Case No. 20-CV-0392

Before the
DISTRICT OF COLUMBIA
COURT OF APPEALS

CENTER FOR INQUIRY, INC.
Plaintiff-Appellant,

v.

WALMART, INC.
Defendant-Appellee.

Appeal from the Superior Court of the District of Columbia,
Civil Division Case No. 2019 CA 3340 B
Honorable Florence Y. Pan, Judge

APPELLANT CENTER FOR INQUIRY, INC.'S OPENING BRIEF

Nicholas J. Little (Bar No. 979725)
Center for Inquiry
1012 14th Street NW, Suite 205
Washington, DC 20005
Phone: 202-734-6494, ext. 203

Counsel for Plaintiff-Appellant Center for Inquiry, Inc.

LIST OF ALL PARTIES AND COUNSEL IN THE TRIAL COURT AND APPELLATE PROCEEDINGS

Plaintiff-Appellant: Center for Inquiry, Inc.
Counsel: Nicholas J. Little

Defendant-Appellee: Walmart, Inc.
Counsel: Christina G. Sarchio
Tharuni A. Jayaraman
DECHERT LLP

Matthew H. Kirtland
Katherine Connolly
Jeffery B. Margulies
NORTON ROSE FULBRIGHT US LLP

Michael Pusateri (Superior Court only)
David E. Sellinger (Superior Court only)
GREENBERG TRAURIG LLP

Please note: It appears not all counsel represented Walmart at all times in the Superior Court proceedings. (Appendix 222, n.1 and 234.)

DISCLOSURE STATEMENT

Pursuant to D.C. App. R. 26.1(a), Center for Inquiry, Inc. is a non-profit 501(c)(3) organization, has no parent corporation, and no publicly held corporation owns 10 percent or more of its stock.

/s/Nicholas J. Little

Counsel for Plaintiff-Appellant Center for Inquiry, Inc.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

OTHER AUTHORITIES

INTRODUCTION

Walmart sells snake oil. Walmart, a large, sophisticated and profitable retailer, sells homeopathic products that are ostensibly medicine. Walmart has the right to sell this snake oil, but it does not have the right to deceive District of Columbia consumers in the process. Yet, this is precisely what Walmart does through its signage and product placement in stores, and marketing on line, which fails to distinguish homeopathic products from science-based medicines.

The Center for Inquiry, Inc. ("CFI") is a non-profit organization that works to foster a secular society in which critical thinking and reliance on evidence is valued, and science and compassion guide public policy. CFI has long battled medical quackery, which robs, injures and even kills consumers. Homeopathy, which CFI has opposed in a number of fora, is an outstanding example of such quackery, as it has no scientific basis, and studies have repeatedly shown it to be worthless.

CFI sued Walmart, alleging it violated the District of Columbia Consumer Protection Procedures Act ("CPPA"), which prohibits misleading representations, omissions and ambiguities in connection with selling goods and services. The Superior Court granted Walmart's dismissal motion, ruling CFI lacked standing and did not state a claim.

The court erred because it read the CPPA too restrictively, failed to fully credit CFI's allegations and draw reasonable inferences in CFI's favor, improperly decided

factual issues and wrongly penalized CFI for not submitting evidence.

JURISDICTIONAL STATEMENT

This court has jurisdiction pursuant to District of Columbia Code § 11-721(a)(1).[1] The Superior Court initially entered an order granting Walmart's motion to dismiss CFI's complaint on May 20, 2010, then entered an amended order granting the motion to dismiss on May 28, 2020. (Appendix ("A") 5.) The order was amended to "correctly reflect the names of defendant Walmart, Inc.'s counsel in the 'Copies to:' section of the Order." (A 222, n.1.) CFI timely filed its notice of appeal from the amended order on June 12, 2020. (A 5); D.C. App. R. 4(a)(1); *Carter v. Cathedral Ave. Co-op., Inc.*, 532 A.2d 681, 684, n.8. (D.C. 1987) (a dismissal order is appealable).

ISSUES PRESENTED

1. Are CFI's assertions that it is a non-profit organization with a vision that public policy be guided by science and compassion, and a long track record of fighting medical quackery such as homeopathy that injures consumers' health and finances, sufficient to allege that it is a "public interest organization" as that term is

[1] All statutory references are to the District of Columbia Code.

defined in the CPPA, thus satisfying a threshold requirement for standing?

2. Are CFI's contentions that it has made extensive efforts to ensure testing, and prevent misleading labeling and marketing of homeopathic products, coupled with assertions that describe the harm caused to District consumers by the manner in which Walmart markets these products, sufficient to allege the "nexus to the interests involved of the consumer or class to adequately represent those interests" required for standing?

3. Did CFI sufficiently allege a CPPA cause of action by accusing Walmart of deceptive and unfair trade practices because Walmart's in-store signage and product placement, and internet marketing, would lead a reasonable consumer to believe that homeopathic products are as effective as science-based medicines?

STATEMENT OF THE CASE

CFI sued Walmart pursuant to the CPPA for statutory damages and declaratory and injunctive relief, alleging "a continuing pattern of fraudulent, deceptive, and otherwise improper marketing practices engaged in by Defendant in the District of Columbia . . .." (A 9, ¶1; 40, ¶126; 42, after ¶137.)

Walmart moved to dismiss CFI's complaint on three grounds: (1) CFI did not have standing; (2) CFI's complaint did not state a claim upon which relief could be granted; and (3) the primary jurisdiction doctrine barred CFI's action. (A 54.) CFI

opposed the motion; Walmart filed a reply. (A 186, 212.)

The Superior Court granted Walmart's motion to dismiss on the grounds that CFI lacked standing and failed to state a claim. (A 226, 230) This appeal followed.

STATEMENT OF FACTS

The following is a summary of facts alleged in the complaint relevant to the issues raised on appeal. Specific facts will be described in more detail in connection with the discussion of the issues to which they pertain.

CFI is a non-profit organization with an executive office and active branch in the District of Columbia that holds regular meetings and events for its members and others. (A 10, ¶6.) This action is brought by CFI for the benefit of the General Public as a Private Attorney General pursuant to § 28-3905(k)(1). (A 12, ¶14.)

CFI's mission is to foster a secular society based upon science, reason, freedom of inquiry, and humanist values. CFI's vision is a world where people value evidence and critical thinking, where superstition and prejudice subside, and where science and compassion guide public policy. (A 10, ¶7.)

CFI has long worked to counter the negative impact of pseudoscientific alternative medicine upon society. (A 11, ¶8.) CFI has attempted to ensure that homeopathic products are tested for consumer safety, that manufacturers and retailers are prevented from making scientifically unsupported claims, and that

homeopathic labeling and marketing materials are accurate. (A 10, ¶8; 12, ¶¶15-18.)

Homeopathic products have no scientific basis and their purported active ingredients have been so diluted with water that no trace of them remains. (A 13-15, ¶¶20-35.) Studies have repeatedly found them to be ineffective. (A 15-17, ¶¶36-47.) Not only do homeopathic products defraud consumers of money, they can (and have) caused physical harm, either through contamination or because a patient foregoes a potentially effective treatment. (A 18-21, ¶¶48-65.)

Walmart retails homeopathic over-the-counter products both online and in its physical stores. (A 21-22, ¶¶66-71.) In a Walmart retail store, over-the-counter medical products are arranged in a section labeled "Pharmacy," within which the individual aisles will themselves be labeled to inform the customer of the symptoms and conditions for which that aisle contains relevant products. (A 22, ¶72.) The individual aisles are then often broken down into individual sections. (A 22, ¶73.) Within each individual section, homeopathic products are displayed alongside science-based medicines with no distinction drawn between them. (A 25, ¶75.) Walmart's website likewise makes no distinction between homeopathic products and science-based medicines. (A 34-35, ¶¶83-90.)

Walmart provides advice to customers regarding health care. (A 36, ¶¶93-94.) Walmart markets itself as a provider of good value and quality products. (A 36,

¶91.) However, through its marketing and product placement, Walmart is sending a clear and false message to its customers that homeopathic products are no different than science-based medicines. (A 37-39, ¶¶101-117.)

This conduct violates District of Columbia customers' 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. (A 39, ¶118.) Reasonable consumers would be misled by this conduct, as Walmart knew or should have known. (A 39, ¶¶ 119-122; 41-42, ¶¶ 132-136.) Although reliance is not required by the CPA, consumers in the District have nevertheless reasonably relied on Defendant's misrepresentations and omissions when purchasing healthcare products from Defendant. (A 42, ¶ 137.)

SUMMARY OF ARGUMENT

CFI raises three arguments on appeal. Two pertain to standing; the third goes to whether CFI has sufficiently stated a claim.

CFI's first standing argument is that it alleged sufficient facts to show it is a "public interest organization" as that term is defined in the CPPA: "a nonprofit organization that is organized and operating, in whole or in part, for the purpose of promoting interests or rights of consumers." § 28–3901(a)(15). CFI's mission includes using science and compassion to influence public policy and it has long

fought medical quackery, including homeopathy. CFI's work regarding homeopathy gives rise to a reasonable inference that part of CFI's purpose is to promote the interests of consumers by protecting them from the financial, emotional and, physical damage that occurs when people are gulled into buying ineffective and potentially dangerous remedies. Therefore, CFI has alleged sufficient facts to show that it is a "public interest" organization.

CFI's second standing argument is that it alleged facts sufficient to show it has the required nexus to the interests of District consumers who purchase Walmart's products. *See* § 28-3905(k)(1)(D)(ii). CFI identified a specific group of consumers on whose behalf it is suing: District of Columbia Walmart customers who purchase homeopathic products from Walmart stores or on Walmart's website. CFI's allegations regarding its anti-quackery work in general, and homeopathy in particular, are more than sufficient to show it has a strong stake in enforcing these consumers' rights. Additionally, CFI has a real connection to the District of Columbia, as it has an active branch in the District that holds regular meetings and events for its members and others.

CFI's final argument is that its allegations regarding Walmart's in-store signage and product placement, and internet marketing, which combine homeopathic products with science-based medicines, are sufficient to state a cause of action under several subsections of the CPPA that prohibit deceptive practices.

CFI's allegations specified the means by which Walmart markets homeopathic drugs deceptively and included specific examples of the conduct. It is facially plausible that these practices will mislead reasonable consumers to believe that the homeopathic products are effective to treat the specific symptoms and conditions stated by Walmart and that there is no difference between the homeopathic products effective science-based medicines Walmart sells.

ARGUMENT

I. CFI ALLEGED SUFFICIENT FACTS TO PRECLUDE DISMISSAL FOR LACK OF STANDING.

A. The *De Novo* Standard of Review Applies and CFI need only to have Alleged Facts Sufficient to Show Standing if Proven at Trial.

"Dismissals under Sup.Ct. Civ. R. 12(b)(6) are reviewed *de novo* and this court must construe all facts and inferences in favor of the plaintiff." *Daley v. Alpha Kappa Alpha Sorority, Inc.*, 26 A.3d 723, 730 (D.C. 2011). Moreover, whether CFI is a "public interest organization," as that term is defined in the CPPA, is a statutory interpretation issue. Such questions are reviewed *de novo* on appeal. *Competitive Enterprise Institute v. Mann*, 150 A.3d 1213, 1233 (D.C. 2016.)

"The facts on which a party bases its claim to standing . . . are evaluated depending on the stage of litigation." *D.C. Appleseed Center for Law and Justice, Inc. v. District of Columbia Dept. of Ins., Securities, and Banking*, 54 A.3d 1188,

1205 (D.C. 2012). "[T]he examination of standing in a case that comes to us on a motion to dismiss is not the same as in a case involving a summary judgment motion; the burden of proof is less demanding when the standing question is raised in a motion to dismiss." *Grayson v. AT & T Corp.*, 15 A.3d 219, 232 (D.C. 2011) (*en banc*) ("*Grayson*").

B. CFI Alleged Facts Sufficient to Show it is a "Public Interest Organization," as that Term is Defined in the CPPA.

1. The CPPA's language and history show that conferring standing on public interest organizations was meant to liberalize standing requirements.

The CPPA states that a "'public interest organization' means a nonprofit organization that is organized and operating, in whole or in part, for the purpose of promoting interests or rights of consumers." § 28–3901(a)(15). The legislative history of this definition shows it was enacted as a response to this court's decision in *Grayson*. (A 90, 94.)[2]

Grayson interpreted a 2000 amendment to the CPPA that changed the statute's standing requirements. Prior to that amendment, the CPPA restricted standing to

[2] Council of the District of Columbia, Committee on Public Services and Consumer Affairs, Report on Bill 19–0581, the "Consumer Protection Amendment Act of 2012," November 28, 2012. ("Alexander Committee Report.") Plaintiff respectfully requests this court to judicially notice this report. *Stone v. Landis Const. Co., Inc.*, 120 A.3d 1287, 1291 (D.C. 2015) (citing the Alexander Committee Report in discussing legislative intent); *Grayson*, 15 A.3d at 238-243 (relying in part on a prior version of the CPPA's legislative history).

"[a]ny consumer who suffers any damage as a result of the use or employment by any person of a trade practice in violation of a law of the District of Columbia . . . ." *Grayson*, 15 A.3d at 236, citing § 28–3905(k) (1981). "In an effort to provide a more robust consumer protection enforcement structure, the 2000 amendments permitted persons (including non-profit organizations and other entities) to sue 'on behalf of themselves or the general public' when the act had been violated." (A 89.)

Despite the 2000 amendments' elimination of the damage prerequisite, *Grayson* held that a plaintiff who had not suffered "a concrete injury-in-fact to himself" could not sue under the CPPA because the District of Columbia Council ("Council") had purportedly not intended to depart from standing requirements set forth in Article III of the United States Constitution that had been observed by the District's Article I courts. *Grayson*, 15 A.3d at 233-235, 244 ("[w]ithout 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.")

The Council became concerned with *Grayson's* impact on actions brought by non-profit organizations attempting to enforce the CPPA. "While *Grayson* did not discuss litigation brought by non-profit public interest organizations, the decision had a chilling effect on non-profit public interest organizations litigating cases in the public interest." (A 90.) This chilling effect was particularly pernicious because

budgetary constraints had curtailed the District's ability to combat unlawful trade practices. (A 131.)

The Council therefore passed legislation to counteract this chilling effect, and described that legislation in the following manner:

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

(A 90.)

The Report noted that even the statute's previous version allowed "non-profit public interest organizations . . . to bring litigation in the public interest." (A 89.) The Report makes clear the Council's determination to ensure that, this time, there would be no mistaking its intentions to relax standing requirements so that organizations could represent consumer interests—explicitly stating one of the legislation's purposes "was to provide explicit new authorization for non-profit organizations and public interest organizations to bring suit under the District's consumer protection statute." (A 89.) Given that intent, the term "public interest organization" should be interpreted so as to expand standing, not limit it.

2. CFI alleged facts sufficient to show it is a public interest organization, as defined by the CPPA.

As noted above, the CPPA defines a "'public interest organization'" as "a nonprofit organization that is organized and operating, in whole or *in part*, for the purpose of promoting interests or rights of consumers." § 28–3901(a)(15). (emphasis added.) CFI alleged facts which, if proven, would enable a fact finder to conclude that it is in part organized and operating for the purpose of promoting interests or rights of consumers.

CFI alleged that it is a non-profit organization whose "mission is to foster a secular society based upon science, reason, freedom of inquiry, and humanist values" and whose "vision is a world where people value evidence and critical thinking, where superstition and prejudice subside, and where science and compassion guide public policy." (A 10, ¶¶6-7.) These ideals are not divorced from day-to-day reality: less than successful responses to the SARS-CoV-2 pandemic illustrate the real world effects of failing to value evidence and critical thinking, and disregarding science and compassion in formulating public policy.

CFI's efforts to promote good public policy through science and compassion involve, among other things, protecting consumers from being preyed on by medical charlatans—including those who sell bogus cures for real ailments. CFI "has long worked to counter the negative impact of pseudoscientific alternative medicine upon

society." (A 10, ¶8.) CFI described its attempts to lessen the harm homeopathy does, alleging that:

- CFI seeks to ensure that homeopathic products "are effectively tested to ensure consumer safety and that manufacturers and retailers are prevented from making claims as to the products' effectiveness without scientific evidence to support such claims; and that labeling and marketing materials properly inform customers of the nature of the products.. . . ." (A 11, ¶8.)

- "CFI has worked diligently to promote accurate labeling and marketing of homeopathic products as part of its campaign to ensure that homeopathic products and other pseudoscientific alternative medical products are not presented to the public in a false and misleading manner." (A 12, ¶15.)

- "CFI has petitioned the Food and Drug Administration (FDA) to better and more effectively regulate the trade in homeopathic products in the United States. [Footnote omitted.]" (A 12, ¶16.)

- "CFI has submitted comments to both the FDA [footnote omitted] and the Federal Trade Commission (FTC) [footnote omitted] regarding the regulation, testing, marketing, and labeling of homeopathic products." (A 12, ¶17.)

- CFI has "delivered invited testimony regarding homeopathy to the FDA. [Footnote omitted.]" (A 12, ¶18.)

In sum, CFI alleged it is an organization that wants science and compassion to guide public policy, and it actualizes this ideal, in part, through its long-standing involvement in fighting medical quackery, including homeopathy, that victimizes consumers. Under any reasonable interpretation of the public interest organization definition adopted to liberalize standing, CFI alleged facts sufficient to show it is in

part organized and operating for the purpose of promoting interests or rights of consumers.

Further, the Superior Court recognized that multi-purpose organizations can be "public interest organizations," *Clean Label Project Foundation v. Panera, LLC,* 2019 CA 001898 B, 2019 D.C. Super. LEXIS 14 at *7 (D.C. Super. Ct. October 11, 2019) ("*Clean Label Project Foundation*") ("GMO Free USA states that its 'mission is to harness independent science and agroecology concepts to advocate for clean and healthy food *and ecological systems*.'") (emphasis added) while other multi-purpose organizations such as the Environmental Policy Institute, Public Citizen and the Union of Concerned Scientists have been characterized as "consumer organizations." *Center for Auto Safety v. National Highway Traffic Safety Admin.* 793 F.2d 1322, 1323 and n.3 (D.C. Cir. 1986) (*Center for Auto Safety*).[3] Although *Center for Auto Safety* did not involve the CPPA, the court's recognition that these organizations served the interests of consumers as well as others is instructive here.

[3] The Environmental Policy Institute "is a non-profit organization that works to promote the effectiveness of various fuel-efficiency programs and encourages conservation in the transportation sector." *Center for Auto Safety*, 793 F.2d at 1328, n. 41. Public Citizen has described itself as "'dedicated to protecting the rights of members of the public as both consumers and citizens . . . .'" *American Historical Ass'n v. National Archives and Records Admin.*, 402 F.Supp.2d 171, 172, n.1 (D.D.C. 2005). The Union of Concerned Scientists is "concerned about the impact of advanced technology on society, including such issues as nuclear arms control, nuclear power safety, and national energy policy." *Media Access Project v. F.C.C.*, 883 F.2d 1063, 1064 (D.C. Cir. 1989).

Like these organizations, CFI is a multipurpose organization that devotes significant resources to working on issues important to consumers. This court has "long considered the CPPA to be a remedial statute that must be 'construed and applied liberally to promote its purpose.'" *Sundberg v. TTR Realty, LLC*, 109 A.3d 1123, 1129 (D.C. 2015) (citing § 28–3901(c)). Therefore, CFI sufficiently alleged it is a "public interest organization" organized and operating in part for the purpose of promoting interests or rights of consumers. The Superior Court erroneously, narrowly construed the CPPA's definition of "public interest organization," thus hamstringing CFI's efforts to protect consumers against worthless homeopathic products. The Council surely did not intend this result when it enacted the post-*Grayson* amendments.

3. The Superior Court erred in concluding, as a matter of law, that CFI was not a public interest organization.

In ruling that CFI was not a public interest organization, the Superior Court ignored the "in part" language of the public interest organization definition, failed to construe the complaint and make reasonable inferences in favor or CFI, and made a crucial impermissible factual determination.

Although the court began the standing subsection of the dismissal order by citing the *complete* public interest organization definition, the court elided the phrase "in whole or in part" when explaining why CFI purportedly did not have standing.

(A 227.) The court then compared CFI unfavorably to other organizations held to have standing as public interest organizations. (A 228.) This comparison is irrelevant because CFI does not have to be *wholly* focused on consumer interests to have standing. That organizations whose sole purpose is to promote consumer interests have been granted standing does not preclude CFI and other organizations with multiple purposes, one of which is to promote consumer interests, from obtaining standing. "'The rule of *stare decisis* is never properly invoked unless in the decision put forward as precedent the judicial mind has been applied to and passed upon the precise question.'" *Murphy v. McCloud*, 650 A.2d 202, 205 (D.C. 1994).

The court then downplayed CFI's efforts to fight quackery in general and homeopathy in particular, stating:

> this conduct, although it may incidentally benefit consumers, does not demonstrate that plaintiff's organizational purpose is to promote consumer interests. To hold otherwise would permit any organization to create standing under § 28-3905(k)(1)(D) simply by filing a lawsuit under the CPPA, or otherwise engaging in conduct that ostensibly furthers consumer interests when such conduct is motivated by purposes that do not fall within the scope of the CPPA's organizational standing provisions.

(A 228.)

CFI's demonstrated efforts go far beyond this lawsuit and are not deserving of the pejorative characterization that the organization merely "ostensibly furthers

consumer interests." CFI is not a Johnny-come-lately group that suddenly became annoyed by homeopathy and attempted to "create standing" by filing suit. CFI has acted, and continues to act, in a variety of fora to minimize the damage homeopathy inflicts upon consumers. (A 10-11, ¶¶6-8; 12, ¶¶15-18.) Walmart acknowledged CFI's involvement when it accused the organization of "browbeating the [federal] agencies to conform to its 'vision' for the world . . . ." (A 57.)

Construing the complaint in CFI's favor, CFI's genuine interest in combating homeopathy results in a reasonable inference that part of CFI's purpose is to promote the interests of consumers by protecting them from being deceived into buying these products. To conclude otherwise is to assume that, although CFI wants compassion as well as science to guide public policy (A 10, ¶7), CFI is indifferent to the effect that quackery has on consumers, and that it spends time and money attempting to influence administrative agencies, legislators, courts and the general public simply for the purpose of vindicating an abstract principle.

Because reasonable inferences must be drawn in favor of the party opposing a motion to dismiss, the Superior Court was not entitled to conclude that CFI is indifferent to consumer interests. Yet it did, finding CFI's "conduct is motivated by purposes that do not fall within the scope of the CPPA's organizational standing provisions." (A 228.) The issue of motive is "not well suited to disposition" even at the *summary judgment* stage. *Arthur Young & Co. v. Sutherland*, 631 A.2d 354,

368 (D.C. 1993). The court should never have made such a finding in ruling on a dismissal motion, especially given the facts alleged in CFI's complaint and the reasonable inferences that can be drawn from those facts.

For all the reasons set forth above, CFI alleged facts sufficient to show it is a public interest organization.

C. CFI Alleged Facts Showing a Sufficient Nexus to the Interests of District Consumers who Purchase Walmart Products and Adequately Represents those Consumers.

The CPPA authorizes a public interest organization to sue on behalf of the interests of a consumer or a class of consumers. § 28-3905(k)(1)(D)(i). However, the public interest organization must have a "sufficient nexus to the interests involved of the consumer or class to adequately represent those interests." § 28-3905(k)(1)(D)(ii).

In enacting the post-*Grayson* Amendments, the Council wanted to "encourag[e] the courts to be receptive to other approaches that rely on different means of ensuring a sufficient stake in the outcome of the case." (A 90.) The nexus requirement:

> enables the court to ensure that, as it considers the application of standing principles to new situations, standing is recognized in those circumstances where the public interest organization has a sufficient stake in the action – whether or not the stake falls squarely within the stakes recognized in prior cases – to be relied upon to pursue the action with the requisite zeal and concreteness.

(A 94.)

The Superior Court found that, even if CFI had sufficiently alleged it was a public interest organization, CFI "fails to allege that it brings this case on behalf of the 'interests of a consumer or a class of consumers,' and therefore fails to allege a 'sufficient nexus' to such an interest." (A 228-229.) The sole basis for this finding was that "[n]owhere in its Complaint does plaintiff identity a specific group of consumers on whose behalf it is suing, or their related interests. *See generally* Compl." (A 229.)

The court was incorrect because, in addition to alleging that CFI "acts for the benefit of the General Public as a Private Attorney General pursuant to District of Columbia Code §28-3905(k)(1)" (A 12, ¶14), CFI's allegations identified a specific group of consumers on whose behalf it is suing: District of Columbia Walmart customers who purchase homeopathic products from Walmart stores or on Walmart's website. The Superior Court was mistaken in finding these allegations "vague and conclusory" (A 229, n.4); they were more than specific enough to identify the relevant group of consumers.

CFI alleged that:

> Walmart, by its marketing and placement of these products, is deceiving customers and deliberately creating the impression that homeopathic products can be used interchangeably with science-based medicines for the treatment of specific conditions. [¶] This violates D.C customers' "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 § 280-3901(c). Walmart retails homeopathic products in both its physical stores and its internet site to residents of the District of Columbia.

(A 39, ¶¶ 117-118.)

CFI further alleged that:

- "A reasonable consumer would purchase these homeopathic products believing that they were equally as effective for the treatment of the listed symptoms or diseases as the science-based remedies displayed beside them." (A 39, ¶ 122.)

- "Defendant knew or should have known that its placement of homeopathic products beside science-based medicines and under labels referring to specific diseases and symptoms would result in consumers considering the products to be equivalents." (A 41, ¶ 132.)

- "Defendant knew or should have known that consumers would be led to believe by its product placement and shelf labelling [*sic*] that homeopathic products were effective in the treatment of specific diseases and symptoms." (A 41, ¶ 134.)

- "Defendant knew or should have known that the organization of its internet site, and the results provided by its search function, would . . . creat[e] confusion among customers between homeopathic and science-based medications and creating a false impression that homeopathic products are efficacious in the treatment of specific diseases and remedies." (A 41-42, ¶ 136.)

- "Homeopathic products risk harming patients in three ways. Patients suffer a financial loss . . . . They may suffer damage from adulterated and dangerously manufactured products. And they may suffer longer and greater harm from diseases that could have been adequately treated or cured by science-based medicine." (A 21, ¶ 65.)

Similar allegations were held sufficient to identify a specific group of consumers in *Toxin Free USA v. JM Smucker Co.*, 2019 CA 3192 B, 2019 D.C. Super. LEXIS 15 (D.C. Super. Ct. November 6, 2019) ("*Toxin Free*"), which involved the same judge as the present case. In *Toxin Free*, the defendant asserted that the plaintiff did not have standing because "'the Complaint says [p]laintiff is only suing on behalf of itself and the general public' and not on behalf of 'consumers.'" *Id*. at *7. The court rejected that argument, stating:

> To the contrary, the Complaint repeatedly references D.C. consumers and the alleged injuries that plaintiff seeks to remediate on their behalf. *See*, *e.g.*, Compl. ¶ 89 ('consumers within the district have purchased [defendant's products] under the misrepresentations made by [defendants]'); *id*. ¶ 82 ('consumers were in fact deceived' by defendants); *id*. ¶ 68 ('consumers are at risk of real, immediate, and continuing harm if the [p]roducts continue to be sold'). Defendants are therefore mistaken.

Toxin Free, 2019 D.C. Super. LEXIS 15 at *7-8.

The allegations in the present case are no less specific than those set forth in the above-cited paragraph. The court nonetheless distinguished *Toxin Free* because the plaintiff in that case "relied on consumer interest surveys indicating that 'a majority of consumers seek out products with a "natural" label, believing that "natural" means that the products are produced without pesticides or artificial ingredients.'" (A 229.) However, the *Toxin Free* court did not even refer to the consumer surveys in rejecting the defendant's argument. Leaving aside for now the

question of whether surveys and other evidence should even be considered in connection with a motion to dismiss, no survey or other evidence is necessary to determine that consumers have an interest in medicines working efficaciously, although such evidence exists.[4]

The nexus requirement's purpose is to ensure that a public interest organization has a sufficient stake in a lawsuit to pursue it with "zeal and concreteness." (A 94.) CFI's allegations regarding its anti-quackery work in general, and homeopathy in particular, show it has a strong stake in this suit; additionally, CFI has a real connection to the District of Columbia, as it has an active branch in the District that holds regular meetings and events for its members and others. (A 10-11, ¶¶6-8; 12

[4] For instance, the Federal Trade Commission ("FTC") conducted focus groups and found that after homeopathic principles were explained to consumers, "most adults and parents were more likely to continue to use the conventional non-prescription products with which they were familiar and unlikely to purchase homeopathic products without an express recommendation from a trusted source due to their skepticism about the effectiveness of such products." Comments of the Staff of the Federal Trade Commission, p. 11, submitted to the FDA pursuant to a request for comments published in 80 Fed. Reg. 16327. ("FTC Staff Comments") (www.ftc.gov/system/files/documents/advocacy_documents/ftc-staff-comment-food-drug-administration-regarding-current-use-human-drug-biological-products/150821fdahomeopathic.pdf).

CFI respectfully requests this court to judicially notice this document. *Phillips v. Spencer*, 390 F.Supp.3d 136, 149, n.7 (D.D.C. 2019) ("The court can take judicial notice of public records and government documents available from reliable sources on the Internet, such as websites run by governmental agencies.") (Internal brackets and quotation marks omitted.)

¶¶15-18.) The *Toxin Free* court cited "[p]laintiff's mission, goal, and work regarding food transparency" in finding the required nexus. *Toxin Free*, 2019 D.C. Super. LEXIS 15 at *7.

Because CFI made a similar showing, and has also identified the consumers whose interest it represents, the court erred in ruling that CFI failed to allege a sufficient nexus to consumer interests.

II. CFI ALLEGED SUFFICIENT FACTS TO STATE A CLAIM.

A. The *De Novo* Standard of Review Applies and CFI Only had to Allege Facts Stating a Facially Plausible Claim for Relief.

The sufficiency of a complaint "raises a question of law" and dismissal is reviewed de novo. *Larijani v. Georgetown University*, 791 A.2d 41, 43 (D.C. 2002). "[A]t the pleading stage, the plaintiff's burden 'is not onerous.' If a complaint's factual allegations are sufficient, 'the case must not be dismissed even if the court doubts that the plaintiff will ultimately prevail.'" *Poola v. Howard University*, 147 A.3d 267, 276 (D.C. 2016) (cleaned up).

"A complaint 'must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face.'" *Pyles v. HSBC Bank USA, N.A.*, 172 A.3d 903, 907 (D.C. 2017) ("*Pyles*"). Facial plausibility cannot be established by "'[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements . . . ." *Fourth Growth, LLC v. Wright*, 183 A.3d 1284, 1288

(D.C. 2018). Plaintiff must "'plead[] factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.'" *Potomac Development Corp. v. District of Columbia*, 28 A.3d 531, 544 (D.C. 2011). ("*Potomac Development Corp.*")

"'The plausibility standard is not akin to a "probability requirement," but it asks for more than a sheer possibility that a defendant has acted unlawfully.'" *Potomac Development Corp.* 28 A.3d at 544. "But '[a] court should be circumspect in assessing the sufficiency of a complaint in any case where the substantive legal standard requires a fact-intensive inquiry.'" *Pyles*, 172 A.3d at 907. Moreover, "because it is a remedial statute, the CPPA must 'be construed and applied liberally to promote its purpose.' D.C. Code § 28–3901(c)." *Saucier v. Countrywide Home Loans*, 64 A.3d 428, 442 (D.C. 2013) "(*Saucier*"); *Modern Mgmt. Co. v. Wilson*, 997 A.2d 37, 62 (D.C. 2010) ("The purpose of the [CPPA] is to protect consumers from a broad spectrum of unscrupulous practices by merchants, therefore the statute should be read broadly to assure that the purposes are carried out.")

B. CFI Alleged Facts Sufficient to State a Facially Plausible Claim for Relief.

1. CFI alleged that Walmart's in-store signage and product placement, and internet marketing, did not distinguish homeopathic products from science-based medicines.

CFI alleged that Walmart's indiscriminate lumping of science-based drugs

together with homeopathic products through in-store signage and product placement, as well as internet marketing, constituted deceptive trade practices that violated § 28-3904 (a), (d), (e), (f) (f-1) and (u). (A 22-35, ¶¶ 72-90; 40-42, ¶¶ 129-137.)[5] CFI alleged these practices were deceptive because homeopathic products are worthless, their purchase and use cause financial and sometimes physical harm to consumers (A 13-21, ¶¶20-65), and Walmart's misrepresentations, ambiguities and omissions would lead consumers to believe that homeopathic products are as effective as science-based medicine in alleviating disease symptoms and other medical problems. (A 22-42, ¶¶ 72-137.)

In regard to in-store signage and product placement, the complaint alleged that over-the-counter medical products are grouped in a section labeled "'Pharmacy,'" which is divided into aisles that are labeled according to symptoms and conditions. (A 22, ¶ 72.) These aisles in turn are often broken down into individual sections. (A 22, ¶ 73.) Within each individual section, homeopathic products are displayed alongside science-based medicines with no distinction drawn between them. (A 25, ¶ 75.)

For example, in the "Cold, Cough & Flu Relief" section, FDA approved and tested over-the-counter remedies such as Tylenol Sinus & Headache are neither

[5] The complaint cited the text of § 28-3904 (d), but it mistakenly identified that statute as § 28-3904 (b).

separated nor distinguished from homeopathic products such as Oscillococcinum, whose only active ingredient is duck offal, diluted with water to the point where no molecules of the offal could possibly remain. (A 14-15, ¶¶ 26-32; 25, ¶ 76.) Oscillococcinum's inactive ingredients are lactose and sucrose. (A 26 – bottom picture.) In other words, it's a literal sugar pill.

Similar placing of science-based remedies and homeopathic products are found in the pain relief, children's pain relief, children's cough and allergy, and heartburn sections of Walmart stores. (A 26-34, ¶¶ 78-82.) For example, Walmart displays the homeopathic Hyland's Baby Oral Pain Relief under a sign reading "pain relief" and alongside science-based remedies for children's pain. (A 38, ¶¶ 107-109.)

In regard to Walmart's internet marketing, the complaint provided several examples of its deceptive nature:

- The homeopathic product Oscillococcinum Quick Dissolve Pallets is nested for sale under the following category path: Health/Vitamins & Supplements/Homeopathic Remedies/Homeopathic Immunity Support. Oscillococcinum is not a "remedy," nor can homeopathy provide "immunity support." (A 35, ¶¶ 84-85.)

- When a customer arrives at Walmart's internet site, and types "flu remedy" or "flu relief" into the search bar, Oscillococcinum returns as a front page result. (A 35, ¶ 86.)

- Similasan Kids Cold and Mucus Relief, a homeopathic product, is a first page result for a search for the term "child cough remedy," and is listed under Health/Cold Cough and Flu/Children's Cold Cough and Flu/Children's Cough Remedies. (A 35, ¶¶ 87, 89.)

- Moreover, a customer in the Similasan example does not even receive an indication in the path that the product is homeopathic rather than science-based. (A 35, ¶ 90.)

2. The facts set forth above are sufficient to state a claim that Walmart's marketing of homeopathic medicine deceives reasonable consumers.

Courts "consider an alleged unfair trade practice 'in terms of how the practice would be viewed and understood by a reasonable consumer.'" *Saucier*, 64 A.3d at 442. A reasonable consumer is not necessarily a sophisticated consumer. *Ibid.* ("'[A]n omission is material if a significant number of unsophisticated consumers would find that information important in determining a course of action.'") "[H]ow a reasonable consumer would view a particular trade practice is usually a question of fact for the jury" although "there are times when it is sufficiently clear to be determined as a matter of law." (A 231); *Mann v. Bahi*, 251 F.Supp.3d 112, 126 (D.D.C. 2017) (same). The present case falls into the former category.

Because Walmart moved to dismiss CFI's complaint, CFI was required to show only that it is plausible on its face that Walmart's in-store and internet marketing will lead reasonable consumers to believe that there is no difference between effective science-based medicines and worthless homeopathic products. Facial plausibility requires more than recitals of a cause of action's elements, supported by conclusory statements, and CFI has supplied more, specifying the means by which Walmart deceptively markets and sells homeopathic drugs, and

even providing concrete, pictorial examples.

Facial plausibility also requires a plaintiff to "'plead[] factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.'" *Potomac Development Corp.*, 28 A.3d at 544. It is reasonably inferable that if products are offered for sale under a sign that says "Cold, Cough & Flu Relief" (A 25, ¶ 76), a reasonable consumer will believe that these products provide such relief. To conclude otherwise would require one to assume either that the signage provides no guidance or that consumers do not care about a product's efficacy. Neither assumption would be reasonable.

It is just as reasonably inferable that when a customer types "flu remedy" or "flu relief" into the search bar at Walmart's internet site, and a homeopathic remedy appears on the front page of the search results (A 35, ¶ 86), the consumer will believe the homeopathic remedy is effective. That Walmart advises its customers regarding health care, and seeks to magnify that impact by marketing itself as a provider of good and quality products (A 36, ¶¶91-94), makes such inferences even more reasonable.

Courts have recognized that in-store and internet marketing practices can be deceptive. See, e.g., *Clean Label Project Found.*, 2019 D.C. Super. Lexis 14 at *1, 10-11 (information on signs and other materials at defendant's physical location); *F.T.C. v. Cantkier*, 767 F.Supp.2d 147, 157-158 (D.D.C. 2011) (use of website URL

ending in .gov to direct consumers to private mortgage services websites was a potential misrepresentation).

It is true, as the Superior Court noted, that signage "cannot support a CPPA claim where the representation that a plaintiff alleges to be conveyed by the sign defies 'basic common sense.'" (A 231-232), citing *Pearson v. Chung*, 961 A.2d 1067, 1075-1076 (2008) ("*Pearson*.") However, in *Pearson*, plaintiff's claim that a "satisfaction guaranteed" sign conveyed an "unconditional and unlimited warranty of satisfaction to the customer as determined solely by the customer" survived an attack at the summary judgment stage. *Pearson v. Chung*, 2005 CA 004302 B, Order Granting in Part and Denying in Part Defendants' Motion to Dismiss and/or for Summary Judgment (D.C. Superior Court May 16, 2006), pp. 4-5.[6] That claim, and plaintiff's allegation that a "'Same Day Service' sign was a false statement unless 'Same Day Service' was always and automatically provided" were only found wanting at trial. *Pearson*, 961 A.2d at 1075-1077. CFI's allegations of deception are far more reasonable than those in *Pearson*.

At least one court permitted a CPPA action involving conduct whose

[6] The Order Granting in Part and Denying in Part Defendants' Motion to Dismiss and/or for Summary Judgment is reproduced in an Addendum to this brief pursuant to D.C. App. R. 28(f). CFI respectfully requests this court to judicially notice this Order. *In re Yelverton*, 105 A.3d 413, 431, n.22 (D.C. 2014) ("[W]e may refer to a judicial order entered on the public record for the undisputed fact that it has been entered and for what it provides.")

deceptiveness resulted in potential confusion between products. In *Beck v. Test Masters Educational Services Inc.*, 994 F.Supp.2d 90 (D.D.C. 2013), summary judgment was granted for plaintiffs, who asserted that a testing preparatory service was deceptive when its representatives failed to deny the service had offered courses in the District of Columbia, as this would permit reasonable consumers to conclude that the company was a similarly named test preparation company that had conducted courses in the District. *Id.* at 96-98.

If it was reasonable for consumers to confuse two testing services based on a failure to deny that courses were given in a specific location, it is reasonable for consumers to confuse worthless homeopathic products with science-based medicines when Walmart's in-store signage and product placement, and internet marketing, intermingle and fail to distinguish between the two. At the very least, this conduct violates § 28-3904 (f-1), which renders it unlawful to "[u]se innuendo or ambiguity as to a material fact, which has a tendency to mislead," and was enacted to "provide a cause of action when merchants bury the truth and leave false impressions without outright stating falsehoods." (A 95.) The Superior Court's finding that Walmart's conduct is not actionable under § 28-3904 (f-1), or any of the other CPPA provisions relied on by CFI, was not supported by facts or case law, and was based on erroneous reasoning.

3. The Superior Court erred in concluding that CFI's allegations were not plausible.

The Superior Court ruled CFI failed to state a claim, "both because plaintiff fails to allege any 'representation,' 'misrepresentation,' or omission by defendant; and because plaintiff's allegations fail to demonstrate anything misleading or inaccurate about the placement of defendant's products." (A 233.) In so ruling, the court improperly penalized CFI for not submitting evidence, misapplied case law, and made a critical prohibited factual determination.

The court's finding that "plaintiff fails to allege any 'representation,' 'misrepresentation,' or omission by defendant" is contradicted by the court's acknowledgement that CFI alleged the manner in which Walmart's practices were deceptive, stating "[p]laintiff's theory is that the product placement, in and of itself, is a *misleading statement* about the efficacy of the homeopathic drugs, because the placement implies that the homeopathic drugs are as effective as the science-based drugs that are shelved nearby." (A 232.) (emphasis added.) The court's conclusion that CFI's allegations "fail to demonstrate anything misleading or inaccurate about the placement of defendant's products" appears to be based on three reasons, none of which adequately support that conclusion.

First, the court found the allegations were unsupported by evidence or "legal authorities," stating:

> Despite being an organization that is devoted to science-based, critical inquiry, plaintiff fails to cite any surveys, studies, or other scientific evidence to support its claim that consumers tend to believe that products placed next to each other are equally effective. See Pret A Manger (USA) Ltd., 2019 D.C. Super. LEXIS 5, at *8-9 (finding that the plaintiff met the "reasonable consumer" standard by citing national consumer survey data). Nor does plaintiff cite any scientific research or legal authorities to support its claim that retailers deliberately make "statements" about products by placing them next to other products.

(A 232.)

As a threshold matter, the case the court cited, *Organic Consumers Ass 'n v. Pret A Manger (USA) Ltd*, No. 2018 CA 006750, 2019 D.C. Super. LEXIS 5, at *8-9 (D.C. Super. Ct. Apr. 29, 2019) ("*Organic Consumers Ass'n*"), did not refer to consumer survey data in finding plausible the allegation that a reasonable consumer could be misled by a representation that a product was "natural" when it contained trace amounts of an artificial chemical. *Id.* at *5-8.

More importantly, the Superior Court made a fundamental error by finding CFI's allegations defective because they were not supported by evidence. *Fridman v. Orbis Business Intelligence Limited*, 229 A.3d 494, 506 (D.C. 2020) ("There is no requirement that a plaintiff offer any evidence to defeat" a Rule 12(b)(6) motion.) Requiring evidence at this stage of the case improperly transforms the "plausibility"

requirement into a "provability" requirement.[7] Similarly, the fact that there is no case law holding that placing certain products next to other products makes a "statement[]" about these products does not render CFI's allegations implausible, especially as there appears to be no case law to the contrary. There is, after all, a first time for everything

The Superior Court's second reason for rejecting CFI's allegations was that "defendant presents strong arguments that the homeopathic drugs are properly placed in the pharmacy sections of its stores and its website." (A 233.) These "strong arguments" consisted of a dictionary's definition of a pharmacy as "a place where medicines are compounded or dispensed" and the fact that homeopathic products are "drugs" under federal law. (A 233.)

Such facts demonstrate at most that homeopathic products could be placed somewhere in a pharmacy section; it does not compel the conclusion that homeopathic products should be intermingled with science-based medicines, and it

[7] Although evidence is not required at this stage of the proceedings, such evidence exists and will be submitted if this court reverses the judgment. See, e.g., Taylor Brownell, *Pink and Blue Advertising: Legal Remedies for Gendered Toy Aisles*, 38 Women's Rts. L. Rep. 136, 145 (2016) ("research shows that in-store signage has a large impact on consumers. One study investigated the extent to which in-store signage was used during navigation of the store and also decision making. The study found that attention to in-store signage affected customers' level of store familiarity and their ability to navigate. It also found that in-store signage had an impact on customers' decision making.") (cleaned up).

certainly does not render implausible CFI's allegations that such an arrangement, with specific symptoms listed above, would mislead consumers. See *Organic Consumers Ass'n*, 2019 D.C. Super. LEXIS 5, *6, 7-8 (rejecting the proposition that because "federal regulations allow trace levels of glyphosate to be present in foods bearing the more stringent 'organic' label . . . it is implausible that a consumer would interpret 'natural' to restrict glyphosate residues.")

The court's third reason for deeming CFI's allegations implausible was that "consumers cannot be presumed to be misled by product placement when the homeopathic products have labels and ingredient lists that clearly differentiate them from 'science-based' drugs." (A 233.) The FTC staff disagrees, stating that, "[w]e believe that consumer confusion likely is created by the retail store shelf placement of homeopathic products side-by-side with conventional medicine that, in fact, has been approved by the FDA and tested on humans for efficacy." FTC Staff Comments, p. 15.

More fundamentally, the court's third reason is a finding of fact that cannot be made at this stage of the case. The extent to which consumers even look at labels on homeopathic products (particularly during internet searches), understand these labels, or deem them more persuasive than store signage and internet pathways grouping homeopathic products and science-based medicine, are empirical questions whose answers require evidence, not speculation. *See generally*, *Clean Label*

Project Found., 2019 D.C. Super. Lexis 14 *1, 10-11 (rejecting at the pleading stage defendant's assertion that information on a website would remedy any confusion caused by information on signs and other materials at defendant's physical location.)

A commentator characterized the Supreme Court's decision in *Ashcroft v. Iqbal*, 556 U.S. 662 (2009), which held the facial plausibility standard enunciated in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007) applicable to all complaints, as "*Twombly* on Steroids." Patricia W. Hatamyar, *The Tao of Pleading: Do Twombly and Iqbal Matter Empirically?*, 59 Am. U. L. Rev. 553, 575, 577 (2010). The Superior Court's ruling that CFI failed to state a claim is *Iqbal* on steroids because the court improperly required evidence from the plaintiff while using "'basic common-sense'" (A 233) to decide a question that requires evidence to answer: does Walmart's in-store signage and product placement, and internet marketing, deceive consumers by equating worthless homeopathic products with evidence-based medicine? Steroids can be just as unhealthy for judicial decision making as for people, and the court's determination that CFI's allegations fail to state a claim should not stand.

CONCLUSION

For the reasons stated above, CFI respectfully requests that this court reverse the judgment and remand this case to the Superior Court for further proceedings.

September 9, 2020

NICHOLAS J. LITTLE

/s/ Nicholas J. Little
Counsel for Plaintiff-Appellant Center for Inquiry, Inc.

CERTIFICATE OF SERVICE

I hereby affirm that on this 9th day of September 2020, I served the foregoing Appellant's Opening Brief via electronic means upon all counsel of record.

Christina G. Sarchio
Tharuni A. Jayaraman
DECHERT LLP
1900 K Street, NW
Washington DC 20006-1110
Telephone: 202-261-3000
Facsimile: 202-261-3333
christina.sarchio@dechert.com
tharunai.jayaraman@dechert.com

Matthew H. Kirtland
NORTON ROSE FULBRIGHT US LLP
799 9th Street NW
Washington, DC 20001-4501
Telephone: 202-662-0200
Facsimile: 202-662-4643
matthew.kirtland@nortonrosefulbright.com

Jeffery B. Margulies (*pro hac vice*)
NORTON ROSE FULBRIGHT US LLP
555 South Flower Street
Los Angeles, CA 90071
Telephone: 213-892-9286
Facsimile: 213-892-9494
jeff.margulies@nortonrosefulbright.com

Counsel for Defendant-Appellee Walmart, Inc.

/s/ Nicholas J. Little
Nicholas J. Little
Center for Inquiry, Inc.
1012 14th St. NW, Suite 205
Washington, DC 20005
Telephone: 202-733-5379
Facsimile: 716-636-1733
nlittle@centerforinquiry.org

Counsel for Plaintiff, Center for Inquiry, Inc.