read Ms. Dixon's Amended Complaint as failing to establish any traditional elements of standing or any testing of the

Product at Issue; (2) interpreted D.C. Code § 28-3905(k)(1)(B) as requiring testing of the specific Product at Issue; (3) rejected Ms. Dixon's tortured construction of "tester standing;" and (4) dismissed her claims under the CPPA for failure to test the Product at Issue. The Superior Court properly applied the authority of the *Praxis* case and disregarded the non-controlling and non-applicable *Mostofi* case, among other cases relied upon by Ms. Dixon. The Superior Court further correctly rejected Ms. Dixon's argument that she be allowed to establish standing at a later date through an expert report. The Superior Court committed no reversible error by dismissing Ms. Dixon's claims. This court should affirm that dismissal.

ARGUMENT

I. Standard of Review

A. Standard of Review of a Trial Court's Dismissal of a Complaint

In Ms. Dixon's brief, she failed to address the standard of review for a dismissal under Super. Ct. Civ. R. 12(b)(1) for lack of subject matter jurisdiction. *See* Dixon Brief at 14-15. "A 'defect of standing is [likewise] a defect in subject matter jurisdiction.'" *UMC Dev., LLC v. District of Columbia*, 120 A.3d 37, 43 (D.C. 2015) (quoting *Haase v. Sessions*, 835 F.2d 902, 906 (D.C. Cir. 1987)). The Superior Court ruled that Ms. Dixon lacked standing to assert her CPPA claims, thereby ruling that it lacked subject matter jurisdiction to hear Ms. Dixon's claims. *See id.* Consequently, the standard of review presented by Ms. Dixon, regarding a

dismissal under Super. Ct. Civ. R. 12(b)(6) for failure to state a claim, is irrelevant to Ms. Dixon's appeal.

"A question of subject matter jurisdiction under Super. Ct. Civ. R. 12(b)(1) concerns the court's authority to adjudicate the type of controversy presented by the case under consideration." *Grayson*, 15 A.3d at 228 n.11 (internal quotations omitted). "Whether the trial court has subject matter jurisdiction is a question of law which this court reviews *de novo*." *Id.* (quoting *Davis & Assocs. v. Williams*, 892 A.2d 1144, 1148 (D.C. 2006)). "[T]his court reviews legal questions of standing . . . *de novo*." *Off. of the People's Couns. for D.C. v. D.C. Water & Sewer Auth.*, 313 A.3d 579, 584 (D.C. 2024).

A complaint must be dismissed under Rule 12(b)(1) if the trial court lacks subject matter jurisdiction. Super. Ct. Civ. R. 12(b)(1). "The burden of proving subject-matter jurisdiction … falls on the party invoking [the court's] jurisdiction." *D.C. Water*, 313 A.3d at 590 n.2. "For purposes of ruling on a motion to dismiss for want of standing, both the trial and reviewing courts must accept as true all material allegations of the complaint, and must construe the complaint in favor of the complaining party." *Grayson*, 15 A.3d at 232 (quoting *Warth v. Seldin*, 422 U.S. 490, 501 (1975)).

B. Standard of Review for Statutory Interpretation

"[T]his court reviews legal questions of . . . statutory interpretation *de novo*." *D.C. Water*, 313 A.3d at 584. "In interpreting statutes, judicial tribunals seek to discern the intent of the legislature and, as necessary, whether that intent is consistent with fundamental principles of law." *Grayson*, 15 A.3d at 237.

> In construing a statute the primary rule is to ascertain and give effect to legislative intent and to give legislative words their natural meaning; ***[s]hould effort be made to broaden the meaning of statutory language by mere inference or surmise or speculation, we might well defeat true [legislative] intent***.

Id. at 237-38 (quoting *Banks v. United States*, 359 A.2d 8, 10 (D.C. 1976)) (emphasis added).

However, "[t]he words of a statute are 'a primary index but not the sole index to legislative intent'; the words 'cannot prevail over strong contrary indications in the legislative history . . . .'" *Id.* at 238 (quoting *Citizens Ass'n of Georgetown v. Zoning Comm'n of D.C.*, 392 A.2d 1027, 1033 (D.C. 1978)).

> [W]ords are inexact tools at best and for that reason there is wisely no rule of law forbidding resort to explanatory legislative history no matter how clear the words may appear on superficial examination.

Id. (quoting *Citizens Ass'n*, 392 A.2d at 1033)). This court "presume[s] [that the legislature] acted rationally and reasonably," and "eschew[s] interpretations that lead to unreasonable results." *Id.* (quoting *In re C.L.M.*, 766 A.2d 992, 996 (D.C. 2001)).

II. A Plaintiff Must Have Standing to Assert a Claim

"Standing is a threshold jurisdictional question which must be addressed prior to and independent of the merits of a party's claims." *Grayson*, 15 A.3d at 229 (quoting *Bochese v. Town of Ponce Inlet*, 405 F.3d 864, 974 (11th Cir. 2005)).

> [The District of Columbia Court of Appeals] has followed the principles of standing, justiciability and mootness to promote sound judicial economy and has recognized that ***an adversary system can best adjudicate real, not abstract, conflicts***.

Id. at 233 (citing *District of Columbia v. Walters*, 319 A.2d 332, 337 n.13 (D.C. 1974)) (emphasis added). "Through the years [the District of Columbia Court of Appeals'] cases consistently have followed the constitutional minimum of standing as articulated in *Warth* and *Lujan*." *Id.* at 235 (referring to *Warth v. Seldin*, 422 U.S. 490 (1975) and *Lujan v. Defs. of Wildlife*, 504 U.S. 555 (1992)).

> [The District of Columbia Court of Appeals has] followed Supreme Court developments in constitutional standing jurisprudence with respect to "whether the plaintiff has made out a case or controversy between him[/her] and the defendant within the meaning of Article III," and we generally have applied prudential limitations on the exercise of our jurisdiction.

Id. at 233-34 (quoting *Consumer Fed'n of America v. Upjohn Co.*, 346 A.2d 725, 727 (D.C. 1975)).

"The actual or threatened injury required by Art. III may exist solely by virtue of 'statutes creating legal rights, the invasion of which creates standing.'" *Id.* at 234 (quoting *Warth*, 422 U.S. at 500).

> Constitutional standing under Article III requires the plaintiff to allege personal injury fairly traceable to the defendant's unlawful conduct and likely to be redressed by the requested relief. Out of prudential concerns, standing doctrine embraces several judicially self-imposed limits on the exercise . . . of jurisdiction, such as the general prohibition on a litigant's raising another person's legal rights. . .***and the requirement that a plaintiff's complaint fall within the zone of interests protected by the law invoked***.

Id. (quoting *Exec. Sandwich Shoppe, Inc. v. Carr Realty Corp.*, 749 A.2d 724, 731 (D.C. 2000)) (internal quotations and citations omitted) (emphasis added).

Traditionally, to have standing to bring a claim, a party must show that it has suffered "(1) an actual or imminent threat of injury (2) that is attributable to the defendant, and (3) that the injury is redressable through adjudication" ("Traditional Standing Elements"). *Riverside Hosp. v. D.C. Dep't of Health*, 944 A.2d 1098, 1104 (D.C. 2008). "[A] plaintiff seeking forward-looking relief, such as an injunction, must allege facts showing that the injunction is necessary to prevent injury otherwise likely to happen in the future." *Equal Rights Ctr. v. Props. Int'l*, 110 A.3d 599, 603 (D.C. 2015).

III. To Qualify for "Tester Standing" under the CPPA, the "Tester" Must Actually Test the Product

In *Grayson*, this court addressed the question of whether in the previous version of the CPPA, "the Council intended to disturb or override the constitutional doctrine of standing which we have applied for decades." *Grayson*, 15 A.3d at 235-36. This court concluded that:

> without a clear expression of an intent by the Council to eliminate our constitutional standing requirement, we conclude that a lawsuit under the CPPA does not relieve a plaintiff of the requirement to show a concrete injury-in-fact to himself.

Id. at 244.

As noted by the Superior Court, in response to this court's ruling in *Grayson*, the Council amended the CPPA to "replace the single standing provision, which *Grayson* interpreted more narrowly with respect to suits by individuals, with four separate, independent standing provisions." App. at 38-39 (quoting Report on Bill 19-0581 at 4). As the Report noted:

> 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."

Report on Bill 19-0581 at 4 (emphasis added). Under the new Section 28-3905(k)(1)(B):

> An individual may, on behalf of that individual, or on behalf of both the individual and the general public, bring an action seeking relief from the use of a trade practice in violation of a law of the District when that trade practice involves consumer goods or services that the individual purchased or received ***in order to test or evaluate qualities*** pertaining to use for personal, household, or family purposes.

D.C. Code § 28-3905(k)(1)(B). (emphasis added).

This court has ruled that the post-*Grayson* amendments to the CPPA "did not displace Article III's requirements" with respect to the new Section 28-3905(k)(1)(***C***) and that plaintiffs initiating actions under that section must still meet the traditional Article III requirements. *Animal Legal Def. Fund v. Hormel Foods Corp.*, 258 A.3d 174, 182, 182 n.5, 190-91 (D.C. 2021). Section 28-3905(k)(1)(C) and Section 28-3905(k)(1)(B) are nearly identical except the former applies to nonprofit organizations while the latter applies to individuals. *See* D.C. Code §§ 28-3905(k)(1)(B), (C).[5] Under this court's reasoning, therefore, a plaintiff pursuing a claim under Section 28-3905(k)(1)(B) must also still meet the traditional Article III requirements of standing. *See Animal Legal Def. Fund*, 258 A.3d at 182, 182 n.5, 190-91.

[5] New Section 28-3905(k)(1)(C) states, in its entirety:

> A nonprofit organization may, on behalf of itself or any of its members, or on any such behalf and on behalf of the general public, bring an action seeking relief from the use of a trade practice in violation of a law of the District, including a violation involving consumer goods or services that the organization purchased or received in order to test or evaluate qualities pertaining to use for personal, household, or family purposes.

D.C. Code § 28-3905(k)(1)(C).

Under the natural meaning of the new Section 28-3905(k)(1)(B), standing arises from the testing or evaluation of the product. D.C. Code § 28-3905(k)(1)(B). Put differently, testing or evaluation of the actual product at issue is necessary to establish standing under the CPPA. *See id*. To conclude otherwise would yield an unreasonable result, especially considering the legislative history. *See infra* Section V.

Interpreting D.C. Code § 28-3905(k)(1)(B) as to maintain traditional Article III standing requirements through the creation of a statutory injury, a "tester" plaintiff must, at the very least: (1) purchase or receive a product, (2) test or evaluate that product, and (3) the test or evaluation demonstrates that (4) a representation made by a merchant (5) violates Section 28-3904. *See Grayson*, 15 A.3d at 233-35; D.C. Code § 28-3905(k)(1)(B). Applying prudential standards and limitations on standing, the "tester" plaintiff must assert a real, rather than abstract, conflict that falls within the zone of interests protected by the CPPA, *i.e.*, show that the specific product purchased or received within the District of Columbia has been tested and revealed to demonstrate a violation of Section 28-3904. *See id.* The distinction between Article III or prudential requirements for standing does not control the outcome of this appeal because Ms. Dixon has demonstrated neither.

To qualify for "tester standing" under the CPPA, therefore, the individual must actually *test* the product at issue. *Praxis*, 2019 D.C. Super. LEXIS 17, at *22.

In *Praxis*, two pastors and a non-profit health advocate organization alleged that a soft drink manufacturer had violated the CPPA by making misleading representations about the nutritional content of its beverages. *Id.* at *3, 4. The plaintiffs alleged that they had purchased the manufacturer's beverages to evaluate and test the beverages' sugar content and potential effects on blood sugar. *Id.* Specifically, the plaintiffs' alleged "testing" or "evaluation" involved a review of the products' nutritional information printed on the label. *Id.* at *20-21.

The *Praxis* court began its analysis of the standing issue by noting that the *Praxis* plaintiffs' "Complaint contains ***no specific allegations of any tests actually conducted***." *Id.* at *20 (emphasis added). The court then identified the importance of testing the ***specific bottle of product at issue***, by stating:

> As an initial matter, the Court is not persuaded that purchasing a product to obtain information printed on the label, the truth of which is *assumed* for the purposes of the "evaluation," rather than *at issue* (and that is clearly visible to the public and thus readily available without purchase) — ***without any actual scientific or physical testing of the product*** — would qualify as "testing" under the statute.

Id. at *22 (emphasis added). In other words, the alleged testing completed by the *Praxis* plaintiffs was so deficient and nonexistent that the *Praxis* plaintiffs could have accomplished the same thing without actually purchasing the product. The *Praxis* court then further detailed the deficiency of the *Praxis* plaintiffs' alleged testing:

> Moreover, even assuming such "testing" would qualify, the alleged "testing" and "evaluation" that apparently occurred here is in no way related to the purpose alleged in the complaint, specifically, to "evaluate and test their purported qualities and characteristics, including but not limited to their sugar content and potential effects on blood sugar levels and Defendants' representation that a calorie of Coke is equivalent nutritionally to a calorie of any other food." Compl. ¶¶ 20, 22, 25. ***There was no scientific test to determine the actual sugar content, there was no test of its effects on blood sugar levels, and there was no evaluation of anything even remotely relevant to the question of whether "a calorie of Coke is nutritionally equivalent to a calorie of any other food."***

Id. at *23 (emphasis added). In other words, there must be a nexus between the Product at Issue and the testing. *Id.* "[W]here no relevant testing or evaluation was actually done, the assertion of standing based on testing . . . fails." *Id.* at *24.[6]

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[6] The United States District Court for the Northern District of Illinois recently dismissed a claim brought against JPMS because the plaintiffs in that matter, who also relied upon testing by Valisure, failed to allege that, and failed to otherwise test to determine whether, the specific product that they had purchased contained benzene. Memorandum Opinion and Order at 5-6, *Nelson, et al. v. John Paul Mitchell Systems*, No. 1:22-cv-06364 (N.D. Ill. Sept. 23, 2024) (ECF 50). The court stated:

> Plaintiffs argue that because Valisure's test of three lots of the Product revealed the presence of benzene, there is a risk that all the lots of the Product contained benzene, and therefore the Product that they purchased did contain or likely contained benzene. These allegations support the reasonable inference that, assuming the results of Valisure's test are true and accurate, there is a general risk that some members of the public may have suffered a financial injury by purchasing the Product. But absent allegations that the Product they purchased was from one of the tested lots, these allegations are not particularized to show that Plaintiffs suffered more than an abstract risk of similar financial injury. For these reasons, Plaintiffs lack standing to seek damages for their claims.

IV. The Superior Court Did Not Err When It Concluded that Ms. Dixon Lacks Standing to Assert Her Claims under the CPPA

Here, Ms. Dixon has done even less than the *Praxis* plaintiffs. Ms. Dixon has not alleged the Traditional Standing Elements, nor has she attempted to do so. *See Riverside Hosp.*, 944 A.2d at 1104; App. at 7-33, *passim.* Rather, Ms. Dixon's claim is based entirely on "tester standing" under the CPPA. App. at 13-20, ¶¶ 15-33. To the extent that Ms. Dixon must still establish Article III standing through the Traditional Standing Elements, Ms. Dixon has failed to do so, which is fatal to her claim. *See Animal Legal Def. Fund*, 258 A.3d at 182, 182 n.5, 190-91.

However, even if satisfaction of the Traditional Standing Elements were not required under the new Section 28-3905(k)(1)(B), Ms. Dixon has still failed to establish the statutory "tester standing" granted by the CPPA. The alleged testing relied upon by Ms. Dixon was conducted by an independent third-party entity a year prior to Ms. Dixon's purchase of the Product at Issue. App. at 8, ¶ 4; *id.* at 13, ¶ 15; *id.* at 21-22, ¶¶ 38, 40-41. That testing was not completed on the Product at Issue. *Id.* Instead, that testing was completed on the Tested Lots, which, although

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> Plaintiffs similarly lack standing to seek injunctive relief. . . Since Plaintiffs are now aware
> that the Product allegedly contains benzene, there is no risk of future deception by JPMS. Therefore, Plaintiffs are not likely to be harmed by the Product in the future.

Id.

they were of the same "***variety***" as the Product at Issue, had no other relation or connection to the Product at Issue. *See id.* at 23, ¶ 43 (emphasis added); *id.* at 7-33, *passim*. The alleged testing by third-party Valisure, therefore, is not remotely relevant to, or probative of, Ms. Dixon's alleged claims, which arise from the purchase of the Product at Issue. *See Praxis*, 2019 D.C. Super. LEXIS 17, at *23.

Moreover, Ms. Dixon did not test or evaluate the Product at Issue in any way. App. at 7-33, *passim*. Ms. Dixon's assertion that Section 28-3905(k)(1)(B) allows for testing or evaluation and that "EITHER ONE ALONE is sufficient" is irrelevant because Ms. Dixon did neither. Dixon Brief at 21. Even if Ms. Dixon claims that her review of the label of the Product at Issue constitutes "evaluation"–which she has not argued–as pointed out in *Praxis*, such a review, which does not actually evaluate anything but simply assumes the truth of the label, is not a scientific or physical test or evaluation of the Product at Issue that would qualify as "testing" under the statute. *See Praxis*, 2019 D.C. Super. LEXIS 17, at *22.

Ms. Dixon conducted "no scientific test to determine the actual [benzene] content" of the Product at Issue, "there was no test of its effect[]" when trace amounts were present in dry shampoo, and "there was no evaluation of anything even remotely relevant to the question of whether" the Product at Issue contained a known carcinogen. *See id.*; *Praxis*, 2019 D.C. Super. LEXIS 17, at *23.

Ms. Dixon, therefore, conducted "no relevant testing or evaluation." *See Praxis*, 2019 D.C. Super. LEXIS 17, at *22-24. Consequently, Ms. Dixon's assertion of "tester standing" under the CPPA fails. *See id*.; D.C. Code § 28-3905(k)(1)(B); Report on Bill 19-0581 at 4.

The Superior Court correctly reached the same conclusion. App. at 43. It considered the plain text of the CPPA, the legislative history relevant to the standing amendments, the cases decided since, and Ms. Dixon's specific allegations. *Id.* at 34-36, 38-42. It concluded, like the *Praxis* court, that Ms. Dixon "fail[ed] to demonstrate tester standing under the CPPA" because she neither completed nor commissioned any relevant testing or evaluation of the Product at Issue. *Id.* at 41-42. For that reason, the Superior Court correctly dismissed Ms. Dixon's claims. *See* D.C. Code § 28-3905(k)(1)(B); *Praxis*, 2019 D.C. Super. LEXIS 17, at *22-24; Report on Bill 19-0581 at 4.

The Superior Court, therefore, did not err with respect to issues (c), (e), and (g), identified by Ms. Dixon, *see* Dixon Brief at 2-3, and Ms. Dixon's arguments in Sections II, III(A), (C), and (D) of her Brief are meritless.

V. Ms. Dixon's Construction of Tester Standing under the CPPA is Untenable and Unreasonable

Ms. Dixon has argued that the Superior Court erred by not liberally construing tester standing as defined by the CPPA. Specifically, Ms. Dixon has argued that, because the CPPA is to be liberally construed, her *awareness* of

testing completed by a third-party on the unrelated and unconnected Tested Lots, without her completion of any testing of any kind of the Product at Issue, is sufficient to support her claim arising from the Product at Issue, and all that is required is the "purchase" of the Product at Issue. Dixon Brief at 16-19, 21 n.2, *passim*. Ms. Dixon is mistaken. Her argument is not for a liberal construction of tester standing; rather it is a construction so broad as to stretch tester standing beyond recognition and any constitutional or prudential principles of standing. The Superior Court properly rejected that overly broad, limitless, and unreasonable construction.

A. The Natural Meaning of the Text of the CPPA Does Not Support Ms. Dixon's Construction of Tester Standing.

As noted above, a claim brought on the basis of tester standing must be brought on the grounds of a "trade practice [that] involves ***consumer goods*** . . . ***that the individual purchased*** or received . . . ***in order to test or evaluate qualities*** pertaining to use for personal, household, or family purposes." D.C. Code § 28-3905(k)(1)(B) (emphasis added). That the statute "does not on its face require that a plaintiff have tested the bottle she purchased in order to have standing," *see* Dixon Brief at 2, 25-26, is pointless. The literal focus of the statutory text is consumer goods or services "that the individual purchased or received in order to test the product." *See* D.C. Code § 28-3905(k)(1)(B). Under

the natural meaning of the CPPA, the consumer good at issue must be purchased or received ***and tested or evaluated*** to establish tester standing. *Id.*

Absent such testing on the specific product at issue, there is no nexus of fact to render the dispute real, rather than abstract, or to conclude that the complaint falls within the zone of interests protected by Section § 28-3905(k)(1)(B). *See Grayson*, 15 A.3d at 234-35. Mere awareness of testing completed on a product other than the specific consumer good purchased and received by the prospective plaintiff does not establish such a nexus. *See id.* Such awareness of testing is *a fortiori* irrelevant, considering the legislative history, which states that standing is granted to "consumers ***who act as*** product or service ***testers***." Report on Bill 19-0581 at 4 (emphasis added). Ms. Dixon did not "act as a product . . . tester."

B. Ms. Dixon's Arguments Based On *Grayson* Are Misplaced.

Ms. Dixon has argued that this court's decision in *Grayson* supports her broad construction. Dixon Brief at 19-20. Nothing could be further from the truth. First, the CPPA did not contemplate "tester standing" at the time that *Grayson* was decided, so Ms. Dixon's argument that "[t]he *Grayson* Court did not require any testing, scientific or otherwise, for Mr. Grayson's claim to survive a motion to dismiss" is meritless and irrelevant. *See id.* at 19.

Second, in *Grayson*, this court specifically rejected a claim for lack of standing due to a failure to establish traditional Article III standing requirements,

and found standing where the plaintiff did establish such requirements. *Grayson*, 15 A.3d at 247, 249-50. Ms. Dixon has failed to establish or even allege traditional Article III standing requirements, which under *Grayson*–and *Animal Legal Def. Fund*–is fatal to her claim. *See id*. at 247; 258 A.3d at 182, 182 n.5, 190-91.

Third, Ms. Dixon's broad construction, which does not require testing of the Product at Issue, presents exactly the type of abstract conflict that fails to fall within the zone of interests protected by the law invoked and, therefore, violates this court's constitutional and prudential limitations on standing. *See Grayson*, 15 A.3d at 233-35. This court's decision in *Grayson* does not support Ms. Dixon's broad construction of tester standing.

C. Ms. Dixon's Reliance on Various Other Cases Is Also Misplaced.

The other cases relied upon by Ms. Dixon to support her broad construction of the CPPA's standing requirement, and her attendant assertion that no testing is required, are either irrelevant and/or, even if relevant, defeat Ms. Dixon's argument because they involved (1) some type of testing (2) of the actual thing at issue (3) by the plaintiffs. *Julian Ford v. ChartOne, Inc.*, 908 A.2d 72 (D.C. 2006), is irrelevant because it involved a version of the CPPA that did not include "tester standing" and concerned the question of whether the transaction at issue was a "consumer" transaction, which is not in dispute here. *See Julian Ford*, 908 A.2d at 80-84. *Havens Realty Corp. v. Coleman*, 455 U.S. 363 (1982), is irrelevant

because it concerned the federal Fair Housing Act, rather than the statutory standing established by the CPPA, and, by Ms. Dixon's own admission, involved the "test" of submission of identical resumes, by a plaintiff, to an apartment complex that yielded different results. *See Havens*, 455 U.S. 363 at 366; Dixon Brief at 18. *Molovinsky v. Fair Employment Council*, 683 A.2d 142 (1996), is irrelevant because it concerned the District of Columbia Human Rights Act, rather than the statutory standing established by the CPPA and, by Ms. Dixon's own admission, involved the "test" of the plaintiffs interviewing for a job. *See Molovinsky*, 683 A.2d at 144, 146; Dixon Brief at 18-19.

Bojko v. Pierre Fabre USA Inc., No. 22-cv-6728, 2023 U.S. Dist. LEXIS 110443, 2023 WL 4204663 (N.D. Ill. June 27, 2023), is irrelevant because it concerned the Illinois Consumer Fraud Act, among other state consumer fraud acts that were not laws of the District of Columbia. *See Bojko*, 2023 U.S. Dist. LEXIS 110443, at *3. Further, the *Bojko* plaintiffs alleged "that they would not have purchased the Products or would have paid less for them had they known that the Products contained or risked containing benzene." *Id.* at *5-6.

Here, however, Ms. Dixon has made no such allegation. App. at 7-33, *passim*.

Ms. Dixon's assertion, in her brief ***alone***, that she pleaded that "had she known of the contamination, [she] would not have purchased the [Product at Issue]," *see*

Dixon Brief at 27, is patently false, and does not override her pleading. App. at 7-33, *passim*. Ms. Dixon's Amended Complaint makes clear that she knew of the Valisure study, completed a year prior to her purchase of the Product at Issue, and purchased the Product at Issue for the sole purpose of trying to manufacture tester standing. *Id.* The basis of standing in *Bojko*, therefore, is completely different than that asserted by Ms. Dixon and *Bojko* is irrelevant.

D. Ms. Dixon's Construction of Tester Standing Must Be Rejected Because It Is Unreasonable, Untenable in Practice, and Lacks Any Limiting Principles.

Ms. Dixon has not identified a single limiting principle to her construction of tester standing. Under Ms. Dixon's construction, anyone in the District of Columbia could purchase a product (a) of a *variety* from which (b) an unrelated sample was tested (c) by an unrelated third-party entity (d) at any remote period of time, to create standing under the CPPA. *See* Dixon Brief, *passim*. No nexus would be required between the specific product at issue and the testing.

As a result, a test completed twenty years ago on a sample of product that never reached the District of Columbia could constitute "testing" of the product under the CPPA, without any relation whatsoever to the purchased product. It is unclear how such a scenario would fall within the zone of interest protected by the CPPA. Nothing in Ms. Dixon's construction of tester standing under Section

28-3905(k)(1)(B) would prevent such an irrational interpretation and unreasonable result.

The Council's post-*Grayson* amendments to the CPPA "did not displace Article III's requirements" with respect to the new Section 28-3905(k)(1)(B). *See Animal Legal Def. Fund*, 258 A.3d at 182, 182 n.5, 190-91. But even if they did, the Council did not express its intent to eliminate the prudential standing requirements of this court for claims brought under the CPPA. Report on Bill 19-0581 at 2 (noting that the proposed amendments intended to "satisfy the prudential standing principles"). This court assumes that the Council "acted rationally and reasonably" and should "eschew interpretations that lead to unreasonable results." *Grayson*, 15 A.3d at 238.

The CPPA requires more than Ms. Dixon has alleged and argued. Ms. Dixon's attempt to stretch tester standing beyond recognition requires elimination of *all* standing principles and requirements, and is exactly the type of attempted "broaden[ing of] the meaning of statutory language" that "defeat[s] true [legislative] intent." *See Grayson*, 15 A.3d at 237-38. Given the unreasonable results, inconsistent with both the stated legislative intent and standing requirements and principles that would ensue from Ms. Dixon's exceedingly broad construction of "tester standing" under the CPPA, Ms. Dixon's arguments must be rejected. *See id.*

The Superior Court considered Ms. Dixon's construction of tester standing and correctly rejected it for the reasons set forth above. The Superior Court, therefore, did not commit error when it interpreted the standing requirements of Section 28-3905(k)(1)(B) and concluded that, to qualify for "tester standing," Ms. Dixon must have actually tested or evaluated the Product at Issue.

The Superior Court, therefore, also did not err with respect to issues (c), (e), and (g), identified by Ms. Dixon, *see* Dixon Brief at 2-3, and Ms. Dixon's arguments in Sections II, III(A), (C), and (D) of her brief are meritless.

VI. Ms. Dixon's Other Arguments and Assignments of Error Are Meritless

A. The Superior Court Did Not Err in Concluding That *Mostofi* Has No Application to This Matter; and Ms. Dixon's Reliance on *Mostofi* Is Misplaced.

Ms. Dixon has argued that *Mostofi* supports her arguments and that the Superior Court erred by finding that *Mostofi* is inapplicable to this matter. Dixon Brief at 22-24. Ms. Dixon's reliance on *Mostofi* can be summarized as follows: the *Mostofi* court did not expressly say that the specific bottle of product at issue needed to be tested, therefore, no such testing is required under the CPPA. *Id.* Ms. Dixon is again mistaken, and her interpretation of *Mostofi*, like her argument on standing generally, misapprehends the role of courts.

Courts "do not sit to decide hypothetical issues or to give advisory opinions about issues as to which there are not adverse parties before us." *Princeton Univ.*

v. Schmid, 455 U.S. 100, 102, 102 S. Ct. 867, 70 L. Ed. 2d 855 (1982). Courts "do[] not decide hypothetical or abstract questions." *Karim v. Gurley (In re Estate of Bates)*, 948 A.2d 518, 530 (D.C. 2008). "Courts should not decide more than the occasion demands." *Id.* (quoting *District of Columbia v. Wical Ltd. P'ship*, 630 A.2d 174, 182 (D.C. 1993)).

Unlike Ms. Dixon, the *Mostofi* plaintiff tested the specific bottle of product at issue. In the *Mostofi* plaintiff's operative complaint, under a section titled "Plaintiff's ***Independent Testing*** of EVOO Purchased in D.C.," he alleged the specific independent testing that he completed on the specific bottle of extra virgin olive oil that he had purchased and from which his claim arose. Second Am. Compl. ¶¶ 46-48, *Mostofi v. Mohtaram, Inc.*, No. 2011 CA 000163 B (D.C. Sup. Ct. Oct. 23, 2012) (emphasis added).[7]

Likely as a result of the *Mostofi* plaintiff's alleged independent testing, the *Mostofi* defendant did not argue that the *Mostofi* plaintiff lacked standing because he failed to test the specific bottle of product at issue. *See* Defendant Mohtaram, Inc.'s Mot. for Summ. J. at 15-20, ; *Mostofi*, 2013 D.C. Super. LEXIS 12, at *5-11. The occasion, therefore, did not demand that the *Mostofi* court rule on whether

[7] The *Mostofi* plaintiff's Second Amended Complaint is available in the record as it was attached, as Exhibit A, to JPMS's Motion to Dismiss Ms. Dixon's Amended Complaint, filed on October 25, 2023. Pursuant to Rule 11(b)(3) of this court, all parts of the record are maintained by the Superior Court for use by the parties and subject to call by this court.

tester standing required testing of the specific product at issue, and so the court did not address the issue at all. *See Karim*, 948 A.2d at 530. Contrary to Ms. Dixon's argument, the *Mostofi* court, therefore, could not have been, and was not, "satisfied" that the *Mostofi* plaintiff had standing based on his reliance on third-party testing, *see* Dixon Brief at 22-23; the *Mostofi* court was not required to even address the issue. *See Karim*, 948 A.2d at 530.

Mostofi, therefore, is silent on the interpretation of D.C. Code § 28-3905(k)(1)(B) as it applies to the issue of "tester standing" under the CPPA presented by Ms. Dixon's allegations. Consequently, Ms. Dixon's reliance upon, and arguments based on, *Mostofi* are misplaced and irrelevant, and the Superior Court did not err when it concluded that *Mostofi* is inapplicable to the issue posed in this matter.

In Ms. Dixon's *Mostofi* argument, she has also pointed to the case of *Henning v. Luxury Brand Partners, LLC*, No. 22-cv-07011, 2023 U.S. Dist. LEXIS 89387, 2023 WL 3555998 (N.D. Cal. May 10, 2023). Dixon Brief at 24. The claims at issue in *Henning* arose under California law, rather than District of Columbia law and, therefore, have no bearing on the application of tester standing or the CPPA. *See Henning*, 2023 U.S. Dist. LEXIS 89387, at *2. Further, as noted by Ms. Dixon, the *Henning* 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," which served as the court's basis for finding standing. Dixon Brief at 24 (quoting *Henning*, 2023 U.S. Dist. LEXIS 89387, at *8-9). Again, Ms. Dixon, however, has made no such allegation. App. at 7-33, *passim*. Nor could she; as her Amended Complaint makes clear, Ms. Dixon knew of the Valisure study and purchased the Product at Issue for the sole purpose of trying to create tester standing. *Id.* Ms. Dixon's argument based on *Henning* is, therefore, irrelevant.

The Superior Court, therefore, also did not err with respect to issues (a), (e), and (f) identified by Ms. Dixon, *see* Dixon Brief at 2-3, and Ms. Dixon's arguments in Section III(B) of her brief are meritless.

B. Ms. Dixon's Arguments That the Superior Court Misinterpreted Her Pleading Are Meritless.

Ms. Dixon has argued that the Superior Court erred in its conclusions regarding what Ms. Dixon had pleaded, specifically that (1) Ms. Dixon "has not proffered that she purchased the Product [at Issue] for purposes of conducting independent testing" and (2) Ms. Dixon "[did] not allege that she conducted any . . . evaluation of the Product [at Issue] or demonstrated any capacity to test the product to determine its benzene content." Dixon Brief at 2-3. Ms. Dixon's arguments are meritless.

Under the header "Product Testing," Ms. Dixon spent eight pages of her Amended Complaint describing Valisure's testing and Ms. Dixon's supposed basis

for standing. App. at 21-28. Nowhere in those allegations, or in the Affidavits of Ms. Dixon and her counsel attached to the Amended Complaint, did Ms. Dixon allege or proffer that she either (1) intended to test the Product at Issue, or (2) had conducted any test of the Product at Issue. *Id.* at 21-28, 32-33.

Instead, Ms. Dixon expressly stated what she had done and believed to be necessary to establish "tester standing" under the CPPA. Ms. Dixon stated that "purchase [*alone*, of the Product at Issue,] is all that is necessary to give [Ms. Dixon] standing" and that "[Ms. Dixon] has standing to represent the General Public of the District of Columbia because there is ***sufficient similarity between the specific Product [at Issue] purchased by the Plaintiff and the [Tested Lots]***." *Id.* at 16, ¶ 16; *id.* at 28, ¶ 63 (emphasis added). Ms. Dixon's alleged basis for standing, therefore, is vague and untethered "similarity" but no specific basis concerning the actual Product at Issue.

The Superior Court correctly interpreted Ms. Dixon's allegations in her Amended Complaint. It did not err in concluding that Ms. Dixon had failed to allege the intent or completion of any testing or evaluation of the Product at Issue. The Superior Court, therefore, also did not err with respect to issues (b) and (d) identified by Ms. Dixon, *see* Dixon Brief at 2-3, and Ms. Dixon's arguments in Sections III(A)-(D) of her brief are meritless.

C. Ms. Dixon's Arguments Based on the Expert Disclosure Rule Misses the Foundational Threshold Nature of Standing.

Ms. Dixon has argued that the Superior Court's dismissal of her claims was inconsistent with the expert disclosure rules of the District of Columbia Rules of Civil Procedure because the dismissal means that the testing, which is the basis of tester standing, must be completed prior to filing. Dixon Brief at 27. Ms. Dixon's argument is meritless. As noted above, "[s]tanding is a ***threshold jurisdictional question*** which must be addressed ***prior to and independent of*** the merits of a party's claims." *Grayson*, 15 A.3d at 229 (quoting *Bochese*, 405 F.3d at 974) (emphasis added). "Thus, the basic function of the standing inquiry is to serve as a ***threshold*** a plaintiff must surmount ***before*** a court will decide the merits question about the existence of a claimed legal right." *Id.* (emphasis added).

Ms. Dixon asserted tester standing. As a threshold question, the Superior Court rightly required Ms. Dixon to demonstrate such standing prior to and independent of the merits of Ms. Dixon's claim. *See id.* Ms. Dixon failed to do so. Consequently, the Superior Court rightly dismissed Ms. Dixon's claim, ruling that she had failed to establish the court's jurisdiction to hear her claim. *See id.* If the court lacks jurisdiction to hear a matter, the discovery rules concerning disclosure of expert reports do not apply. Ms. Dixon's argument that she should not be required to demonstrate standing until production of an expert report is inconsistent

with standing principles, this court's jurisprudence, and the District of Columbia Rules of Civil Procedure. *See id.*

Ms. Dixon has also argued that the Superior Court's requirement to establish standing prior to filing a complaint makes a tester standing claim "more difficult to bring than a typical CPPA case" and that it is unreasonable to require the consumer to test the specific product at issue. Dixon Brief at 27. Ms. Dixon's argument is baseless. First, the Superior Court did not rule that Ms. Dixon, ***herself***, must personally test the product at issue; commissioning such a test is sufficient, so long as it is completed on the specific product at issue. Ms. Dixon commissioned no such test. Second, the *Mostofi* plaintiff, whom was initially represented by Ms. Dixon's counsel, did personally complete a test of the extra virgin olive oil, albeit minimally and unscientifically. Ms. Dixon's argument, therefore, is undermined by the case upon which she most heavily relies. Third, it is no more difficult to bring a tester standing case under the CPPA than a traditional case. A traditional case would require, prior to filing suit, an injury-in-fact, even only a statutory injury, incurred by the particular plaintiff, arising from a statement of a merchant concerning a particular product. The threshold standing requirement must be fulfilled. A tester standing case is the same; the threshold standing requirement must be established prior to filing.

The Superior Court correctly disregarded Ms. Dixon's arguments regarding the production of an expert report and did not err in concluding that the factual basis for tester standing, as a threshold matter, must be established prior to filing a complaint. The Superior Court, therefore, also did not err with respect to issue (d) identified by Ms. Dixon, *see* Dixon Brief at 2-3, and Ms. Dixon's arguments in Section III(E) of her brief are meritless.

CONCLUSION

The Superior Court correctly dismissed Ms. Dixon's Amended Complaint because she failed to allege any Traditional Standing Elements and failed to establish "tester standing" under D.C. Code § 28-3905(k)(1)(B) because she failed to test the Product at Issue. This court should, therefore, affirm the judgment of the Superior Court.

Respectfully submitted,

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STATUTORY ADDENDUM

D.C. Code § 28-3905 Complaint Procedures.

* * *

(k)(1)(A) A consumer may bring an action seeking relief from the use of a trade practice in violation of a law of the District.

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

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

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

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

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing Appellee Brief was electronically filed and served through the Court of Appeals' E-filing System on September 25, 2024, upon:

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