IN THE SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
CIVIL DIVISION

DISTRICT OF COLUMBIA, **Plaintiff,** **v.** **EXXON MOBIL CORP. et al.,** **Defendants.**	**2020 CA 002892 B** **Judge Yvonne Williams**

ORDER DENYING DEFENDANTS' MOTION TO DISMISS

Before the Court is a Motion to Dismiss ("Motion") filed by Shell plc and Shell USA, Inc. ("Shell Defendants") on March 10, 2023.[1] Shell Defendants filed a Memorandum in Support of the Motion to Dismiss ("Memo") on March 11, 2024.[2] Plaintiff, the District of Columbia ("the District"), filed an Opposition to the Motion ("Opp'n") on April 8, 2024, to which Shell Defendants filed a Reply ("Reply") on April 22, 2024. For the foregoing reasons, the Motion to Dismiss shall be **DENIED**.

I. BACKGROUND

A. Complaint

The District alleges that Defendants violated the District of Columbia Consumer Protection Procedures Act ("CPPA"), D.C. Code §§ 28-3901 *et seq.*, "systematically and intentionally [misleading] consumers in Washington, DC about the central role their products play in causing climate change, one of the greatest threats facing humanity." Compl. at 1. The District describes

[1] Shell Defendants filed a Motion on March 10, 2023 informing the Court and all parties that they changed their names from Royal Dutch Shell plc to Shell plc and from Shell Oil Company to Shell USA, Inc.

[2] The Court is separately considering and responding to Motions to Dismiss and Memoranda filed by BP P.L.C. and BP America Inc ("BP Defendants"), Exxon Mobil Corporation and ExxonMobil Oil Corporation ("Exxon Defendants"), and Chevron Corporation and Chevron U.S.A. Inc. ("Chevron Defendants"). The Court refers to BP Defendants, Exxon Defendants, Shell Defendants, and Chevron Defendants collectively as "Defendants."

the arc of Defendants' public-facing climate personas as follows: "Shell first falsely denied the link between its products and global warming, and then pivoted to greenwashing—misleadingly portraying its products and brand as sustainable…once it could no longer contain the reality of fossil fuel-driven climate change." Opp'n at 1.

"Independently and through coordinated campaigns and industry front groups, Defendants have deceived DC consumers about how Defendants' fossil fuel products warm the planet and disrupt the climate in a quest to drive profits through increased sales of gas and other fossil fuel products." *Id.* In the meantime, "the climate crisis, as Defendants presciently anticipated, is here and is an existential threat to humankind and the planet." Compl. at 42. "Defendants continue to mislead DC consumers to this day" (*Id.* at ¶ 1), and "[t]he District seeks injunctive relief, civil penalties, and costs to deter Defendants from continuing to engage in these and similar unlawful trade practices, as well as restitution for DC consumers." *Id.* at ¶ 3.

The named "agents and front groups" are the American Petroleum Institute ("API") and the Global Climate Coalition ("GCC"). *Id.* at ¶ 20. API is a national trade association whose "purpose is to advance the individual members' collective business interests, which includes increasing consumers' consumption of oil and gas to Defendants' financial benefit." *Id.* at ¶ 20(a). "Among other functions, API coordinates among members of the petroleum industry and gathers information of interest to the industry and disseminates that information to its members." *Id.* at ¶ 20(b). "All Defendants and/or their predecessors-in-interest are, or have been, core API members at times relevant to this litigation and had executives serving on the API Executive Committee and/or as API Chairman, which is akin to serving as a corporate officer." *Id.* The GCC, which was disbanded in or around 2001, "was an industry group formed to oppose greenhouse gas emission reduction initiatives." *Id.* at ¶ 21(a). "Founding members included Defendants through API," and

"over the course of its existence, the GCC's individual corporate members" included Defendants. *Id.*

The District alleges that "Defendants' CPPA violations take the form of both significant **misrepresentations** and **omissions** of information material to DC consumers' decisions to purchase Defendants' fossil fuel products." *Id.* at ¶ 3 (emphasis added). "In connection with selling gasoline and other fossil fuel products to DC consumers, Defendants **failed to inform consumers** about the effects of their fossil fuel products in causing and accelerating the climate crisis." *Id.* at ¶ 9 (emphasis added). "The significant harm that Defendants knew would result from increased consumer use of their fossil fuel products is material to and would have affected DC Consumers' purchasing decisions." *Id.*

1. **The District alleges "Defendants have known for decades that their fossil fuel products would disrupt the global climate with potentially catastrophic consequences for humankind."** *Id.* at 20.

According to the District, scientists within the fossil fuel industry understood the role that greenhouse gases play in climate disruption as far back as the early 1950s. Defendants' "internal actions demonstrated awareness and acceptance of the known effects of climate change." *Id.* at ¶ 25. The District offers an extensive history to demonstrate Defendants' knowledge, including, among others (1) a 1968 report commissioned by API "regarding the state of research on environmental pollutants, including carbon dioxide" (*Id.* at ¶ 32); (2) a 1979 Task Force convened by API and its members, including Defendants, to "monitor and share climate research among the oil industry," (*Id.* at ¶ 35); and (3) a Shell internal "Greenhouse Effect Working Group." *Id.* at ¶ 39.

2. **The District alleges "contrary to their clear knowledge of climate change and resultant business decisions, Defendants promoted disinformation and doubt among DC consumers and nationwide."** *Id.* at 27.

The District alleges individual misrepresentations made by the individual Defendants and collective misrepresentations by "industry front groups." Compl. at 1; *see supra*. The District claims Defendants "…deceptively worked to influence consumer demand for its fossil fuel products through a long-term advertising and communications campaign centered on **climate change denialism**." Compl. at ¶ 174(a), 181(a), 188(a), 195(a) (emphasis added). It alleges that Defendants made affirmative misrepresentations and material omissions "through **coordinated messaging** by industry front groups, which [Defendants] funded, controlled, and directly participated in." *Id.* at ¶ 174(a), 181(a), 188(a), 195(a) (emphasis added). Moreover, "Defendants funded and controlled scientists to sow confusion and doubt about the realities of climate science." *Id.* at 32. "By concealing and misrepresenting the scientific understanding of the consequences of burning fossil fuels and increasing atmospheric concentrations of greenhouse gases," Defendants allegedly "...failed to state and/or misrepresented material facts, which had a tendency to mislead consumers." *Id.* at ¶ 174(a), 181(a), 188(a), 195(a) (citing § 28-3094(e) & (f)).

The District claims "Defendants employed and financed several industry associations and industry-created front groups to serve their climate disinformation and denial mission." *Id.* at ¶ 19. Defendants allegedly used API "to deceive consumers as to the existence of climate change and whether fossil fuels had a role in causing it" (*Id.* at ¶ 30); and used GCC to "oppose greenhouse gas emission reduction initiatives" (*Id.* at ¶ 21(a)) and "to deceive consumers by distorting climate science." *Id.* at 28. For example, a 1995 GCC pamphlet stated "there is no evidence to demonstrate the climate has changed as a result of…man-made greenhouse gases." *Id.* at ¶ 57.

Shell's "Profits & Principles" advertising campaign, launched in 1998, was intended "…to reposition the company's image as open and forward looking, with the goal of influencing consumer demand for Shell's fossil fuel products." Compl. at ¶ 84. The ad was published in major

magazines distributed to D.C. consumers. It stated: "The issue of global warming has given rise to heated debate. Is the burning of fossil fuels and increased concentration of carbon dioxide in the air a serious threat or just a lot of hot air?" *Id.* In fact, "…Shell already knew the answer to the question of whether global warming was 'a serious threat or just a lot of hot air'…" *Id.* Shell's internal "Greenhouse Effect Working Group" wrote a confidential report titled "The Greenhouse Effect." *See id.* at ¶ 39. "The report…noted the burning of fossil fuels as a primary driver of CO_2 buildup and warned that warming could 'create significant changes in sea level, ocean currents, precipitation patterns, regional temperature and weather.'" *Id.*

3. The District alleges "Defendants continue to mislead DC consumers about the impact of their fossil fuel products on climate change through greenwashing campaigns and other misleading advertisements." *Id.* at 44.

The District next alleges that "[a]s public concern over global warming mounted, [Defendants] deceitfully represented [themselves] as [leaders] in renewable energy and made misleading or incomplete claims about the steps [they have] taken to reduce [their] overall carbon footprint[s] as well as misrepresented or made incomplete claims about [their] investment practices and expansion in fossil fuel production." Compl. at ¶ 174(b), 181(b), 188(b), 195(b). By doing so, according to the District, "[Defendants] failed to state and/or misrepresented material facts that tended to mislead consumers regarding its commitment to environmental sustainability." *Id.* at ¶ 174(b), 181(b), 188(b), 195(b) (citing § 28-3094(e) & (f)).

According to the District, "Defendants also made misleading claims about specific 'green' or 'greener' fossil fuel products" (Compl. at 59); and "[s]uch 'greenwashing' advertising is aimed at spreading misleading information to create a false impression that a company and/or its products are environmentally friendly." *Id.* at ¶ 98. "By falsely representing that it operated a diversified energy portfolio with meaningful renewable and low-carbon fuel components, [Defendants]

falsely represented that its goods had characteristics and benefits that they do not in fact possess." *Id.* at ¶ 174(b), 181(b), 188(b), 195(b) (citing § 28-3094(a)) & (f)). "…Defendants portray themselves as working to reduce reliance on fossil fuels through investment in alternative energy sources, but Defendants' investments in low-carbon energy are negligible." *Id.* at ¶ 100. The District claims that between 2010 and 2018, Shell spent 1.2% of its total capital expenditures on low-carbon energy sources. *Id.*

The District claims that through greenwashing campaigns, "…Shell has misleadingly promoted itself to D.C. consumers as environmentally conscientious through advertisements in publications such as the *Washington Post* and the *New York Times*." *See id.* at ¶ 117. For example, "[a]s part of Shell's 'Make the Future' campaign, the company has published numerous advertisements currently viewable on the *Washington Post* and *New York Times* websites, in which the company touts its investment in 'alternative energy sources,' including liquefied natural gas ('LNG'), natural gas, hydrogen fuel cells, and biofuel, which Shell repeatedly refers to as 'cleaner sources.'" *Id.* at ¶ 118. Additionally, "…Shell's 'In for the Long Haul' advertisement misleadingly states that expanding LNG [liquefied natural gas] would 'help prevent climate change from advancing,' including by fueling ships 'with low to no emissions.'" *Id.* at ¶ 124. "But LNG is a fossil fuel that produces significant greenhouse gas emissions at all stages of its lifecycle…" *Id.*

4. The District argues "information regarding the role of Defendants' fossil fuel products in causing the climate crisis is material to consumers' purchasing decisions." *Id.* at 65.

Lastly the District claims that "[Defendants have] **aggressively marketed its fossil fuel products**, including at the point of sale at [Defendant]-branded gasoline stations in the District, with **misleading representations about the products' environmental benefits**, and has also **failed to adequately disclose the known risks** of burning fossil fuels, in a manner that tended to

mislead consumers." Compl. at ¶ 174(c), 181(c), 188(c), 195(c) (citing § 28-3094(a)) & (f)) (emphasis added). In describing why Defendants' "false and misleading representations are material," the District states "they are capable of influencing a consumer's decision to purchase [Defendants'] fossil fuel products, have the capacity to affect consumer energy, transportation, and consumption choices, and deter consumers from adopting cleaner, safer alternatives to [Defendants'] fossil fuel products." *Id.* at ¶ 175, 182, 189, 196.

B. Procedural History

The District filed the instant suit in the D.C. Superior Court on June 25, 2020.

1. Removal to Federal Court

Exxon Defendants filed a notice of removal on July 17, 2020. On November 12, 2022, the U.S. District Court for the District of Columbia granted a Motion to Remand filed by Defendants ("USDC Remand Memo"). The District Court held that "federal common law does not confer jurisdiction over the District's claims" (USDC Remand Memo at 3); removal is improper under *Grable & Sons Metal Prods. v. Darue Eng'g & Mfg.*, 545 U.S. 308 (2005) because "Defendants have identified no disputed federal issue necessary to resolve the District's consumer protection claims" (*Id.* at 9-10); "the Court does not have federal enclave jurisdiction" (*Id.* at 11); "removal is improper under the Outer Continental Shelf Lands Act" (*Id.* at 13 (citing 43 U.S. Code § 1349)); "the Federal Officer Removal Statute does not apply" (*Id.* at 15 (28 U.S. Code § 1442)); "the [District] Court does not have diversity jurisdiction over the Parties" (*Id.* at 17); "the Class Action Fairness Act does not apply" (*Id.* at 19 (citing 28 U.S. Code § 1332).

Defendants filed an Emergency Motion for a Temporary Stay of Execution of Remand Order ("Emergency Mot. for Stay) on November 13, 2022, the day after the District Court remanded the case. Defendants asked for time to file a formal motion to stay remand pending their

appeal of the remand to the U.S. Court of Appeals for the District of Columbia Circuit. *See* Emergency Mot. for Stay at 1. The District Court agreed to stay its Order to permit briefing on November 14, 2022. They filed a Notice of Motion and Motion to Stay Execution of Remand Order Pending Appeal on November 28, 2022, the same day they filed an Appeal of the Remand with the D.C. Circuit Court. The District opposed the Motion to Stay on December 12, 2022, to which Defendants filed a Reply a week later. The District Court ultimately denied Defendant's Motion to Stay Execution of Remand Order Pending Appeal on December 20, 2022. On December 23, 2022, the D.C. Circuit Court administratively stayed the District Court's November 12, 2022 Order pending further review ("D.C. Circuit December 23, 2022 Order"), and ordered briefing on the motion for a stay. *See* D.C. Circuit December 23, 2022 Order at 1. On January 30, 2023, the D.C. Circuit Court denied the Motion to Stay. The Parties argued before the D.C. Circuit Court on May 8, 2023, and on December 19, 2023, the case was remanded to the D.C. Superior Court.

2. Remand to the D.C. Superior Court

Meanwhile, on March 10, 2023 Defendants filed the following Motions. BP Defendants filed (1) a Motion to Dismiss on 12(b)(2) and 12(b)(6) grounds and (2) a Motion to Dismiss pursuant to the D.C. Anti-SLAPP Act. Chevron Defendants filed (3) a Motion to Dismiss on 12(b)(2) and 12(b)(6) grounds and (4) a Motion to Dismiss pursuant to the D.C. and California anti-SLAPP acts. Shell Defendants filed (5) a Motion to Dismiss on 12(b)(2) and 12(b)(6) grounds and (6) a Motion to Dismiss pursuant to the D.C. Anti-SLAPP Act. Exxon Defendants filed (7) a Motion to Dismiss on 12(b)(2) and 12(b)(6) grounds and (8) a Motion to Dismiss pursuant to the D.C. Anti-SLAPP Act. Defendants filed (9) their Joint Brief Regarding Applicability of District of Columbia Anti-SLAPP Statute ("Joint Brief").

On January 12, 2023, the D.C. Council codified D.C. Law 24-344, the Corrections Oversight Improvement Omnibus Amendment Act of 2022 ("the Exemption"), which exempted cases initiated by the District from the Anti-SLAPP Act. In the Defendants' Joint Brief, they asked the Court to (1) find that the exemption is unconstitutional and (2) consider their Motions to Dismiss pursuant to the Anti-SLAPP Act. *See generally* Joint Brief. The court accepted the Joint Brief as filed on February 13, 2024.

On March 20, 2023, Defendants filed an Opposed Motion to Stay Proceedings ("March 2023 Motion to Stay") pending resolution of the then-pending appeal before the D.C. Circuit Court and other pending cert petitions in similar suits about climate change in the Supreme Court of the United States. *See* March 2023 Motion to Stay at 1. The District filed an Opposition and Defendants filed a Reply on July 23, 2023, and Judge Irving granted the Motion and stayed the case for 90 days on September 6, 2023. As the appeal was still pending before the D.C. Circuit Court, Defendants filed an Opposed Motion to Continue Stay of Proceedings on November 29, 2023, and the District filed an Opposition on November 30, 2023. Judge Irving granted the Motion on December 4, 2023.

The District filed an Opposed Motion to Lift Stay of Proceedings on January 11, 2024, which Judge Irving denied as moot on February 1, 2024 because the case was remanded to the D.C. Superior Court on December 19, 2023. On February 8, 2024, the District filed an Opposed Motion to Amend the Briefing Schedule, which Defendants opposed on February 22, 2024. The District filed a Reply on February 28, 2024, and the Motion was granted in part on March 4, 2024 ("March 4, 2024 Order"). Judge Irving set a briefing schedule and held that if the Court invalidated D.C. Code § 16-5505(a)(2), the Exemption, the District would have to file Oppositions within fourteen days of the decision, and Defendants would file Replies fourteen days thereafter. March

4, 2024 Order at 2. On March 8, 2024, the Court granted a Joint Motion to Extend the briefing schedule by two weeks.

On March 11, 2024, Defendants filed their respective memoranda in support of their Motions to Dismiss. The District filed Oppositions to Defendants' Motions to Dismiss, as well as the Joint Brief, on April 8, 2024, to which Defendants filed Replies on April 22, 2024. The Parties have filed numerous Notices of Supplemental Authority in the months since, to which other Parties have filed Replies. For example, on September 5, 2024, the District filed a Praecipe to Provide Supplemental Authority ("District Supplemental Authority Praecipe") to give notice of the D.C. Court of Appeals' opinion in *Earth Island Inst. v. Coca-Cola Co.*, 321 A.3d 654 (D.C. App. 2024), to which Shell Defendants filed a Response ("Praecipe Response") on September 20, 2024.

The instant case was transferred to Judge Williams on January 1, 2025. The Parties appeared before Judge Williams for a Motion Hearing on March 20, 2025.

C. Motions before the Court

Defendants filed their respective Motions to Dismiss pursuant to Rules 12(b)(2) and 12(b)(6) on March 10, 2023 and Memoranda in Support of their Motions to Dismiss on March 11, 2024. As to Rule 12(b)(2), Defendants argued in March of 2023 that this Court does not have jurisdiction over them. *See e.g.* Mot. at 2 (Shell Defendants argued that "the Court may not exercise general or specific jurisdiction over them" because "none of the Shell Defendants are incorporated in or have their principal place of business in Washington, D.C." and "there is no specific personal jurisdiction over the Shell Defendants" for the alleged CCPPA violation.). At the time of filing the Motions to Dismiss, Defendants had removed the case to federal court. However, on December 19, 2023 the case was remanded to the D.C. Superior Court. Shell Defendants' March 2024 Memorandum in support of their Motion to Dismiss does not address the Parties' 12(b)(2)

argument. Thus, the Court does not address those arguments and denies as moot the requests to dismiss pursuant to Rule (12)(b)(2). The District filed Oppositions on April 8, 2024, to which Defendants filed Replies on April 22, 2024.

In Shell Defendants' Memorandum in Support of their Motion to Dismiss, they make the following arguments. (1) The Complaint should be dismissed because it does not challenge statements about consumer goods. Memo at 9. (2) The Complaint should be dismissed because it does not plausibly allege that Shell made a false or misleading statement (*Id.* at 11) because (a) of the reasonable-consumer standard (*Id.* at 11); (b) the Complaint's sole allegation about a consumer good does not plausibly allege a false or misleading statement (*Id.* at 12); and (c) the Complaint's allegations about other matters do not plausibly allege a false or misleading statement. *Id.* at 13. (3) The Complaint does not plausibly allege materiality. *Id.* at 15. (4) The First Amendment protects Shell's right to speak on matters of public concern and petition the government. *Id.* at 18. (5) This lawsuit is preempted to the extent it seeks damages for the effects of transboundary emissions on the global climate. *Id.* at 20.

In the District's Opposition, it argues the following. (1) The District alleges valid CPPA claims against Shell (Opp'n at 3) because (a) Shell's greenwashing is sufficiently connected to its sales (*Id.* at 4); (b) Shell made misleading statements and omissions (*Id.* at 7); (c) Shell's misrepresentations were materially misleading (*Id.* at 9); (d) actual falsity is not required (*Id.* at 11); (e) Shell's representations are not non-actionable aspirational statements (*Id.* at 13); and (f) Shell is liable for its own conduct and the conduct it directed (*Id.* at 16). (2) The District's claims are not barred by the First Amendment (*Id.* at 17) because (a) Shell's deceptive and misleading commercial speech receives no First Amendment protection (*Id.* at 17) and (b) Shell's additional First Amendment arguments are also meritless. *Id.* at 18.

In their Reply, Shell Defendants claim (1) with one non-actionable exception, the Complaint does not plausibly allege misrepresentations related to consumer goods (Shell Reply at 1); (2) the Complaint does not plausibly allege that Shell made any false or misleading statements or omissions (*Id.* at 3); (3) the Complaint does not plausibly allege materiality (*Id.* at 6); (4) Shell is not liable for statements made by others (*Id.* at 8); and (5) the First Amendment does not permit the Attorney General to dictate Shell's speech on matters of public concern and protects the right to petition the government. *Id.* at 9.

II. LEGAL STANDARD

A complaint should be dismissed under Rule 12(b)(6) if it does not satisfy the requirement of Rule 8(a) that a pleading contain a "short and plain statement of the claim showing that the pleader is entitled to relief." *Potomac Dev. Corp. v. District of Columbia*, 28 A.3d 531, 543 (D.C. 2011) (quoting Super. Ct. Civ. R. 8(a)). "To survive a motion to dismiss, a complaint must set forth sufficient information to outline the legal elements of a viable claim for relief or to permit inferences to be drawn from the complaint that indicate that these elements exist." *Williams v. District of Columbia*, 9 A.3d 484, 488 (D.C. 2010) (citation and quotations omitted); *see Doe v. Bernabei & Wachtel, PLLC*, 116 A.3d 1262, 1266 (D.C. 2015) ("To survive a motion to dismiss, a complaint must set forth sufficient facts to establish the elements of a legally cognizable claim.") (citations and quotations omitted)). In resolving a motion to dismiss, "the court accepts as true all allegations in the Complaint and views them in a light most favorable to the nonmoving party." *Jordan Keys & Jessamy, LLP v. St. Paul Fire & Marine Ins. Co.*, 870 A.2d 58, 62 (D.C. 2005) (citations and quotations omitted).

"A pleading that offers 'labels and conclusions' or 'a formulaic recitation of the elements of a cause of action will not do.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atlantic*

Corp. v. Twombly, 550 U.S. 544, 555 (2007)); *see Sundberg v. TTR Realty, LLC*, 109 A.3d 1123, 1128–29 (D.C. 2015) ("[W]here a complaint pleads facts that are merely consistent with a defendant's liability, it stops short of the line between possibility and plausibility of entitlement to relief." (Citations and quotations omitted)). "To satisfy Rule 8(a), plaintiffs must nudge their claims across the line from conceivable to plausible." *Tingling-Clemmons v. District of Columbia*, 133 A.3d 241, 246 (D.C. 2016) (citation and quotations omitted). However, "[w]hen there are well-pleaded factual allegations, a court should assume their veracity and then determine whether they plausibly give rise to an entitlement to relief." *Carlyle Inv. Mgmt., L.L.C. v. Ace Am. Ins. Co.*, 131 A.3d 886, 894 (D.C. 2016) (alteration in original) (citation and quotations omitted).

"A complaint should not be dismissed because a court does not believe that a plaintiff will prevail on its claim; indeed it may appear on the face of the pleadings that a recovery is very remote and unlikely but that is not the test." *Carlyle Inv. Mgmt., L.L.C.*, A.3d at 894 (citation, quotations, and brackets omitted). In addition, the Court should "draw all inferences from the factual allegations of the complaint in the [non-movant's] favor." *Id*. (citation omitted). However, legal conclusions "are not entitled to the assumption of truth," *Potomac Dev. Corp*., 28 A.3d at 544 (quoting *Iqbal*, 556 U.S. at 664), so "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Sundberg*, 109 A.3d at 1128–29 (quoting *Iqbal*, 556 U.S. at 678). The complaint must plead "factual content that allows the court to draw the reasonable inference that defendant is liable for the misconduct alleged." *Poola v. Howard Univ*., 147 A.3d 267, 276 (D.C. 2016) (citation and quotations omitted).

III. DISCUSSION

The Court denies Shell Defendants' Motion to Dismiss.

A. The District plausibly alleges that its claims are sufficiently tied to consumer goods such that they are actionable under the CPPA.

The Parties fundamentally disagree about how explicit a statement about consumer goods or services must be for the CPPA to apply. Shell Defendants argue "[e]ach enumerated example of 'unfair or deceptive trade practice[s]' in § 28-3904 relates in a defined way to 'consumer goods or services.'" Reply at 6. The District argues "the CPPA covers more than advertisements that explicitly reference a company's goods or services by name." Opp'n at 5.

Shell Defendants state that "to plead a deceptive trade practice under the CPPA, a plaintiff must plausibly allege that a defendant misrepresented its 'economic output' that a person would purchase or use for 'personal, household, or family purposes'…" Memo at 9 (quoting D.C. Code § 28-3901(a)(2), (7)). "'Misrepresentation[s] about other matters' do not suffice…" *Id.* (quoting *Floyd v. Bank of Am. Corp.*, 70 A.3d 246, 248-49, 254-55 (D.C. App. 2013)). According to Shell Defendants, the District alleges misrepresentations about "matters" that are not consumer goods, such as "climate science, the energy transition, and alternative fuels that the Complaint does not allege are available to consumers." *Id.* at 10.

As to the misrepresentation allegations about climate science, Shell Defendants claim their statement that "[t]he issue of global warming has given rise to heated debate" (Compl. at ¶ 85) is not related to consumer goods sold in the District. So too for misrepresentation allegations about transitioning to cleaner energy: "there is no mention of gasoline in Shell's alleged statements that it is 'taking steps toward developing the infrastructure to support growth in hydrogen-fuel-cell vehicles,' 'setting the course' for a 'lower-carbon mobility future.'" *Id.* (quoting Compl. at ¶ 119). Lastly, as to the misrepresentation allegations about alternative fuel options, Shell Defendants claim they concern "natural gas or LNG, hydrogen fuel cells, and biofuel—none of which is alleged to be available for consumer purchase." *Id.*

The District responds in its Opposition that while some of the alleged misrepresentations do explicitly refer to fossil fuel products sold in the District (*e.g.* Compl. at ¶ 158(a)-(c) alleging a misrepresentation about nitrogen gasoline), "the bulk of the other allegations describe Shell's misrepresentations about the harms caused by its products." Opp'n at 5 (citing Compl. at ¶¶ 117–24). The District argues "the CPPA covers more than advertisements that explicitly reference a company's goods or services by name." *Id.* "Here, the District alleges violations to sections (b), (e), (f), and (f-1), none of which mention 'goods or services.'" *Id.* at 6. "Indeed, the Council clearly decided not to limit the CPPA to representations that expressly describe a company's goods and services." *Id.*

Pursuant to D.C. Code § 28-3904, it is a violation to engage in an unfair or deceptive trade practice. The statute defines "trade practice" to mean "any act which does or would create, alter, repair, furnish, make available, provide information about, or, directly or indirectly, solicit or offer for or effectuate, a sale, lease or transfer, of consumer goods or services." D.C. Code § 28-3901(a)(6). The District argues that Shell Defendants' campaigns qualify as trade practices "at a minimum" because they "'indirectly…effectuate[] a sale of consumer goods,' including Shell's gasoline, lubricants, and motor oils." Opp'n at 5 (quoting D.C. Code § 28-3901(a)(6)). "Indeed," the District claims, "that was the intended purpose of [their] campaigns…" *Id.* "And they engaged in greenwashing tactics in order to 'induce purchases and brand affinity.'" *Id.* (quoting Compl. at ¶ 164). In their Reply, Shell Defendants retort that "[t]hat interpretation would make actionable *any* statement by a company that might incidentally affect consumer demand or create 'affinity' among consumers." Reply at 2. "Plaintiff's interpretation would write 'consumer goods or services' out of the CPPA." *Id.*

The CPPA "…is a broad consumer protection statute, meant to 'assure that a just mechanism exists to remedy all improper trade practices.'" *Earth Island Inst. v. Coca-Cola Co.*, 321 A.3d 654, 663 (D.C. App. 2024) (quoting D.C. Code § 28-3901(b)(1)). In *Earth Island Inst. v. Coca-Cola Co.*, the D.C. Court of Appeals considered an appeal of a dismissal of a similar suit in which Earth Island Institute, an environmental organization, alleged that the Coca-Cola Company violated the CPPA. "Earth Island allege[d] that Coca-Cola engages in deceptive marketing that misleads consumers into thinking that its business is environmentally sustainable, or at least that it is currently making serious strides toward environmental sustainability," when "[i]n fact, in Earth Island's telling, the sheer scale on which Coca-Cola relies on single-use plastics in its packaging—and the scale on which it intends to use them—renders it an environmental blight and a fundamentally unsustainable business." *Id.* at 658. Earth Island further alleged that Coca-Cola engaged in "greenwashing…deceptively billing [itself] as environmentally friendly, in an effort to generate profits, when they are in fact far from it." *Id.* The Court reversed the dismissal, holding that Earth Island stated a facially plausible misrepresentation claim.

As articulated by the D.C. Court of Appeals, "[w]hile some provisions of the CPPA specifically require that any misleading statements be about 'goods or services,' *see, e.g.*, § 3904(a), (d); *Floyd v. Bank of Am. Corp.*, 70 A.3d 246, 254 (D.C. 2013) (discussing those subsections in particular), other CPPA provisions do not contain that express limitation, *see*, e.g., § 3904(e), (f)." *Earth Island*, 321 A.3d 654 at 671, n.6. The Court of Appeals "…assume[d], without deciding, that Coca-Cola's statements had to relate to its goods or services to be actionable under any subsection of § 3904, as strongly suggested by the CPPA's overarching purpose." *Id.* (citing § 3901(c) ("This chapter establishes an enforceable right to truthful information from merchants about consumer goods and services.").

The CPPA broadly defines "goods and services" as "any and all parts of the economic output of society, at any stage or related or necessary point in the economic process…" D.C. Code § 28-3901(7). For example, in *Earth Island*, the D.C. Court of Appeals held that "…Coca-Cola's various claims about its plastic packaging are very much statements about its 'goods and services'…" *Earth Island*, 321 A.3d 654 at 659. "Coca-Cola's packaging is part of the products that it sells, and the environmental impact of how it creates that product, and what becomes of it, are qualities of the product itself under the CPPA's broad approach to goods and services."[3] *Id.* at 671.

As to whether the CPPA applies to statements that do not explicitly address goods or services that may be purchased, leased or received in the District, the Court follows the analysis in *Earth Island*. This Court assumes, "without deciding, that [Shell Defendants'] statements had to relate to its goods or services to be actionable under any subsection of § 3904…" *Earth Island*, 321 A.3d 654 at 671, n.6. While it appears that all the alleged statements were made in the name of selling Shell Defendants' products, the Court will not now decide whether the individual statements sufficiently relate to goods or services such that the CPPA applies.

[3] In Shell Defendants' Praecipe Response, they distinguish the instant case. "Unlike in *Earth Island*, the vast majority of the alleged statements by Shell are not actionable under the CPPA because they do not concern consumer goods and services." Praecipe Response at 2. They argue that their alleged statements do not "'provide information about' or even indirectly 'effectuate[] a sale of . . . consumer goods or services.'" *Id.* (quoting D.C. Code § 28-3901(a)(6)). *Id.* "As for the single Shell statement that does concern consumer goods—that its V-Power gasoline 'produce[s] fewer emissions,' *id.* ¶ 158(b)—it is a truthful description of the gasoline's benefits on engine performance, not an 'aspirational statement' about sustainability efforts." *Id.* at 3. The Court however finds the District has plausibly alleged an actionable sustainability narrative to sell products in the District. *See* District Supplemental Authority Praecipe at 4 (citing *Earth Island*, 321 A.3d 654).

B. The District plausibly alleges that Shell made a false or misleading statement.

Shell Defendants argue the District has not plausibly alleged a false or misleading statement. First, they allege their statement that "[t]he issue of global warming has given rise to heated debate" (Compl. at ¶ 85) is true, and that it does not show their participation in climate change denial because the same publication stated "Shell believes that action needs to be taken now." Memo at 13. The full statement read: "The issue of global warming has given rise to a heated debate. Is the burning of fossil fuels and increased concentration of carbon dioxide in the air a serious threat or just a lot of hot air? Shell believes that action needs to be taken now, both by companies and their customers." *See* Compl. at ¶¶ 85-87; *see also* March 20, 2025 Motion Hearing. The statement goes on to express a commitment to sustainability. *See id.* At the March 20, 2025 Motion Hearing, Shell Defendants argued the misrepresentation allegation for this statement is self-defeating. *See* March 20, 2025 Motion Hearing (packet produced by Shell Defendants).

Shell Defendants further argue that their statements about energy transition (statements that Shell was "'taking steps' toward hydrogen-fuel-cell vehicles, 'setting the course' for a 'lower-carbon mobility future,' and 'a bigger player than you might expect in this budding movement to realize a cleaner and more efficient transportation future'") are aspirational statements "that cannot support a CPPA claim." *Id.* at 14 (quoting Compl. at ¶ 119). Shell Defendants claim these statements would not mislead a reasonable consumer to believe "Shell is largely invested in alternative energy." *Id.*

Lastly, Shell Defendants argue that their alleged statements referring to alternative fuels as "cleaner," "sustainable," and "lower-carbon" do not give "the misimpression that these fuels are 'not associated with greenhouse gas emissions.'" *Id.* (quoting Compl. at ¶¶ 119, 121-122; ¶¶ 123-124). Instead, a "reasonable consumer would understand that these statements refer to the relative

levels of vehicle emissions created by alternative fuels—not that the fuels can be produced without creating any emissions." *Id.* at 15.

The District responds in its Opposition that "whether Shell's statements or omissions 'have a tendency to mislead reasonable consumers is a jury question.'" Opp'n at 7 (quoting *Ctr. for Inquiry Inc. v. Walmart, Inc.*, 283 A.3d 109, 117 (D.C. 2022)). "Viewed in the light most favorable to the District, these allegations separately and collectively satisfy the CPPA's test for statements and omissions that tend to mislead." *Id.* (citing *McMullen v. Synchrony Bank*, 164 F. Supp. 3d 77, 94 (D.D.C. 2016) ("[T]he CPPA does not require much by way of pleading to state a claim under § 28-3904(e)." (citation omitted)). They also argue falsity is not required to be actionable under the CPPA because a statement may be both true and misleading. *Id.* at 12.

In their Reply, Shell Defendants argue that the District "alleges no facts suggesting that District consumers—who have been aware of the connection between fossil-fuel use and climate change for decades, *see, e.g.*, Compl. ¶¶ 30, 56—would be misled by Shell's alleged failure to disclose that information alongside statements about its gasoline's benefits for engine performance." Reply at 4. Moreover, they claim the District cherrypicked the alleged statements out of context, and urge that "the Court can and should consider the full statements." *Id.*

As an initial matter, the District is correct that a representation may be misleading, and thus actionable under the CPPA, even if true. *See* Opp'n at 12 (citing *Ctr. for Inquiry Inc.*, 283 A.3d at 120, n.11). In other words, the CPPA does not require "actual falsity." *Id.* at 11. Next, the District plausibly alleges that Shell Defendants' statements—(1) "global warming ha[d] given rise to heated debate;" (2) Shell was "'taking steps' toward hydrogen-fuel-cell vehicles, 'setting the course' for a 'lower-carbon mobility future,' and 'a bigger player than you might expect in this budding movement to realize a cleaner and more efficient transportation future;'" and (3)

alternative fuels are "cleaner," "sustainable," and "lower-carbon"—are misleading. *See* Compl. at ¶¶ 84-85, 119, 121-124.

First, as to the claim that "global warming ha[d] given rise to heated debate," the District plausibly alleges that "[t]here was no serious debate among scientists or even within Shell itself as to the reality of climate change and the contribution of fossil fuel products to the warming of the planet" and "internal Shell documents showed that the company had no doubt global warming posed a serious threat." Compl. at ¶ 86. Accepting the Complaint's allegations about Shell Defendants' knowledge as true and viewing them in the light most favorable to the District (*see Jordan Keys & Jes*samy at 62), the Court finds a facially plausible misrepresentation claim for the statement that there was "heated debate" about climate change. The advertisement's statement that "Shell believes that action needs to be taken now, both by companies and their customers" (Compl. at ¶¶ 85-87) does not, as Shell Defendants argue, make the allegation "self-defeating." *See also* March 20, 2025 Motion Hearing (packet produced by Shell Defendants). A jury could find, as the District alleges, that the second half of the advertisement is not an answer to the question about whether there is heated debate, but instead a false portrayal of a commitment to sustainability. *See* Compl. at ¶ 87.

Second, the District plausibly alleges that Shell Defendants' statements about energy transition are misleading. To argue that these statements are aspirational and therefore inactionable, Shell Defendants rely on *Earth Island Inst. v. The Coca-Cola Co.*, 2022 WL 18492133 (D.C. Super. Ct. Nov. 10, 2022), which has since been overturned by the D.C. Court of Appeals in *Earth Island Inst. v. Coca-Cola Co.*, 321 A.3d 654 (D.C. App. 2024). While this Court found in *Earth Island Inst. v. The Coca-Cola Co.*, 2022 WL 18492133 that aspirational statements are inactionable, the D.C. Court of Appeals reversed, holding that "…even aspirational statements

can be actionable under the CPPA because they can convey to reasonable consumers that a speaker is taking (or intends to take) steps that at least have the potential of fulfilling those aspirations." *Earth Island*, 321 A.3d 654 at 659. Earth Island alleged that Coca-Cola "neither takes nor intends to take any such steps, and if that is correct, then its representations could mislead reasonable consumers." *Id.* "There is thus no real dispute about the thrust of Coca-Cola's representations to consumers; in a nutshell, Coca-Cola represents that it is working toward environmental sustainability." *Id.* at 661. "Where the parties disagree is whether those representations give consumers a false impression of Coca-Cola's current and anticipated environmental impact on the ground." *Id.*

The Parties in the instant case similarly disagree whether Shell Defendants give consumers a false impression of their current and anticipated environmental impact. The District claims Shell is not at all "setting the course" for a "lower-carbon mobility future." *See* Compl. at ¶ 119. Instead, it claims "only 1.2% of Shell's capital spending from 2010 to 2018 was in low-carbon energy sources, and that number continues to be heavily outweighed by Shell's continued expansion of its fossil fuel business." Compl. at ¶ 120. A jury could consider Shell's role in contributing to climate change and decide that Shell Defendants mislead consumers when they claim they are at the forefront of transitioning to cleaner energy.

While the Court does not agree with the District that "Shell's focus on tailpipe emissions is misleading because it gives consumers the false impression that hydrogen fuel is not associated with greenhouse gas emissions" (Compl. at ¶ 122), the District still plausibly alleges that Shell Defendants' statements about alternative fuels are misleading. *See* Compl. at ¶¶ 84-85, 119, 121-124. For example, a jury could find it is misleading to advertise that "[h]ydrogen fuel cell vehicles...emit nothing from their tailpipes but water vapor" (Compl. at ¶ 121), if, as alleged by

the District, "producing and transporting the natural gas for hydrogen fuel production leads to methane emissions that make the total greenhouse gas emissions associated with hydrogen fuel similar to those from petroleum…" Compl. at ¶ 122.

As to Shell Defendants' argument that the District "alleges no facts suggesting that District consumers—who have been aware of the connection between fossil-fuel use and climate change for decades…would be misled by Shell's alleged failure to disclose that information alongside statements about its gasoline's benefits for engine performance" (Reply at 4), the District plausibly alleges that "these ads still have a 'tendency to mislead,' D.C. Code § 28- 3904(f-1), because they cloak 'engine performance' in the language of sustainability—stating nitrogen gasoline 'produce[s] fewer emissions,' Compl. ¶ 158, without disclosing that it still plays a key role in causing climate change." Reply ay 13. In other words, the District claims some of the alleged statements, including those focusing on engine performance, include actionable *omissions*.

In *Earth Island*, the D.C. Court of Appeals held that "Earth Island plausibly allege[d] that Coca-Cola misleads consumers about the extent to which recycling can offset the environmental impacts of its mass-scale plastic production." *Earth Island*, 321 A.3d 654 at 665. The Court found that a reasonable consumer could plausibly think, based on Coca-Cola's advertisements, that "its recycling efforts will put a serious dent in its environmental impacts," which Earth Island alleged was misleading. *Id.* "If those facts are borne out, then it is quite plausible that Coca-Cola misleads consumers both through its statements and by failing to qualify them, i.e., via omission." *Id.* "That is, when it promotes its recycling efforts, it omits the fact that those efforts will not prevent the vast bulk of its plastic products from ending up as waste or pollution, a deception that Earth Island alleges Coca-Cola very much intends." *Id.*

So too here. "Under the CPPA, people and businesses are precluded from 'misrepresent[ing]' any 'material fact which has a tendency to mislead.'" *Earth Island*, 321 A.3d 654 at 664 (quoting D.C. Code § 28-3904(e)). "That prohibition extends beyond literal falsehoods and includes any omissions, 'innuendo[s],' or 'ambiguit[ies]' that have a tendency to mislead reasonable consumers." *Id.* (quoting D.C. Code § 28-3904(e)). The District plausibly states that Shell Defendants' omissions are actionable under the CPPA: if the facts are "borne out" in the instant suit, a jury could very well find that reasonable consumers are misled into believing that by using Shell products, they are addressing, rather than contributing to climate change.

As to Shell Defendants' concerns about cherry-picked statements, the Court notes that "the CPPA does not require that misleading representations be contained in a single statement in order to be actionable; a series of statements can in combination be misleading even when, taken individually, they fall short of that." *Earth Island*, 321 A.3d 654 at 659.[4] Still, as instructed by the D.C. Court of Appeals, "a litigant cannot unfairly strip isolated statements out of their context and then cobble them together to form an unrepresentative tapestry of what has been conveyed…" *Id.* It does not appear to the Court that the District has stripped isolated statements out of context to cobble together an unrepresentative tapestry, although that could be the case. It is plausible, at the very least, that the District has instead diligently pieced together a decades-long story of deceit. The Court therefore finds it appropriate to consider the alleged statements in combination at this stage of litigation.

[4] Shell Defendants argue "*Earth Island*'s holding that Coca-Cola's statements could be considered in the aggregate does not apply here, because, unlike the Earth Island plaintiff's 'limited' claims for injunctive relief regarding Coca-Cola's current statements, Plaintiff seeks monetary penalties for isolated alleged misrepresentations spanning decades." Praecipe Response at 2. The Court disagrees that because the District seeks monetary penalties, the Court may not consider the Complaint's claims in the aggregate.

C. The Complaint plausibly alleges materiality.

Shell Defendants argue that the Complaint did not plausibly plead a material misrepresentation or omission because (1) "it does not plausibly allege that, at relevant times, consumers in the District were unaware of the link between fossil fuels and climate change;" and (2) "even if consumers were unaware (they were not), the Complaint still does not plausibly allege that additional information would have changed their actions." Memo at 16.

As to the first point (consumers were not unaware of the link between fossil fuels and climate change), they state that "[o]n the contrary, a wealth of documentary evidence…shows that this link has been widely known since at least 1965 and consumers purchased fossil fuels anyway—indeed, they continue to do so today at increasing rates despite the deluge of information concerning climate change." *Id.* They claim that "[t]he District does not and cannot plausibly claim that more information about these topics would have changed consumer behavior, and omitting such information therefore was not material." *Id.* (citing *Dahlgren v. Audiovox Commc'ns Corp.*, 2010 WL 2710128 (D.C. Super. Ct. July 8, 2010)) ("If a person who is the alleged victim of an omission already knows the information omitted, there cannot be, as a matter of law, a material omission."). At the March 20, 2025 Motion Hearing, Shell Defendants argued that for the statements to be material, a consumer would need to see the full statements in their proper context and be persuaded to buy gas. *See* March 20, 2025 Motion Hearing. The Court disagrees.

As to the second point, (the Complaint still does not plausibly allege that additional information about climate change would have changed consumers' actions), Shell Defendants argue that their "alleged statements…did not deprive consumers of any value of Shell-branded gasoline they might have purchased." *Id.* at 17. "Nor does the Complaint plausibly allege that any reasonably available alternative to fossil fuels could meet energy demands, such that consumers

had a 'choice of action' that additional information could meaningfully affect." *Id.* (quoting *Saucier v. Countrywide Home Loans*, 64 A.3d 428, 442 (D.C. App. 2013)). According to Shell Defendants, the Complaint's allegation that "a consumer who received accurate information that fossil fuel use was a primary driver of climate change . . . might [have] purchase[d] less fossil fuel products, or decide[d] to buy none at all" is "conclusory" and "pure speculation."[5] *Id.* (quoting Compl. at ¶ 168).

The District counters that Shell Defendants' allege climate-denialism campaign "occurred before there was widespread public awareness of global warming—indeed, Shell and the other Defendants aimed to prevent exactly that."[6] Opp'n at 8-9 (citing Compl. at ¶ 49). Further, it argues that "any subsequent knowledge of climate change does not bar liability for Shell's greenwashing, as Shell '*intended* to capitalize on consumers' concerns about climate change' and 'reassure' them that using nitrogen gasoline and other Shell products would help 'address[] climate change.'" *Id.* at 9 (quoting Compl. at ¶¶ 99, 151) (emphasis added).

The District also states that, generally, the question of materiality should not be treated as a matter of law. *Id.* at 9 (citing *Mann v. Bahi*, 251 F. Supp. 3d 112, 126 (D.D.C. 2017)). They argue the Complaint easily clears the "low threshold" of the test for materiality: "a deceptive statement or omission is material so long as 'a significant number of unsophisticated consumers would find that information important in determining a course of action.'" *Id.* (quoting *Saucier*, 64 A.3d at 442 (cleaned up)). They allege that statements about the "dangerous impacts" of Shell

[5] The District responds that Shell Defendants' "bold argument" that "consumers would not have changed their behavior even if Shell had properly disclosed information about its products" contradicts the Complaint's allegations and should not be considered. Opp'n at 9.

[6] Shell Defendants fashion this statement "conclusory and meritless." Reply at 7.

Defendants' products are "'presumed material.'" *Id.* (quoting *Novartis Corp. v. FTC*, 223 F.3d 783, 786 (D.C. Cir. 2000)) (citing FTC Deception Policy Statement, 103 F.T.C. at 182).

Shell Defendants reply that "[t]he Complaint does not allege any facts suggesting that environmentally minded consumers would purchase more (or less) gasoline from Shell because of its investments in alternative energies or predictions about the future of energy." Reply at 7. "Nor does it allege facts suggesting that statements about Shell gasoline's benefits for engine performance would persuade consumers to buy that gasoline out of concern for the environment." *Id.*; *see* March 20, 2025 Motion Hearing.

Importantly, there is no requirement under the CPPA "that any consumer in fact be misled by the deceptive statements." *Earth Island*, 321 A.3d 654 at 664 (citing D.C. Code § 28-3904) ("It shall be a violation . . . for any person to engage in an unfair or deceptive trade practice, whether or not any consumer is in fact misled, deceived, or damaged."). In *Earth Island*, the D.C. Court of Appeals found that the statements at issue there were "material" because "there is no dispute that costumers" care about products' potential harm to the environment. *Id.* "…[T]he concerted efforts that companies like Coca-Cola make to cultivate an image of being environmentally friendly strongly suggests that even their vague assurances have a real impact on consumers." *Id.* at 665-666.

The Court is not prepared to hold definitively that the alleged statements are indeed "presumed material." Opp'n at 9. The District, however, has more than plausibly alleged that D.C. consumers care about the environment such that information as to a company's role in causing climate change might affect their purchasing decisions. *See* Compl. at ¶¶ 61-68 (arguing that as consumer awareness grows, particularly related to issues of public health, purchasing decisions are affected). The Court disagrees with Shell Defendants that "none of Shell's alleged

representations were material to consumers' choice of whether to buy gasoline because…there is already 'widespread public awareness of global warming,' and the connection between fossil fuels and climate change has been publicized for decades." Praecipe Response at 4 (citing Compl. at ¶ 30).

Reasonable consumers can be aware of the concept of climate change and still be deceived by an oil company's clever advertising. A consumer need not understand the intricacies of clean energy versus fossil fuels to be reasonable, and she may be aware of, or even be concerned about, climate change and believe, based on advertising, that Shell Defendants are doing net good for the environment. Further, the Court is not convinced by Shell Defendants' argument that the statements are not material because the District cannot show that consumers bought gasoline out of concern for the environment. *See* Reply at 7. The question is whether purchasing decisions (for example, to buy or not to buy, to buy less or to buy more) may have been affected by a misleading statement, not whether items were indeed purchased due to a misleading statement. For the purposes of considering a Motion to Dismiss, the Court finds the District has more than plausibly alleged materiality.

D. The Court is not convinced that applying the CPPA to the instant claims would violate Defendants' First Amendment rights.

Finally, Shell Defendants argue that applying the CPPA to the instant claims would violate the First Amendment. Memo at 18. They claim the phrase "unfair or deceptive trade practice" (D.C. Code § 28-3904) is ambiguous, and that "[b]ecause applying the CPPA to Shell's alleged conduct would raise serious doubts about its constitutionality under the First Amendment, this Court should hold the CPPA does not apply."[7] *Id.* Alternatively, they argue the District is

[7] The District replies "…Shell itself quotes D.C. Code § 28-3904, which provides 41 subsections defining the specific actions that constitute an 'unfair or deceptive trade practice,' and the Complaint identifies several specific subsections that Shell's conduct violated." Opp'n at 18 (citing Compl. at ¶ 181).

attempting to "prescribe what shall be orthodox in matters of climate science and policy," an effort that "offends the First Amendment, which gives Shell the right to engage in public advocacy on these issues." *Id.* Shell Defendants break down this offense into three parts.

First, they argue "the First Amendment protects statements about climate change, an issue of public concern" and therefore "Shell's statements addressing climate science and policy, and especially Shell's view of those issues" receive First Amendment protection. *Id.* at 19. Second, they argue "[m]any of the challenged statements—most of which allegedly were made by others and are not attributable to Shell" are First Amendment-protected government petitioning. *Id.*; *see e.g.* Compl. at ¶ 50, 64 ("For example, the Complaint alleges that Defendants 'affect[ed] public opinion through the dissemination of misleading research to the press, *government*, and academia' and '*educate[d] members of Congress*…about uncertainties in climate science.' (emphases added)."). "Under the *Noerr-Pennington* doctrine, courts construe ambiguous statutes to avoid burdening a defendant's rights under the Petitioning Clause." *Id.* (citing *Eastern R.R. Presidents Conf. v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 137-38 (1961)).

Third, "this lawsuit improperly seeks to compel Shell to speak in violation of the First Amendment" because "[the]Attorney General would require, as a condition for speaking about its products, that Shell include a statement about climate and energy policy—matters of public concern—that aligns with the Attorney General's view of those issues." *Id.* at 20 (citing Compl. ¶ 155; *id.* ¶ 158(c) ("faulting Shell for not 'disclosing the key role fossil fuels play in causing climate change'")).

The District argues in its Opposition that "Shell's challenged conduct receives no First Amendment free speech protection because it constitutes deceptive and misleading commercial speech." Opp'n at 17 (citing *Zauderer v. Off. of Disciplinary Couns.*, 471 U.S. 626, 638 (1985)).

The three factors for commercial speech set out in *Bolger v. Youngs Drug Products Corp.*, (1) the speech's "advertis[ing]" format; (2) its "reference[s] to a specific product"; and (3) the speaker's "economic motivation," "make clear that Shell's deceptive statements are commercial speech." *Id.* (quoting *Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60, 66–68 (1983)). "*First*, Shell's statements were often disseminated in traditional advertising formats." *Id.* (citing Compl. at ¶¶ 84, 118–121 (print and internet ads)). "*Second*, the advertisements repeatedly referred to Shell's energy products and operations." *Id.* (citing Compl. at ¶ 87). "Third, Shell had a profit motive." *Id.* (citing Compl. at ¶ 50). Further, "[c]ourts have consistently held that the First Amendment does not protect sophisticated campaigns designed to mislead consumers about the dangers of a product." *Id.*; *see e.g. United States v. Philip Morris USA Inc.*, 566 F.3d 1095, 1144 (D.C. Cir. 2009).

The District states that "Shell's additional First Amendment arguments are also meritless." Opp'n at 18. "[T]he Constitution does not protect Shell's right to deceive about the dangers of its fossil fuel products—even if those dangers are grave enough to prompt public concern." *Id.*; *see e.g. United States v. Philip Morris USA Inc.*, 566 F.3d 1095, 1142-45 (D.C. Cir. 2009). The District disagrees with Shell Defendants about the applicability of the *Noerr-Pennington* doctrine. "The doctrine 'applies only to what may fairly be described as petitions,' *Freeman v. Lasky, Haas & Cohler*, 410 F.3d 1180, 1184 (9th Cir. 2005), and does not immunize 'what are in essence commercial activities simply because they have a political impact.'" *Id.* at 19 (quoting *Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U.S. 492, 507 (1988)).

According to the District, "Shell's liability rests on commercial activities—*i.e.*, its 'longterm campaign to influence consumers' demand,' Compl. ¶ 55, which sought to stymie 'consumer awareness of the detrimental impacts of the purchase and use of fossil fuel products…to

increase sales and protect profits.'" *Id.* (quoting Compl. at ¶¶ 49-50). So, "*Noerr-Pennington* does not apply." *Id.* (citing *United States v. Philip Morris Inc.*, 304 F. Supp. 2d 60, 73 (D.D.C. 2004) ("*Noerr-Pennington* immunity did not apply to 'press releases' and 'statements made to members of the public' aimed at influencing demand for cigarettes"). It argues "if the Court harbors any doubt that Shell engaged in unprotected commercial speech or is shielded by *Noerr-Pennington*, it is premature to rule on such issues without a fully developed factual record*." Id.* As to Shell's argument about compelled speech, the District states that it "may require 'purely factual and uncontroversial' disclosures in 'commercial advertising' as long as they are 'reasonably related to the State's interest in preventing deception of consumers' and not 'unjustified or unduly burdensome.'" *Id.* (quoting *Zauderer*, 471 U.S. at 651; *Philip Morris* II, 566 F.3d at 1142–45).

In their Reply, Shell Defendants thrice undercut the District's arguments. "First, even if some of Shell's alleged statements could be characterized as commercial, '[c]ommercial speech that is not false or deceptive…may be restricted only in the service of a substantial governmental interest, and only through means that directly advance that interest,'" and "Plaintiff has not plausibly alleged that any of Shell's statements are false or deceptive." Reply at 9 (quoting *Zauderer*, 471 U.S. at 638). Second, they claim "most of the challenged speech is not commercial" and "relates to 'matters of public concern.'" *Id.* "Finally," the Shell Defendants argue the District "seeks to 'prescribe what shall be orthodox in politics…or other matters of opinion'—not to mandate a 'purely factual and uncontroversial' disclosure to inform consumers." *Id.* at 10 (quoting *Zauderer*, 471 U.S. at 651). "Plaintiff attempts to force Shell to discourage consumers from using fossil fuels in line with Plaintiff's preferred message on climate change—hardly an 'uncontroversial' message." *Id.*

Shell Defendants have failed to convince the Court that applying the CPPA to the instant claims would violate their First Amendment rights. "'The First Amendment does not prohibit the State from insuring that the stream of commercial information flow cleanly as well as freely.'" *Earth Island*, 321 A.3d 654 at 672 (quoting *Meta Platforms, Inc. v. District of Columbia*, 301 A.3d 740, 758 (D.C. 2023) (quoting *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 772, 96 S. Ct. 1817, 48 L. Ed. 2d 346 (1976)) (internal citations omitted). In *Earth Island*, the D.C. Court of Appeals stated that "[t]he speech that Earth Island targets is Coca-Cola's commercial speech about its goods and services; it is alleged that Coca-Cola cultivates a sustainability narrative in an effort to sell products." *Id.* The District similarly argues in the instant suit that Defendants cultivate a sustainability narrative to sell their products. *See* District Supplemental Authority Praecipe at 4.

In *Environmental Working Group v. Tyson Foods, Inc.*, Plaintiff Environmental Working Group ("EWG") alleged that Defendant Tyson Foods, Inc. ("Tyson") "…made false or misleading statements to consumers in advertising its commitment to achieving net-zero greenhouse gas emissions by 2050." *Environmental Working Group v. Tyson Foods, Inc.*, No. 2024 CAB 5935, slip op. at 1 (D.C. Super. Ct. Feb 3, 2025). This Court held that "Tyson's net-zero and climate-smart beef statements are clearly commercial speech, as EWG alleges that Tyson *launched these campaigns to generate more sales* from 'consumers [who] care about the climate and environmental impact of the products they purchase.'" *Id.* at 15-16 (quoting *EWG v. Tyson* Compl. at ¶ 56). Here, the District similarly argues the allegedly misleading statements were intended to generate sales. *See* Opp'n at 19; *see infra* ("Shell's liability rests on commercial activities—*i.e.*, its 'longterm campaign to influence consumers' demand…"). The District plausibly alleges that it targets commercial speech.

In *Earth Island*, the Court of Appeals held that "[b]ecause Earth Island plausibly alleges that commercial speech would mislead reasonable consumers, Coca-Cola's First Amendment claim [was] a non-starter," and that "[t]he fact that some remedy could conceivably intrude on Coca-Cola's First Amendment rights [was] no basis to preclude [the] suit at its inception." *Earth Island*, 321 A.3d 654 at 673. The Court declines to dismiss the instant suit on account of Defendants' First Amendment concerns, as the District plausibly alleges (1) that the suit targets commercial speech and (2) that the speech at issue would mislead reasonable consumers. *See infra.* While any future remedies may not intrude on Shell Defendants' First Amendment rights, the instant claims are not in and of themselves First Amendment violations worthy of dismissal.

E. The District does not seek recovery for climate-related harms.

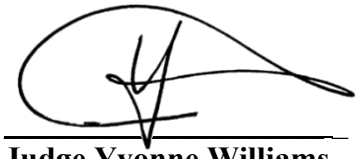
While Shell Defendants argue this suit is preempted "to the extent it seeks damages for the effects of transboundary emissions on the global climate," the District does not seek relief for the physical impacts of climate change. Therefore, the Court declines to address Shell Defendants' arguments that the District cannot recover such damages.

Accordingly, it is on this 21st day of April, 2025, hereby,

ORDERED that Shell Defendants' Motion to Dismiss is **DENIED**; and it is further

ORDERED that as to Rule (12)(b)(2), the Motion is **DENIED AS MOOT.**

IT IS SO ORDERED.



Judge Yvonne Williams

Date: April 21, 2025

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