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New York Supreme Court

APPELLATE DIVISION—FIRST DEPARTMENT

Docket No.
2025-01687

—◆◆◆—
THE CITY OF NEW YORK,

Plaintiff-Appellant,

—against—

EXXON MOBIL CORPORATION; EXXONMOBIL OIL CORPORATION; ROYAL DUTCH
SHELL PLC; SHELL OIL COMPANY; BP P.L.C.; BP AMERICA INC.,

Defendants-Respondents,

and

AMERICAN PETROLEUM INSTITUTE,

Defendant.

BRIEF FOR DEFENDANTS-RESPONDENTS

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INTRODUCTION

This case involves an attempt to hold three multinational energy companies liable under New York City's Consumer Protection Law for statements the companies made about the relative emissions-reducing benefits of their premium gasoline products and about their corporate efforts to address climate change, without simultaneously stating the widely known fact that the use of fossil-fuel products contributes to climate change. The trial court correctly dismissed the complaint on multiple grounds.

New York City's Consumer Protection Law makes it unlawful for any person to engage in deceptive or unconscionable trade practices "in the sale" or "in the offering for sale" of "consumer goods." The statute applies only to representations made "in connection with" the sale of those goods. And courts have long applied an objective standard that looks to whether an allegedly deceptive statement or omission is likely to mislead a reasonable consumer acting reasonably under the circumstances.

Appellant does not dispute that respondents' statements about their products and their corporate efforts to address climate change were factually accurate. And as the trial court correctly determined, appellant failed to allege facts sufficient to show that either set of statements was otherwise actionable under the Consumer Protection Law.

With respect to the product-related statements: appellant did not allege facts sufficient to show that a reasonable consumer would have been deceived

by those statements—particularly where appellant’s own complaint pleaded that the connection between the use of fossil-fuel products and climate change is widely held public knowledge. Appellant alleged only that respondents marketed their fossil-fuel products as producing fewer emissions than comparable products without also disclosing that all fossil-fuel products produce greenhouse-gas emissions and thereby contribute to climate change (which, as appellant alleged, is universally known).

With respect to the statements concerning respondents’ corporate investments in alternative-energy technologies and their corporate views and actions concerning climate change: the trial court correctly held that the statements at issue did not involve the sale or offering for sale of consumer goods or services. Those statements neither discussed respondents’ consumer products nor were alleged to have been made at the point of sale for those products. Instead, they expressed respondents’ opinions in the public debate about energy policy and described investments in alternative energy sources—such as wind, solar, and hydrogen—that appellant did not allege were sold to consumers anywhere, let alone in New York City. Appellant’s breathtakingly broad reading of the phrase “in connection with . . . the sale . . . of consumer goods” would transform any statement by any consumer-goods company about virtually any subject into actionable conduct under the Consumer Protection Law, as long as a plaintiff alleged that the statement might affect the

company's brand. The Consumer Protection Law's text and structure foreclose that reading, and appellant's proposed interpretation would raise serious First Amendment concerns that should be avoided.

Finally, as to respondent Shell, the trial court correctly held that claims based on statements made by Shell before April 22, 2018, were time-barred under the applicable three-year limitations period. Contrary to appellant's position, that conclusion was not based on a mistaken understanding of the parties' stipulation. And the trial court correctly rejected appellant's argument that the limitations period runs anew each time an allegedly deceptive statement is viewed by a consumer, even if only distributed or published outside that period.

The trial court correctly dismissed appellant's claims against respondents, and its judgment should be affirmed.

QUESTIONS PRESENTED

1. Whether the trial court correctly determined that respondents' alleged statements about their fossil-fuel products were not misleading for purposes of the New York City Consumer Protection Law.

2. Whether the trial court correctly determined that respondents' alleged statements about their corporate efforts to invest in alternative energy sources and to address climate change were not made "in the sale" or "offering for sale" of "consumer goods," or "in connection with the sale" or "offering for

sale” of “consumer goods,” within the meaning of the New York City Consumer Protection Law.

3. Whether the trial court correctly determined that appellant’s claims based on statements made by respondent Shell on or before April 22, 2018, were time-barred.

STATEMENT OF THE CASE

A. Appellant’s First Lawsuit

This case is the second attempt by plaintiff-appellant City of New York to impose liability on the energy industry for global climate change. In 2018, appellant filed a lawsuit in federal court against defendants-respondents Exxon Mobil Corporation (ExxonMobil), BP p.l.c., and Shell plc (formerly known as Royal Dutch Shell plc), as well as two other energy companies. *See City of New York v. Chevron Corp.*, 993 F.3d 81, 86, 94 (2d Cir. 2021). Appellant alleged that the defendants “orchestrated a campaign of deception and denial regarding climate change” and launched a “sophisticated advertising campaign[]” to “portray fossil fuels as environmentally responsible.” *See* Dkt. 80, at 3-4, *City of New York v. BP p.l.c.*, 325 F. Supp. 3d 466 (S.D.N.Y. 2018) (Civ. No. 18-182). Appellant claimed that the defendants’ worldwide “production, promotion, and sale of fossil fuels” constituted a nuisance under state law. *City of New York*, 993 F.3d at 88. According to appellant, the defendants

caused “increasingly severe injuries” by “marketing” and “extensively promot[ing] fossil fuels for pervasive use” and misleading the public by “denying or downplaying” the risks of climate change. *City of New York*, 325 F. Supp. 3d at 468-470. The district court dismissed appellant’s claims, and the Second Circuit unanimously affirmed, holding that a municipality may not “utilize state tort law to hold multinational oil companies liable for the damages caused by global greenhouse gas emissions.” *City of New York*, 993 F.3d at 85. Appellant did not seek review in the United States Supreme Court.

B. The Complaint

1. On April 22, 2021—three weeks after the Second Circuit’s decision in *City of New York*—appellant filed this lawsuit. R. 35-132. Appellant once again named ExxonMobil, BP, and Shell as defendants (as well as their corporate affiliates), and added defendant American Petroleum Institute (API). R. 35. As in appellant’s first lawsuit, the complaint here alleged that respondents have “systematically and intentionally misled consumers” about “the central role their products play in causing the climate crisis.” R. 39. Unlike in the earlier federal case, however, appellant asserted that the alleged conduct was actionable under the New York City Consumer Protection Law, N.Y.C. Admin. Code §§ 20-700 to 20-706, rather than state tort law. *See* R. 84-92.

a. Respondents are multinational energy companies that sell crude oil, petroleum, natural gas, and other energy products around the world. R.

39. Some of those products are sold to consumers at service stations in New York City. R. 44, 46, 49-50.

Among other offerings, respondents sell fuel products fortified with cleaning agents that can improve engine performance and thereby produce fewer emissions relative to other fuels. R. 20, 58-62, 2245-2246. Respondents have introduced those products in New York City and sell them under various product names. In 2016, ExxonMobil introduced Synergy fuel at service stations in New York City, and in 2019, ExxonMobil introduced Synergy Supreme+, a premium fuel product. R. 58. Also in 2016, BP introduced the version of its Invigorate product at issue in this litigation. R. 21. All Shell gasoline sold in New York City features the Shell Nitrogen Enriched Cleaning System, and Shell also offers V-Power NiTRO+, a premium product. R. 108.

The complaint alleged that “[c]onsumer use of fossil fuel products, by driving gasoline-powered cars and other vehicles as well as electric and home energy choices, is a significant contributor to climate change,” creating “unprecedented threats to people in New York City and elsewhere.” R. 53. As a result, appellant alleged that climate change is “a central focus of consumers’ anxiety about the future,” R. 39, and that there is a “growing desire” among New York City consumers to “reduce fossil fuel consumption,” R. 40.

b. Appellant’s complaint identified a limited number of statements made by respondents that appellant alleged were deceptive and violated the

Consumer Protection Law. Those statements fall into two general categories corresponding to Counts 1 and 2 of the complaint: (1) statements about the benefits of respondents' respective fossil-fuel products, and (2) statements about respondents' respective corporate investments in alternative-energy technologies and their corporate views and actions concerning climate change.

i. Appellant first challenged respondents' statements about their premium gasoline products. For example, appellant challenged BP's advertisement of Invigorate as "'better than 'ordinary fuels' that have problems like 'increased emissions.'" R. 10, 62. BP's website also advertised its fuel selection as "including a growing number of lower-carbon . . . products." R. 10, 62. Shell similarly advertised its Nitrogen Enriched Cleaning System and its V-Power NiTRO+ Premium gasoline as "produc[ing] fewer emissions," and Shell advertisements stated that engine wear caused by other fuel products could lead to "higher emissions." R. 10, 62. ExxonMobil, for its part, marketed its Synergy Diesel Efficient product as a "breakthrough formulation" that helped consumers "[i]ncrease fuel economy," "[r]educe emissions" and "burn cleaner." R. 58, 98. ExxonMobil also advertised Synergy Supreme+ as "Our Best Fuel Ever." R. 11, 58. More broadly, ExxonMobil marketed its Synergy line of products as "engineered" for "[l]ower emissions." R. 11, 58.

In those advertisements, respondents also explained the mechanisms by which use of their products could result in fewer emissions, as well as the relative nature of any emissions reductions. BP marketed Invigorate gasoline as a product that helped protect against engine intake-valve deposits caused by other fuels, preventing a variety of problems caused by poor engine performance—including increased emissions. R. 21. BP specified that Invigorate performed favorably as compared to “ordinary, minimum-detergency fuels” and detailed how that claim was substantiated. R. 21, 796 n.13. Shell likewise explained that its V-Power NiTRO products had “the ability to clean up gunk” and provided “protection against wear.” R. 2042. Along the same lines, ExxonMobil’s advertisements for Synergy Supreme+ explained that the product kept one’s engine “2x cleaner for better gas mileage.” R. 11, 58-59. ExxonMobil further explained that its Synergy line of products was “engineered” for “[l]ower emissions” because it “[h]elps remove deposits, which can lead to fewer emissions.” R. 11, 58. ExxonMobil’s advertisements clarified that Synergy fuels could lead to lower emissions “compared to gasoline meeting minimum U.S. government standards,” and that the “[a]ctual benefits are based on continuous use and may vary depending on vehicle type, driving style, and gasoline previously used.” R. 2032-2033.

Appellant did not allege that any of respondents' representations about their products were false. R. 11. Rather, appellant alleged that those statements misled consumers about the effect of respondents' products on the climate because the statements "conceal[ed] from consumers" that use of the products "still significantly increases greenhouse gas emissions." R. 56. Appellant alleged that respondents "never disclose[d]" to consumers that "fossil fuels—'emissions-reducing' or otherwise—are the primary cause of climate change." *Id.* In appellant's view, a New York City consumer "might purchase fewer—or no—fossil fuel products if provided with accurate information that fossil fuel use was a primary driver of climate change and the resultant danger to the environment and people." R. 55. Appellant further argued that those statements "create[d] a misleading impression" that the relevant products do not "significantly increase greenhouse gas emissions." R. 86.

ii. The second category of challenged statements concerned respondents' corporate views about, and efforts related to, climate change. That category included statements of opinion about climate policy, forward-looking statements about respondents' goals for reducing emissions in their own operations, and statements about respondents' investments in particular alternative-energy technologies.

Some of the statements identified by appellant were subjective statements of opinion made in the public debate about energy policy. For example,

ExxonMobil has expressed its “support” for “the ambition to achieve net-zero emissions by 2050 and the goals of the Paris Agreement.” R. 69. Along the same lines, BP has opined that solar power “could account for 10% of the world’s power by 2040” and that “[t]he world needs fuels that are abundant, affordable, and lower carbon—fuels like natural gas.” R. 495-497.

Other statements described in general terms respondents’ respective approaches to alternative-energy issues and their aspirations for the future of energy. Shell, for instance, represented its leadership as “setting the course” to develop “cleaner fuel alternatives.” R. 72. To that end, it commented that it was “a bigger player than you might expect in th[e] budding movement to realize a cleaner and more efficient transportation future.” R. 13. BP described itself as “working to make energy that’s cleaner and better” and opined that it “see[s] possibilities everywhere” to produce “[m]ore energy with fewer emissions . . . that help[s] the world keep advancing.” R. 74-75. ExxonMobil similarly stated that it was “committed to meeting the demand for affordable energy while reducing emissions and managing the risks of climate change.” R. 107.

A third group of statements discussed respondents’ specific alternative-energy investments. BP stated that it has “invest[ed] in new businesses” involving “car batteries” and “charging infrastructure” and is “developing solar projects in more countries.” R. 123, 790. ExxonMobil said that it is “working

to develop” carbon-capture technologies; discussed its efforts to develop bio-fuel from algae; and made general, subjective statements about the virtues of its alternative-energy investments, such as “Chips and guacamole are an ideal combination. Kind of like natural gas and renewable energy.” R. 14, 78, 100, 274. Shell discussed, for example, its investments in “lower-carbon transport fuels” and described itself as part of “an array of . . . businesses” that are “hard at work creating more efficient ways of moving around.” R. 71. In particular, Shell noted that it had invested in liquefied natural gas, biofuels, hydrogen, and electric-vehicle capabilities. *Id.* The complaint did not allege that any of BP’s, ExxonMobil’s, or Shell’s statements about their investments in alternative energies was false.

2. In 2021, respondents removed this action to federal district court, and appellant moved to remand. The case was remanded to state court in 2024. R. 8.

C. The Motion To Dismiss

1. After remand, respondents moved to dismiss the complaint. R. 27-29 (ExxonMobil), 405-408 (BP), 819-821 (Shell). As relevant here, respondents argued that the complaint failed to state a claim for violations of the Consumer Protection Law. With respect to the product statements, respondents argued that, even accepting appellant’s allegations as true, their factually accurate

statements would not have misled consumers into believing that the use of respondents' products would not contribute to climate change. R. 389-390, 392-394 (ExxonMobil), 794-799 (BP), 1227-1231 (Shell). With respect to corporate statements, respondents argued that appellant failed to allege that those statements were "made in connection with the sale" or "offering for sale" of "consumer goods or services." N.Y.C. Admin. Code § 20-701(a); R. 386-389 (ExxonMobil), 792-793 (BP), 1236-1238 (Shell).

Shell separately argued that the claims against it were time-barred because some of its alleged statements related to its V-Power NiTRO+ Premium Gasoline and Nitrogen Enriched Cleaning System were originally made more than three years before appellant filed its complaint. R. 1233-1234, 1244; *see* CPLR 214(2). The parties stipulated that appellant "does not seek civil penalties in this case for any violation of the [Consumer Protection Law] that occurred on or before April 21, 2018," and that the "three-year statute of limitations under CPLR 214(2) applies to each of [appellant's] claims insofar as those claims seek to recover civil penalties for alleged violations of the [Consumer Protection Law]." R. 1254c.

2. The trial court granted respondents' motions to dismiss under CPLR 3211(a)(5) and (7). R. 8-9, 26.¹

¹ In an earlier order, the trial court also granted a motion to dismiss filed by API, concluding that it lacked personal jurisdiction over API and that API's allegedly deceptive statements were not made "in connection with the sale" or

a. The trial court first concluded that the proper standard for determining whether a statement “has the capacity, tendency or effect of deceiving or misleading consumers” is a reasonable-consumer standard. R. 18. The court so concluded because it was consistent with the Court of Appeals’ “retreat” from the prior “subjective standard” under Section 349 of the General Business Law. R. 18. It was also “consistent” with the language of the Consumer Protection Law, which instructs that rules and regulations “‘shall not be inconsistent with’ [the] Federal Trade Commission Act, which adheres to a reasonable-consumer standard.” R. 18 (quoting N.Y.C. Admin. Code § 20-702); *see* N.Y.C. Admin. Code § 20-706.

b. Applying the reasonable-consumer standard, the trial court dismissed appellant’s claims based on the product statements alleged in Count 1. As the trial court observed, appellant’s theory of deception as to those statements was that respondents “portray[ed] the[ir] fuels as good for the climate and the environment, without disclosing the material facts that those products significantly increase greenhouse gas emissions and are one of the primary drivers of climate change.” R. 19 (quoting R. 86). At the same time, the trial court observed, the complaint pleaded that “the connection between fossil fuel

“offering for sale” of consumer goods, as required by the Consumer Protection Law. Appellant did not seek this Court’s review of that decision. R. 7; Br. of Appellant 19 n.4.

products and climate change is public information,” widely known by consumers in New York City. R. 19. Indeed, appellant’s theory of deception was premised on climate change being a “central focus of consumers’ anxiety about the future” that “driv[es] consumer choices” concerning “transportation and energy alternatives.” R. 19 (quoting R. 39). The trial court further noted appellant’s allegation in the earlier federal lawsuit that there is a “near universal consensus that global warming is primarily caused, or at least accelerated, by the burning of fossil fuels, which emits greenhouse gases like carbon dioxide and methane into the atmosphere.” R. 19-20 (quoting *City of New York*, 993 F.3d at 86); *see also id.* at 20 (noting that “the general public [has] had knowledge of or had access to information about” the “existence of climate change and effects” for “decades” (quoting *Delaware ex rel. Jennings v. BP America Inc.*, No. N20c-09-097, 2024 WL 98888, at *19 (Del. Super. Ct. Jan. 9, 2024))).

The trial court reasoned that appellant “cannot have it both ways by, on one hand, asserting that consumers are aware of and commercially sensitive to the fact that fossil fuels cause climate change, and, on the other hand, that the same consumers are being duped by [respondents’] failure to disclose that their fossil fuel products emit greenhouse gases that contribute to climate change.” R. 20. That theory of deception was also “not cognizable” in part because appellant could not allege that respondents “alone possessed” the

omitted “material information” and had “fail[ed] to provide” it to consumers. R. 19, 20 (citation omitted).

Independently, the trial court reasoned that certain of the product-related statements alleged in appellant’s complaint were actually “distortions of statements” that appellant “t[ook] out of context,” and were not misleading “when viewed ‘in light of [their] context on the product label or advertisement as a whole.’” R. 20 (citation omitted). For example, appellant’s complaint quoted ExxonMobil as stating that its Synergy Supreme+ premium fuel was “2X cleaner for better gas mileage,” yet ExxonMobil stated in full that Synergy Supreme+ “*keep[s] your engine 2x cleaner for better gas mileage.*” R. 21 (emphasis added). Appellant quoted Shell as advertising that its fuels “‘produce[d] fewer emissions’ and that not using them c[ould] lead to ‘higher emissions,’” yet Shell stated in full that its gasoline could “clean up gunk” in an engine which, according to industry data, could “produce[] fewer emissions and allow[] vehicles to perform at their best.” R. 20-21. And BP never made an unqualified claim that its Invigorate fuel was “‘cleaner’ and ‘emissions-reducing,’” as appellant alleged; it made a narrow, specific statement about intake-valve deposits and engine performance. R. 21. The trial court further determined that other statements were nonactionable expressions of aspiration, opinion, or puffery (*e.g.*, “Our Best Fuel Ever” or “better than ordinary fuels”). R. 21.

c. As for the corporate statements alleged in Count 2, the trial court concluded that the complaint did not sufficiently allege that those statements were “made in connection with the sale” or “offering for sale” of “consumer goods or services.” R. 22 (quoting N.Y.C. Admin. Code § 20-701(a)). The trial court noted that appellant did not allege that respondents sold any clean or alternative-energy products or technologies “anywhere, let alone in [New York City].” R. 22. And appellant provided “no legal authority for the notion that statements about unrelated product[s] (*e.g.*, alternative fuels such as natural gas) or technologies (*e.g.*, wind and solar energy) are actionable” under the Consumer Protection Law as “related to the sale of a different product (fossil fuels).” *Id.*

The trial court determined that other corporate statements were “generic in nature” and “implicate[d] broad policy initiatives,” not the sale of respondents’ fossil-fuel products. *Id.* “At bottom,” the court explained, the corporate statements “d[id] not reference fossil fuel products” and lacked “any nexus to a consumer good sold in [New York City].” R. 23. The court reasoned that adopting appellant’s interpretation of the Consumer Protection Law “would render the ‘made in connection’ requirement meaningless” and would “transform[] *any* statement ‘about a company’s brand or business, not just its products,’ into actionable conduct.” R. 22 (citation omitted).

d. The trial court separately held that the claims against Shell based on statements made more than three years before the filing of the complaint were time-barred under CPLR 214(2). R. 24-25. The court reasoned that appellant's arguments on this issue were "contrary to the parties' agreement and [appellant's] explicit statement that [respondents'] statute of limitations arguments [we]re mooted by the parties' [s]tipulation." R. 24. The trial court further rejected appellant's position that, for limitations purposes, a defendant violates the Consumer Protection Law every time consumers view the allegedly deceptive statement, rather than only when the statement was originally distributed or published. R. 24-25. The court accordingly dismissed Count 1 as to Shell on the independent ground that it was time-barred. R. 25.

SUMMARY OF ARGUMENT

The trial court correctly dismissed appellant's claims under the New York City Consumer Protection Law for failure to state a claim and, as to Shell, on limitations grounds.

I. The trial court correctly dismissed Count 1 for failure to state a claim because respondents' alleged statements about their fossil-fuel products were not misleading. In so ruling, the trial court correctly applied an objective "reasonable-consumer" standard. That standard is consistent with the text of the Consumer Protection Law and also the decisions of courts interpreting the Federal Trade Commission Act and Section 350 of the General Business Law. And as the trial court correctly determined, no reasonable consumer would

have been misled by respondents' statements into believing that their fossil-fuel products do not contribute to climate change. Indeed, appellant's own complaint alleges that the connection between the use of fossil-fuel products and climate change is a matter of general public knowledge. The fact that respondents did not reiterate that widely known connection when making the challenged statements hardly renders the statements misleading.

On appeal, appellant attempts to reframe its case around the theory that respondents' statements were misleading not because they failed to mention the link between the use of fossil-fuel products and climate change, but because they overstated the emissions-reducing benefits of their products. That pivot is both at odds with appellant's complaint and unpersuasive on its merits. A reasonable consumer would not have been misled into believing that respondents' fossil-fuel products produced drastically lower emissions, particularly given that respondents clearly explained that, by cleaning the engine (and thereby permitting better fuel efficiency), the fuels produced fewer emissions relative to products without respondents' additives. In any event, many of the challenged statements (*e.g.*, "Our Best Fuel Ever" or "better than ordinary fuels") were subjective, general in nature, and constitute nonactionable puffery.

II. The trial court correctly dismissed Count 2 for failure to state a claim because respondents' alleged statements concerning their corporate

views about, and efforts to address, climate change lacked a sufficient connection to the sale of consumer goods. The language and structure of the Consumer Protection Law make clear that a statement is not made “in the sale of” or “in connection with the sale” of a product where the statement does not itself discuss that particular product and is not made at the point of sale. Appellant did not allege that respondents sold any products or technologies related to alternative energy sources anywhere, let alone in New York City. And none of those statements was alleged to have been published on any of respondents’ product labels or at any service station selling respondents’ products. As for respondents’ statements about climate policy and the future of energy, those statements never mentioned consumer products.

Appellant’s principal position on appeal is that respondents’ corporate statements must have been made in connection with the sale of consumer goods because, in its view, they were all made in service of respondents’ fundamental business goal of bettering their brand images in order to sell more fossil-fuel products to consumers. That framing only underscores the extraordinary breadth of appellant’s position, which if adopted would have the effect of subjecting nearly any statement by a company that sells consumer products to liability under the Consumer Protection Law. That reading cannot be squared with the text of the law and would also pose serious constitutional

concerns, as it would permit appellant to target non-commercial speech entitled to full First Amendment protection.

III. Finally, the trial court correctly held that appellant's claims against Shell were time-barred under the three-year limitations period. In briefing the motions to dismiss, the parties stipulated that appellant did not seek civil penalties based on violations of the Consumer Protection Law that occurred outside the limitations period, and appellant represented to the trial court that respondents' limitations arguments were moot. Given that all of Shell's alleged statements about its V-Power NiTRO+ Premium Gasoline and Nitrogen Enriched Cleaning System were published online more than three years before the complaint was filed, the trial court correctly concluded that appellant's claims against Shell could not proceed.

STANDARD OF REVIEW

This Court applies de novo review to orders granting motions to dismiss under CPLR 3211(a)(5) and (7). *See Consolidated Restaurant Operations, Inc. v. Westport Insurance Corp.*, 205 A.D.3d 76, 81 (2022); *Basilotta v. Warshavsky*, 91 A.D.3d 460, 460 (2012).

ARGUMENT

I. THE TRIAL COURT CORRECTLY DISMISSED COUNT 1 ON THE GROUND THAT RESPONDENTS' PRODUCT STATEMENTS WERE NOT MISLEADING

The trial court dismissed Count 1 of the complaint for failure to state a claim under New York City's Consumer Protection Law. R. 21. It first held that the correct standard for assessing whether a statement is misleading under the Consumer Protection Law is based on how a reasonable consumer would view the statement. R. 18. Applying that standard, the court determined that respondents' statements about their premium fossil-fuel products were not misleading. R. 20. It further determined that certain of the alleged product statements were nonactionable statements of aspiration, opinion, or puffery. R. 21. The trial court was correct on each score.

A. The Trial Court Correctly Applied The Reasonable-Consumer Standard To Determine Whether Respondents' Statements Were Misleading

The Consumer Protection Law prohibits “any deceptive or unconscionable trade practice in the sale” or “in the offering for sale” of “any consumer goods or services.” N.Y.C. Admin. Code § 20-700. The law defines a “[d]eceptive trade practice” in relevant part as a false or misleading statement or omission that has the “capacity, tendency or effect” of “deceiving or misleading consumers.” *Id.* § 20-701(a). Although the complaint alleged that respondents' statements could mislead “reasonable consumers,” R. 85, 87, appellant argues

that, when determining whether a statement is deceptive, a court must consider how “the ignorant, the unthinking[,] and the credulous” might interpret the statement. Br. 25-26. Appellant is incorrect.

1. This Court has already applied the reasonable-consumer standard to reverse a finding of the Department of Consumer Affairs that a practice was deceptive under the Consumer Protection Law. In *City Line Auto Mall, Inc. v. Mintz*, 42 A.D.3d 407 (2007), the Department of Consumer Affairs found in an administrative proceeding that a used-car dealership had violated the Consumer Protection Law by offering for sale a Jeep Cherokee with a small sticker affixed to the front windshield stating that the vehicle was a Honda. *See id.* at 408. The Court reversed in relevant part, explaining that a reasonable consumer would not have been deceived by the sticker into believing that the vehicle was a Honda and not a Jeep. *See id.*

That decision was consistent with the Consumer Protection Law’s text and structure. In that law, the New York City Council instructed that the law’s provisions “shall in no instance be interpreted in a manner inconsistent with the rules, regulations and decisions of the [F]ederal [T]rade [C]ommission and the courts interpreting 15 U.S.C. § 45(a)(1).” N.Y.C. Admin. Code § 20-706; *see id.* § 20-702. Appellant agrees that the Consumer Protection Law thus “aligns with federal standards, which the City Council intended to serve as a guide for interpreting the City’s law.” Br. 28. But as the Second Circuit

and other federal courts of appeals have held, 15 U.S.C. § 45(a)(1) prohibits only representations “likely to mislead reasonable consumers.” *FTC v. Lead-Click Media, LLC*, 838 F.3d 158, 172 (2d Cir. 2016); *see FTC v. Tashman*, 318 F.3d 1273, 1277-1278 (11th Cir. 2003); *FTC v. Stefanchik*, 559 F.3d 924, 929 (9th Cir. 2009); *FTC v. Bay Area Business Council, Inc.*, 423 F.3d 627, 635 (7th Cir. 2005). The FTC has long taken the same view: “to be deceptive the representation, omission or practice must be likely to mislead reasonable consumers under the circumstances.” FTC Policy Statement on Deception § 3 (1984) (appended to *In re Cliffdale Associates, Inc.*, 103 F.T.C. 110, 174 (1984)). The reasonable-consumer standard thus applies under the Consumer Protection Law as well.

In addition, the Consumer Protection Law states that any implementing regulations adopted by the Commissioner of Consumer and Worker Protection “shall not be inconsistent” with the decisions of courts interpreting Section 350 of the General Business Law—New York State’s consumer-protection law prohibiting false advertising. N.Y.C. Admin. Code § 20-702; *see* Gen. Bus. Law § 350. As the Court of Appeals has explained, the “standard for recovery” under Section 350, while “specific to false advertising,” is “otherwise identical to [S]ection 349.” *Goshen v. Mutual Life Insurance Co.*, 98 N.Y.2d 314, 324 n.1 (2002). And the Court of Appeals has held that liability under Section 349

is “limited to those [statements] likely to mislead a reasonable consumer acting reasonably under the circumstances.” *Oswego Laborers’ Local 214 Pension Fund v. Marine Midland Bank, N.A.*, 85 N.Y.2d 20, 26 (1995); *see Gaidon v. Guardian Life Insurance Co.*, 94 N.Y.2d 330, 343 (1999). Accordingly, both this Court and the Second Circuit have applied the reasonable-consumer standard to claims under Section 350. *See Solomon v. Bell Atlantic Corp.*, 9 A.D.3d 49, 52 (1st Dep’t 2004); *MacNaughton v. Young Living Essential Oils, LC*, 67 F.4th 89, 96 (2d Cir. 2023); *Orlander v. Staples, Inc.*, 802 F.3d 289, 300 (2d Cir. 2015). Because the New York City Council indicated that the Consumer Protection Law should be administered consistently with Section 350, a reasonable-consumer standard applies to it as well.

Application of a reasonable-consumer standard makes good sense. The Court of Appeals has explained that such a standard appropriately balances furthering the goal of consumer protection while avoiding a “tidal wave of litigation against businesses,” which the New York City Council likely did not intend. *See Oswego*, 85 N.Y.2d at 26 (interpreting Gen. Bus. Law § 349). Appellant’s proposed unthinking-consumer standard would give the government expansive authority to challenge everyday statements—and even mistakes—made by businesses across the City. All appellant would need to do is conjure up a far-fetched interpretation of a company’s advertisement that might have

a tendency to deceive one consumer, and the defendant could be subject to liability.

The facts in *City Line Auto Mall* are illustrative: It defies common sense to think that a reasonable consumer would be fooled into thinking that a Jeep Cherokee is a Honda merely because a small registration sticker said so. *See* 42 A.D.3d at 408. But the City relied on that mistake to subject the dealership to enforcement proceedings and ultimately to impose a fine. *Id.* If appellant's preferred unthinking-consumer standard were the law, similarly dubious enforcement actions would surely follow.

The better approach is the one supported by this Court's precedents and the text of the Consumer Protection Law itself. The trial court correctly determined that a reasonable-consumer standard applies here.

2. Appellant makes three arguments in support of its more lenient proposed standard. Each is unpersuasive.

First, appellant cites (Br. 25-26) the Court of Appeals' decision in *Guggenheimer v. Ginzburg*, 43 N.Y.2d 268 (1977). There, the Court stated that, when assessing consumer deception under General Business Law § 349 and the New York City Consumer Protection Law, it did "not look to the average customer but to the vast multitude which the statutes were enacted to safe-

guard—including the ignorant, the unthinking and the credulous who, in making purchases, do not stop to analyze but are governed by appearances and general impressions.” *Id.* at 273.

As courts have recognized, the Court of Appeals long ago “retreat[ed] from that approach.” *McVetty v. TomTom North America, Inc.*, Civ. No. 19-4908, 2021 WL 965239, at *3 n.3 (S.D.N.Y. Mar. 13, 2021); see *Hollander v. Metropolitan Transportation Authority*, 48 Misc. 3d 1206(A), at *4 n.2 (Sup. Ct., N.Y. Cnty. 2015); *Card v. Chase Manhattan Bank (USA)*, 175 Misc. 2d 389, 395 (Civ. Ct., Kings Cnty. 1996). *Guggenheimer* is the only case in which the Court of Appeals has applied the ignorant-consumer standard in the last half century. And in *Oswego*, *supra*, the Court of Appeals held that a reasonable-consumer standard applies under Section 349. See 85 N.Y.2d at 26. This Court, too, has since applied a reasonable-consumer standard under the Consumer Protection Law. See *City Line Auto Mall*, 42 A.D.3d at 408. So considered, it would make little sense to apply to the Consumer Protection Law an outdated standard of deception that conflicts with more recent precedent on New York State consumer-protection law and the FTC Act.

Second, appellant argues that the Consumer Protection Law “must be construed liberally to serve its purpose.” Br. 26. But in *Oswego*, the Court of Appeals rejected the notion that a standard other than the reasonable-consumer standard was necessary to effectuate the statutory purposes of Section

349 of the General Business Law. To the contrary, the Court recognized that the reasonable-consumer standard “further[ed] the statutory purposes” while avoiding the possibility of a “tidal wave of litigation against businesses.” 85 N.Y.2d at 26. So too for the Consumer Protection Law.

Third, appellant argues (Br. 28) that the reasonable-consumer standard is in any event the same as the ignorant-consumer standard. In particular, appellant suggests that the reasonable-consumer standard must account for the fact that certain consumers can be “impressionable” and are “sometimes vulnerable to stratagems designed to induce wishful thinking about products.” *Id.*

That is just an attempt to smuggle the more lenient language from *Guggenheimer* back into the reasonable-consumer standard. Courts applying a reasonable-consumer standard have explained that it requires “more than a mere possibility that [a statement] might conceivably be misunderstood by some few consumers viewing it in an unreasonable manner.” *Bustamante v. KIND, LLC*, 100 F.4th 419, 426 (2d Cir. 2024); *see McGinity v. Proctor & Gamble Co.*, 69 F.4th 1093, 1097 (9th Cir. 2023). Instead, the reasonable-consumer standard “requires a probability that a significant portion of the general consuming public or of targeted consumers, acting reasonably in the circumstances, could be misled.” *Bustamante*, 100 F.4th at 426. The only contrary

support appellant can muster is a footnote from a federal district-court decision citing a footnote from a Tenth Circuit decision. Br. 29 (quoting *FTC v. Medical Billers Network, Inc.*, 543 F. Supp. 2d 283, 303 n.24 (S.D.N.Y. 2008) (quoting *FTC v. Freecom Communications, Inc.*, 401 F.3d 1192, 1202 n.5 (10th Cir. 2005))). Those stray dicta do not suffice to support appellant’s attempt to water down the reasonable-consumer standard.

B. The Trial Court Correctly Determined That Respondents’ Product Statements Were Not Misleading

A plaintiff fails to state a claim for deceptive trade practices where the complaint does not adequately plead that the defendant engaged in an act or practice that is “deceptive in a material way.” *New York University v. Continental Insurance Co.*, 87 N.Y.2d 308, 320 (1995). It is “well settled” that a court may “determine as a matter of law that an allegedly deceptive advertisement would not have misled a reasonable consumer.” *Lee v. Mikimoto (America) Co.*, Civ. No. 22-01923, 2023 WL 2711825, at *5 (S.D.N.Y. Mar. 20, 2023) (quoting *Fink v. Time Warner Cable*, 714 F.3d 739, 742 (2d Cir. 2013)). Here, the trial court correctly determined that a reasonable consumer would not have been misled by respondents’ statements about their products. R. 19-20. The court thus correctly dismissed Count 1.

1. Count 1 focuses on statements made by respondents about their fossil-fuel products that are not alleged to be false. For example, the complaint highlighted statements made by ExxonMobil in connection with its Synergy

Diesel Efficient fuel that its “breakthrough formulation” helped consumers “[i]ncrease fuel economy” and “[r]educe emissions and burn cleaner.” R. 58, 98. The complaint similarly targeted advertisements from BP that its Invigorate-supported gasoline was better than “ordinary fuels,” which had problems such as “increased emissions.” R. 62. As to Shell, the complaint focused on statements that a new Shell additive and premium gasoline “produce[d] fewer emissions.” R. 62. In stating the cause of action, appellant alleged that those statements were deceptive because they promoted the gasoline as “good for the climate and the environment, without disclosing the material facts that those products significantly increase greenhouse gas emissions and are one of the primary drivers of climate change.” R. 86.

No reasonable consumer would have been misled by respondents’ statements based on the failure to connect the use of respondents’ products to climate change. That is for the simple reason that, as the complaint itself alleged, the fact that the use of fossil-fuel products contributes to climate change was widely known among consumers. R. 20. The complaint described the extent of awareness about climate change among the general public and alleged that many Americans have “becom[e] more reliant on renewable energy sources” in an effort to mitigate their contributions to climate change. R. 54. Appellant made similar statements in the federal litigation, alleging a “near universal consensus that global warming is primarily caused, or at least accelerated, by

the burning of fossil fuels, which emits greenhouse gases like carbon dioxide and methane into the atmosphere.” R. 19-20 (quoting *City of New York*, 993 F.3d 81, 86 (2d Cir. 2021)). Because there was “widespread public awareness” of the link between the use of fossil-fuel products and climate change, reasonable consumers would not have been misled by the alleged omissions as to the link between such use and climate change. R. 20.

In addition, a consumer-deception claim based on an alleged omission is not viable unless “the business alone possesses material information that is relevant to the consumer” and “fails to provide” it. *Dixon v. Ford Motor Co.*, Civ. No. 14-6135, 2015 WL 6437612, at *8 (E.D.N.Y. Sep. 30, 2015); *see* R. 19-20. Consumer-protection laws seek to alleviate informational asymmetries and ensure that a reasonable consumer has adequate information “to evaluate his or her market options and to make a free and intelligent choice.” *North State Autobahn, Inc. v. Progressive Insurance Group Co.*, 102 A.D.3d 5, 13 (2d Dep’t 2012); *see* Br. of Appellant 46. If a business does not have specific, material information the consumer lacks, then the alleged omission does not impede a consumer’s ability to make an informed choice. Put another way, “there is no necessity to warn a customer already aware—through common knowledge or learning—of a specific hazard.” *Lancaster Silo & Block Co. v. North Propane Gas Co.*, 75 A.D.2d 55, 65 (4th Dep’t 1980). Here, appellant

conceded that the link between the use of fossil-fuel products and climate change was a matter of “common knowledge.” R. 19-20.

When a court determines whether a reasonable consumer would be deceived by a statement, “context is crucial.” *Geffner v. Coca-Cola Co.*, 928 F.3d 198, 200 (2d Cir. 2019). But contrary to appellant’s suggestion (Br. 34), the context surrounding respondents’ statements made clear that those statements discussed the benefits of respondents’ premium gasoline products as compared to other gasoline products, not to other modes of transportation more generally. That context favors respondents—as the trial court correctly determined. *See* R. 20-21.

When respondents made the statements identified in the complaint, they provided consumers with specific information about the effect of their premium gasoline products relative to other gasoline products and the mechanism by which they could improve engine performance and generate fewer emissions. For example, ExxonMobil explained that using Synergy fuels could lead to lower emissions “compared to gasoline meeting minimum U.S. government standards” and that the benefits of Synergy would “vary based on factors such as vehicle type, driving style and gasoline previously used.” R. 2032-2033. That suggested benefits only as compared to other gasoline products. Similarly, BP explained that its statement about engine intake-valve deposits and Invigorate was relative to “minimum detergency gasoline,” “[b]ased on fleet

testing representative of the U.S. car population,” and “[r]equire[d] continuous use over 5,000 miles” to “[r]estore[] an average of 3-5 miles per tank that had been lost due to deposits.” R. 796 n.13.

In light of that context, no reasonable consumer would have taken respondents’ statements to mean that the use of respondents’ gasoline products would not contribute to climate change, or would contribute to climate change less than other qualitatively different forms of transportation cited by appellant (“public transit, walking, riding bikes, or using electric or hybrid cars”), most of which do not even involve fossil fuels. *See* Br. 7. Appellant’s allegations about supposedly unqualified environmental-benefit claims bear little resemblance—when viewed in their full contexts—to the narrow, qualified statements that respondents actually made. R. 20-21.

In addition, ExxonMobil explained that using Synergy could achieve “[l]ower emissions” not by eliminating fossil fuels from gasoline, but rather through the mechanism of “remov[ing] deposits.” R. 58. Shell similarly explained that its products had “the ability to clean up gunk” and provided “protection against wear.” R. 2042. And BP explained that Invigorate improved fuel efficiency by introducing a “cleaning agent” into gasoline that helped avoid “a variety of problems” caused by minimum-detergency fuels, including “increased emissions.” R. 21, 2246. That context further conveyed that re-

spondents' products produced only incremental emissions reductions compared to other gasoline products without similar engine-cleaning agents. If, as appellant has alleged, climate change is a "central focus of consumers' anxiety," R. 39, and many consumers aim to become "more reliant on renewable energy sources," R. 54, it is hard to believe that a reasonable consumer would think that the use of a particular gasoline has no effect on the climate, or has less effect than other forms of transportation, merely because it has an engine-cleaning additive.

Geffner illustrates the point. There, the plaintiffs alleged that Coca-Cola's use of the label "diet" for Diet Coke misled consumers by promising that the drink would "assist in weight loss," or at least "not cause weight gain." 928 F.3d at 199. The Second Circuit concluded that this theory of alleged deception was "implausible on [its] face." *Id.* at 199-200. The court recognized that, "in the context of soft drink marketing," the term 'diet' "carries a primarily relative (rather than absolute) meaning"; "it connotes simply that the 'diet' version of the drink is *lower* in calories than the 'non-diet' version of the drink." *Id.* at 200-201. Given that the plaintiffs' own complaint had alleged that Diet Coke had fewer calories than "regular" Coke, the plaintiffs "failed plausibly to allege that the 'diet' label [wa]s misleading." *Id.* at 201. In much the same way, respondents' statements about the emissions levels of their products,

viewed in context, communicated to consumers a relative, rather than absolute, benefit. And reasonable consumers aware of the connection between the use of fossil-fuel products and greenhouse-gas emissions would hardly expect otherwise. *Cf. Fink*, 714 F.3d at 742 (noting that “the presence of a disclaimer or similar clarifying language may defeat a claim of deception”).

2. On appeal, appellant now argues that respondents “failed to provide enough context for consumers to understand the touted emissions reductions from defendants’ advertised products—including that those reductions were not meaningful.” Br. 31. In appellant’s view, “[w]ithout those details,” a consumer might assume that respondents’ products were a “significantly more environmentally friendly . . . choice than they had previously thought.” *Id.* That narrow theory was not presented in appellant’s complaint and, in any event, fails as a matter of law.

a. Appellant’s complaint did not present the theory appellant now presses on appeal. The complaint alleged that respondents’ advertisements were deceptive because they failed to inform consumers that the gasoline products “significantly increase greenhouse gas emissions” and “are one of the primary drivers of climate change.” R. 56, 86. The complaint alleged that the advertisements “omit[ted] any mention of the products’ role in aggravating climate change.” R. 57. And it contended that the advertisements were mis-

leading “without mention of the key role these fossil fuels play in causing climate change.” R. 61; *see* R. 62. The complaint’s materiality allegations were to the same effect, alleging that a New York City consumer “might purchase fewer—or no—fossil fuel products if provided with accurate information that fossil fuel use was a primary driver of climate change and the resultant dangers to the environment and people.” R. 55.

In its appellate briefing, appellant abandons the theory that respondents failed to disclose that the use of fossil-fuel products contributes to climate change. That was the theory presented in the complaint and the one the trial court rejected as an attempt to “have it both ways,” because appellant “assert[ed] that consumers are aware of and commercially sensitive to the fact that fossil fuels cause climate change” and yet argued that “the same consumers are being duped by [respondents’] failure to disclose that their fossil fuel products emit greenhouse gases that contribute to climate change.” R. 20; *see* Br. 30.

Appellant now suggests that, in failing to provide certain disclosures, respondents deceived consumers about the *magnitude of impact* of their products: that is, that respondents failed to disclose that any reduction in climate impact from use of the products would not be “meaningful.” But appellant’s complaint framed the alleged deception in *absolute* terms: that respondents failed to disclose that the use of fossil-fuel products contributes to climate

change and thus that the use of respondents' fossil-fuel products also contributes to climate change. And the complaint was devoid of allegations that the allegedly omitted context concerning whether emissions reductions would be "meaningful" would be material to consumers. *See* R. 53-56.

b. Either way, appellant's theory on appeal depends on the same flawed premise as its now-abandoned theory below: namely, that consumers lack basic information about the connection between the use of fossil-fuel products and climate change. As already explained, the complaint admitted that the link between the use of fossil-fuel products and climate change was widely known among consumers. R. 20. Any reasonable consumer knowing about that link would not expect a significantly reduced climate impact from the continued use of a fossil-fuel product that produced fewer emissions "compared to gasoline meeting minimum U.S. government standards," R. 2032-2033, by "remov[ing] deposits" and "clean[ing] up gunk" in the engine, R. 58, 2042. A reasonable consumer would understand that a premium version of gasoline is still gasoline—which is widely known to be a fossil-fuel product. And as appellant has alleged elsewhere, "there is near universal consensus that global warming is primarily caused, or at least accelerated, by the burning of fossil fuels, which emits greenhouse gases like carbon dioxide and methane into the atmosphere." R. 19-20 (citation omitted). Armed with such knowledge, a reasonable consumer would not expect that using gasoline would have no effect

on the climate merely because it contained a “cleaning agent” or yielded “fewer” or “lower” emissions. R. 2245-2246.

Appellant suggests that respondents’ statements could have misled a reasonable consumer because they “never quantified” the benefits of their fuel products. Br. 33. But appellant cites no case to support the proposition that a business must quantify the benefits of its products in order to avoid liability for consumer deception. Rather, courts tend to find vague and unquantified statements to be non-actionable puffery, which the trial court found as an independent basis for dismissal here. *See* pp. 40-43, *infra*; *see, e.g., Dwyer v. Allbirds, Inc.*, 598 F. Supp. 3d 137, 153-154 (S.D.N.Y. 2022). Indeed, no reasonable consumer would extrapolate broad environmental benefits from an unquantified claim about a gasoline additive. That is particularly true here, where respondents disclosed to consumers that any emissions-related benefits depend on a number of variables outside the manufacturer’s control. *See* pp. 8, 31, *supra*.

Appellant also argues that the trial court expected consumers to have a “level of expertise” that does not reflect that of a reasonable consumer. Br. 30. But the trial court expected no such expertise, and the cases cited by appellant do not support that conclusion.

Appellant cites *Mantikas v. Kellogg Co.*, 910 F.3d 633, 637 (2d Cir. 2018), which concerned crackers marketed as “Whole Grain” but for which the first

ingredient listed in the “Nutrition Facts” was “enriched white flour.” *Id.* at 634-635. The court concluded that “a reasonable consumer should not be expected to consult the Nutrition Facts panel on the side of the box to correct misleading information set forth in large bold type on the front of the box.” *Id.* at 637. But to avoid the deception alleged by appellant here, a consumer need not consult any information beyond what appellant conceded is already in consumers’ heads and on the face of the advertisements.

Appellant also cites the Court of Appeals’ decision in *Gaidon*, *supra*, which noted that a reasonable consumer may not be able to understand complex financial concepts. 94 N.Y.2d at 345. But “perceiv[ing] the connection between a fluctuation in dividend/interest rates and a vanishing date” or “mak[ing] the necessary arithmetic adjustments,” *id.*, is a far more daunting task for a consumer than understanding that using a gasoline product with an engine-cleaning agent would still generate emissions and thus contribute to climate change—particularly where, as here, the product was never advertised as eliminating any climate impact.

Richardson v. Edgewell Personal Care, LLC, No. 23-128, 2023 WL 7130940 (2d Cir. Oct. 30, 2023), is likewise inapposite. The *Richardson* court observed that “a reasonable consumer cannot be expected to know the universe of chemicals harmful to coral reefs such that she could discern from an

ingredient list describing [the] contents” of sunscreen “in scientific terminology whether a product is in fact ‘Reef Friendly.’” *Id.* at *2. Again, that is far more complex than the understanding necessary to determine whether the use of respondents’ gasoline in one’s car would generate emissions and thus contribute to climate change.

Appellant next argues that “courts have repeatedly held in regard to other kinds of products that a lack of proper context can mislead consumers.” Br. 34. But as already explained, *see* pp. 31-34, the context provided by respondents was more than sufficient for a reasonable consumer to know that the use of respondents’ products would still contribute to climate change. Unlike in *Richardson, Mantikas, and Atik v. Welch Foods, Inc.*, Civ. No. 15-5405, 2016 WL 5678474 (E.D.N.Y. Sep. 30, 2016), the advertisements here themselves informed consumers that any relative emissions reduction that “may” occur was due to engine cleaning; that the possible benefit was a “reduction” rather than an elimination of emissions; that any such reduction was relative to minimum federal standards for gasoline; and that the reduction would depend on a number of independent variables. *See* pp. 7-8, *supra*. In light of that context, a reasonable consumer would not expect that the use of respondents’ gasoline products would significantly reduce or eliminate climate impact.

Appellant separately cites an example from the FTC’s Green Guides in which “a manufacturer’s website states, ‘Eco-smart gas-powered lawn mower

with improved fuel efficiency!’ but the fuel efficiency has actually only been increased by a tenth of a percent.” Br. 34 (citing 16 C.F.R. § 260.4, ex. 4). As an initial matter, the Green Guides “do not operate to bind the FTC or the public.” *Swartz v. Coca-Cola Co.*, Civ. No. 21-4643, 2023 WL 4828680, *3 n.1 (N.D. Cal. July 27, 2023) (quoting 16 C.F.R. § 260.1). But even setting that aside, the manufacturer in the cited example provided *no* information for a consumer to determine the environmental impact of the new mower relative to other mowers—thus making an unqualified, general claim of environmental benefit. Here, by contrast, respondents’ advertisements made clear that any emissions-reducing effect was from engine cleaning, not a fundamental change to the nature of the product, and that the benefits were merely relative to ordinary gasoline. Such comparative and conditional claims, tied to a specific mechanical function of internal combustion engines, are what the Green Guides encourage. The challenged statements are a far cry from the broad environmental claims appellant makes them out to be.

C. The Trial Court Correctly Determined That Certain Of Respondents’ Product Statements Constituted Nonactionable Puffery

Separately, the trial court correctly determined that respondents’ broad statements about their products constituted nonactionable puffery. R. 21; *see Sheth v. New York Life Insurance Co.*, 273 A.D.2d 72, 74 (1st Dep’t 2000).

A consumer-protection claim is subject to dismissal for challenging puffery where the claim is based on “subjective statements that cannot be proven true or false.” *MacNaughton*, 67 F.4th at 96; see *Loeb v. Architecture Work, P.C.*, 154 A.D.3d 616, 617 (1st Dep’t 2017). That standard encompasses statements that amount to “general claims of superiority expressed in broad, vague, and commendatory language.” *MacNaughton*, 67 F.4th at 96 (internal quotation marks, citation, and brackets omitted). A court can hold that a statement is puffery as a matter of law. See, e.g., *Kommer v. Ford Motor Co.*, Civ. No. 17-296, 2017 WL 3251598, at *3 (N.D.N.Y. July 28, 2017).

Many of the statements alleged in appellant’s complaint clearly qualify as puffery. For example, the complaint cited a statement by ExxonMobil that Synergy Supreme+ gasoline was “Our Best Fuel Ever,” R. 58, and statements by BP that its fuel was “better” than “ordinary fuels” because it contained a particular additive. R. 62. As the trial court observed, “[n]o reasonable consumer would be misled by these subjective, non-specific, and vague statements to believe that the use of the Invigorate, Shell V-Power® NiTRO+, or Synergy™ fuel products d[id] not contribute to climate change.” R. 21. Those broad statements of opinion, along with many others discussed in the complaint, were merely “general claims of superiority expressed in broad, vague

and commendatory language.” *MacNaughton*, 67 F.4th at 96 (internal quotation marks, citation, and brackets omitted). They thus cannot constitute consumer deception.

Courts have dismissed similar claims as nonactionable puffery. For example, in *Dwyer, supra*, the court rejected as puffery a statement made by a manufacturer of wool sneakers that “Our Sheep Live the Good Life.” 598 F. Supp. 3d at 153. A court similarly dismissed as puffery a consumer-protection claim based on statements by a cable company that its “Faster Internet” “takes the waiting out of the Web.” *Serrano v. Cablevision Systems Corp.*, 863 F. Supp. 2d 157, 167 (E.D.N.Y. 2012). Just so here, where respondents marketed their products as “new and improved,” (BP’s Invigorate), “Our Best Fuel Ever” (ExxonMobil’s Synergy Supreme+), “allow[ing] vehicles to perform at their best” (Shell’s Nitrogen Enriched Cleaning System), and “provid[ing] our best protection against wear” (Shell’s V-Power). R. 20-21. Respondents’ use of subjective, general, adjective-laden statements is not actionable.

Appellant argues that a statement constitutes puffery only where it is “so patently hyperbolic that it is implausible for a reasonable consumer to be misled.” Br. 38 (quoting *MacNaughton*, 67 F.4th at 96). That misstates the legal standard. “[P]atently hyperbolic” puffery is merely one of “two types” of nonactionable puffery. *McNaughton*, 67 F.4th at 96-97. The other type—

which courts treat as “non-actionable puffery as a matter of law”—involves “subjective statements of opinion.” *Id.* The statements that form the basis of appellant’s claims are exactly that.

II. THE TRIAL COURT CORRECTLY DISMISSED COUNT 2 ON THE GROUND THAT RESPONDENTS’ CORPORATE STATEMENTS WERE NOT MADE IN CONNECTION WITH THE SALE OF CONSUMER GOODS

To state a claim for deceptive trade practices under the Consumer Protection Law, a plaintiff must allege that the challenged statements were sufficiently connected with the sale of consumer goods or services. Here, the trial court held that respondents’ statements about their views of, and corporate efforts to address, climate change were not made in connection with the sale of respondents’ consumer goods. That holding was correct, and appellant’s contrary arguments lack merit.

A. Respondents’ Corporate Statements Were Not Made In Connection With The Sale Of A Consumer Product

1. Liability for deceptive trade practices under the Consumer Protection Law can arise only from statements that discuss a particular product or are made at the point of sale for a product. The Consumer Protection Law imposes that requirement in two places. *First*, the law prohibits only those “deceptive . . . trade practice[s]” that are “in the sale” or “in the offering for sale” of “any consumer goods or services.” N.Y.C. Admin. Code § 20-700. *Second*, the law defines a “deceptive trade practice” to include only false or

misleading misrepresentations or omissions “made in connection with the sale” or “the offering for sale” of “consumer goods or services.” *Id.* § 20-701(a). Both provisions limit the scope of the statute’s reach to trade practices that are “in connection with” the sale or offer of sale of consumer goods and services.

Courts interpreting the phrase “in connection with” have concluded that, despite its potentially amorphous reach, it “must have a limit.” *Maracich v. Spears*, 570 U.S. 48, 61 (2013). To derive that limit, courts look to the structure of the statute, the surrounding provisions, and the statute’s purpose. *See id.* at 59-60. Here, the language and structure of the Consumer Protection Law make clear that a statement is not “made in connection with the sale” of a product where that statement does not itself discuss that particular product and is not made at the point of sale.

To begin with, the Consumer Protection Law provides a list of practices specifically included within the scope of the definition of a “deceptive trade practice[.]” N.Y.C. Admin. Code § 20-701(a)(1). That list confirms that the law is intended to apply to deceptive practices that are directly related to goods and services offered for sale. Among those illustrative examples are “representations that goods or services have sponsorship, approval, certification, accessories, characteristics, ingredients, uses, benefits, or quantities that they do not have”; representations that “goods are original or new” if they are not;

and representations that “goods or services are of a particular standard, quality, grade, style, or model, if they are of another.” N.Y.C. Admin. Code § 20-701(a)(1). Each of those examples concerns a representation about a specific good or service being sold to a consumer.

A comparison to analogous statutes confirms the limited intended scope of the Consumer Protection Law. Section 349 of the General Business Law broadly prohibits “deceptive . . . acts or practices in the conduct of any business, trade or commerce or in the furnishing of any service in this state.” Gen. Bus. Law § 349(a). By contrast, the Consumer Protection Law refers more specifically to deceptive practices “in the sale” of “consumer goods or services.” N.Y.C. Admin. Code § 20-700. That difference in language suggests that the Consumer Protection Law’s requirement that a deceptive trade practice be “in connection with” the sale of consumer goods or services imposes a meaningful limit on the law’s reach.

Polonetsky v. Better Homes Depot, Inc., 97 N.Y.2d 46 (2001), confirms that plain-text reading of the statute. At issue there was whether certain advertisements for the sale of real estate and associated services fell within the scope of the Consumer Protection Law. *See id.* at 51-52. The Court of Appeals first determined that the relevant statements “had the potential to mislead consumers in material ways” and therefore “satisfied the ‘deceptive or unconscionable trade practice’ element of the statute.” *Id.* at 52. But the Court

reasoned that, for the statements to be actionable, the Court also needed to find that “defendants’ practices involved consumer goods or services.” *Id.* The Court concluded that “simple sale of a house” would not have “involve[d] consumer goods or services within the meaning of the Code.” *Id.* at 53 & n.2. But the defendant’s additional “system of providing services” to prospective home buyers did. *Id.* at 53-54.

The Court of Appeals in *Polonetsky* thus confirmed what the text of the Consumer Protection Law makes clear: for a statement to be actionable under the law, it must actually concern a consumer good or service. And as a general matter, that can occur in two ways: the statement can discuss a particular consumer good or service, or it can be made at the point of sale (or the offer of sale) for such a good or service.

2. Applying the plain text of the Consumer Protection Law, the trial court correctly concluded that the statements by respondents that did not discuss their fossil-fuel products and were not alleged to have been made at the point of sale for those products were not “made in connection with the sale” or the “offering for sale” of those products.

To begin with respondents’ statements as to investments in clean energy resources (such as wind and solar power) and alternative energy sources (such as liquefied natural gas, hydrogen fuel cells, and biofuels): appellant’s complaint alleged that respondents touted “their research on fuel sources such as

algae biofuels and hydrogen fuel cells, claiming that these energy sources are clean, cheap, and capable of mitigating climate change.” R. 63. But as the trial court observed, appellant “d[id] not allege that [respondents] s[old] these non-fossil fuel products or technologies anywhere, let alone in [New York City].” R. 22. Moreover, none of these statements referred to any products respondents were alleged to have sold to consumers, nor were the statements alleged to have been published on any of respondents’ product labels or at any service station selling respondents’ products. They were thus not made in connection with the sale or offering for sale of consumer goods. R. 22.

The same is true of respondents’ statements opining on energy policy and expressing their aspirations for the future of energy. For example, ExxonMobil has stated that it “support[s] the ambition to achieve net-zero emissions by 2050 and the goals of the Paris Agreement,” R. 69; BP has explained that “[a]ll across BP, we are changing, encouraging our people to innovate, create, partner, and invest, exploring activities that you might not expect to support our net-zero ambition,” R. 500-501; and Shell has opined that the company was “a bigger player than you might expect in this budding movement to realize a cleaner and more efficient transportation future,” R. 110. Statements such as these, the trial court correctly recognized, “are generic in nature and implicate broad policy initiatives and statements, as opposed to the sale of [respondents’] fossil fuel or non-fossil fuel products.” R. 22. These statements

were not made “in connection with” the sale of a consumer good in any way. The only purported connection to the sale of consumer goods is that these statements were made by respondents, which also happen to sell consumer goods. If that were sufficient, it would nullify any limit provided by the “in connection with” requirement. The Consumer Protection Law applies only to statements made in connection with the sale of consumer goods—not to any statement, on any subject, made by a company that sells them.

B. Appellant’s Contrary Position Is Incorrect

Appellant does not dispute that the aforementioned statements did not refer to respondents’ consumer products, let alone offer to sell them. Indeed, appellant refers to those statements as “corporate greenwashing,” seemingly in contrast to “product greenwashing.” Br. 1. Appellant contends, however, that respondents’ statements about climate change and their efforts to address it were all made “in service of [respondents’] fundamental business goal of selling more fossil fuel products to consumers, and for that reason were made in connection with sale of their consumer goods.” Br. 40. That is a breathtakingly broad interpretation of the Consumer Protection Law, and it is fundamentally flawed.

1. To begin with, appellant’s interpretation finds no support in New York law. Appellant does not cite a single case standing for the proposition

that statements about one product (*e.g.*, alternative fuels such as liquefied natural gas) or technology (*e.g.*, wind or solar energy) are actionable as having been made “in connection with” the sale of a different product (petroleum-based gasoline). R. 22. Indeed, every Consumer Protection Law decision cited by appellant involved statements or practices directly connected to the sale of consumer goods or services. *See, e.g., Polonetsky*, 97 N.Y.2d at 53-54 (“system of providing services” to prospective home buyers); *City of New York v. T-Mobile USA, Inc.*, 67 Misc. 3d 1203(A), 126 N.Y.S.3d 311, at *1 (Sup. Ct., N.Y. Cnty. 2020) (sale of mobile phones and services); *Mintz v. American Tax Relief, LLC*, 16 Misc. 3d 517, 519 (Sup. Ct., N.Y. Cnty. 2007) (sale of tax-relief services). And that makes sense, because the plain text of the Consumer Protection Law requires such a direct connection. *See* pp. 43-46, *supra*.

Appellant argues that the Consumer Protection Law provides that “advertising about a corporate brand, rather than a specific product, can be actionable,” because the definition of “deceptive trade practice” includes representations that “the supplier has a sponsorship, approval, status, affiliation, or connection that he or she does not have.” Br. 41 (quoting N.Y.C. Admin. Code § 20-701(a)). But that does not obviate the Consumer Protection Law’s requirement that the challenged representation be made *in connection with the sale of consumer goods*. In other words, a misleading representation about a

supplier may be actionable, but only if such a misrepresentation is made in connection with the sale of consumer goods.

In any event, appellant's reading of the statute fails on its own terms. The type of representations about "status" or "affiliation" contemplated by this portion of the law are those in which a good or service is claimed to have an official endorsement from, or relationship with, a specified entity. For example, in *Polonetsky*, the Court of Appeals permitted a Consumer Protection Law claim to go forward based on an alleged misstatement that the defendants' recommended attorneys and contractors were approved by the Federal Housing Authority when they were not. *See* 97 N.Y.2d at 53-54. That portion of the Consumer Protection Law has nothing to do with a company's subjective characterization of its own business activities or its policy views.

Along a similar line, appellant points to the Consumer Protection Law's prohibition against representations or omissions with the "*capacity, tendency or effect of directly or indirectly* deceiving or misleading" consumers. Br. 23, 40 (quoting N.Y.C. Admin. Code § 20-701(a)) (emphases added). Appellant reads "indirectly" to mean that the Consumer Protection Law applies to statements that merely refer to a company, rather than to its products. Appellant is again ignoring the law's independent restraint that "a statement ha[ving] the tendency to indirectly deceive a consumer must still be 'made in connection with the sale' of a consumer good or service[]." R. 22. In other words, the use

of the word “indirectly” refers to one way that statements about the sale of goods can be *deceptive*; it does not create a new category of deception separate from the sale of goods or services. Appellant’s reliance on “indirect[]” deception is also misguided, because that language was added to the statute after this lawsuit was filed and cannot apply retroactively here. *See* N.Y.C. Local Law No. 98/2021, § 15 (eff. Jan. 25, 2022); *Gottwald v. Sebert*, 40 N.Y.3d 240, 258 (2023).

The other New York cases cited by appellant for related propositions are inapposite. To begin, appellant argues that *Polonetsky* “endorsed a broad reading of the [Consumer Protection Law’s] requirement that misleading statements be made in connection with the sale of consumer goods or services.” Br. 42. It did not. In *Polonetsky*, the Court of Appeals held that an advertisement of a package of services sold to prospective homebuyers—such as promises of repairs and recommendations of lawyers and contractors—fell within the scope of “consumer goods or services” under the Consumer Protection Law. *See* 97 N.Y.2d at 53-54. The Court reasoned that there was “no question” that, if the services were sold on their own, the statements would be actionable. *Id.* at 54. The only dispute was whether offering those services as *part of the sale of a home* meant that the services fell outside of the statute. That is miles away from this case, where appellant did not allege that any

goods or services were advertised in the challenged statements or that any of the statements were made at the point of sale.

Appellant also argues that the trial court's reading of the "in connection with" requirement is incorrect because, in *23 Realty Associates v. Teigman*, 213 A.D.2d 306, 308 (1995), this Court rejected a "narrow[]" interpretation of the Consumer Protection Law. Br. 41. But there, the Court addressed the unrelated question of whether residential leases constitute "consumer goods or services" within the meaning of the Consumer Protection Law. *See* 213 A.D.2d at 308. The Court concluded that they did and disagreed with the trial court's contrary determination, which "construed the law narrowly." *Id.* The fact that this Court rejected a narrow construction of what constitutes "consumer goods or services," in deference to promulgated regulations to the contrary, says nothing about whether the Consumer Protection Law reaches statements not connected to consumer goods or services at all.

2. In addition, appellant's interpretation of the Consumer Protection Law is untethered to its text and has no limiting principle.

Appellant insists that the phrase "in connection with" is "especially broad language" and should be interpreted as such. Br. 40 (citation omitted). As already explained, the phrase "in connection with" must "have a limit." *Maracich*, 570 U.S. at 61. And the text of the Consumer Protection Law provides one. *See* pp. 43-46, *supra*. By contrast, if "no limits are placed" on the

scope of that language—as appellant advocates here—then all statements by any company with even the remotest relation to the goods or services it sells to consumers would fall within its reach. *See Maracich*, 570 U.S. at 59. That is a facially implausible interpretation of a consumer-protection statute focused on consumer goods and services, and it would raise significant constitutional concerns. *See* pp. 57-58, *infra*.

Quoting *Karlin v. IVF America, Inc.*, 93 N.Y.2d 282 (1999), appellant further argues that the Consumer Protection Law must be interpreted “flexibl[y]” to address “the numerous, ever-changing types of false and deceptive business practices targeting consumers.” Br. 42 (internal quotation marks omitted). But *Karlin* says no such thing. In *Karlin*, considering claims under General Business Law §§ 349 and 350, the Court of Appeals explained that “the reach of *these statutes*”—not the Consumer Protection Law—“provides needed authority to cope with the numerous, ever-changing types of false and deceptive business practices.” 93 N.Y.2d at 291 (citation and alteration omitted, emphasis added). Contrary to appellant’s representation, *Karlin* does not stand for the proposition that *the Consumer Protection Law* must be interpreted so broadly. Nor would that make sense, given that the text of Sections 349 and 350 are broader than that of the Consumer Protection Law. *See* p. 45, *supra*.

Overall, appellant fails to grapple with the obvious consequences of its expansive interpretation of the Consumer Protection Law. As the trial court recognized, it “would have the effect of transforming *any* statement about a company’s brand or business, not just its products, into actionable conduct under the Consumer Protection Law.” R. 22. That would render the law’s requirement that a statement be made “in connection with” the sale of consumer goods or services meaningless—a result that “should be avoided.” *Avella v. City of New York*, 29 N.Y.3d 425, 434 (2017). Nor is it enough to say that a company’s brand alone motivates consumers to buy (or not to buy) the company’s product, such that all of that company’s statements are made “in connection with” the sale of that product. That too would capture every statement by a corporate speaker: any act or practice by a for-profit corporation (including those discussing important matters of policy) could be said to have been made in part to affect the company’s bottom line.

Appellant contends that the trial court’s concerns on this score were “misplaced” because the claims here “turn on the specific features” of respondents’ so-called “climate branding” initiatives. Br. 39, 48; *see* Br. 13. Respondents’ statements are actionable, appellant continues, because they were received by a “wide consumer audience in New York City and beyond” through “major publications and on multiple social media platforms.” Br. 48. That

explanation hardly addresses the basis for the trial court’s unease. In the modern age, many speakers communicate through a variety of platforms and, in doing so, may ultimately reach a wide audience. That is not specific or “unique” to respondents. And, more importantly, the fact that respondents’ statements supposedly reached a wide audience does nothing to render those statements made “in connection with” the sale of goods.

Appellant attempts to alleviate the tension by citing (Br. 46-48) trial-court decisions in consumer-protection lawsuits against respondents and other energy companies from different jurisdictions. That reliance is misplaced. The relevant consumer-protection statute in each of those jurisdictions is materially broader than New York City’s Consumer Protection Law with respect to the required nexus between corporate speech and goods or services. For example, the Vermont Consumer Protection Act prohibits “deceptive acts or practices *in commerce*.” 9 Vt. Stat. Ann. § 2453 (emphasis added); *see Vermont v. Exxon Mobil Corp.*, No. 21-CV-2778, 2024 WL 5189025, at *9 (Vt. Super. Ct. Dec. 11, 2024). Similarly, the statute at issue in *Massachusetts v. Exxon Mobil Corp.*, No. 1984CV03333BLS1, 2021 WL 3493456 (Mass. Super. Ct. June 22, 2021), makes unlawful “[u]nfair methods of competition and unfair or deceptive acts or practices *in the conduct of any trade or commerce*.” Mass. Gen. Laws ch. 93A, § 2 (emphasis added); *see Massachusetts*, 2021 WL 3493456, at *11 (discussing the sale of securities). And the D.C. Consumer

Protection Procedures Act is limited by its “overarching purpose” but lacks an “express limitation” that the “statement be about ‘goods or services.’” *Earth Island Institute v. Coca-Cola Co.*, 321 A.3d 654, 670-671 n.6 (D.C. 2024). The Consumer Protection Law’s use of discernibly narrower language warrants a discernibly narrower interpretation.

The D.C. Court of Appeals’ decision in *Earth Island Institute*, *supra*, is also distinguishable. There, the “corporate ethos” statements at issue were not standalone representations about corporate philosophy or issues of policy wholly divorced from the good or service offered for sale to consumers (as is the case here); they were statements about the “processes by which [Coca-Cola] packaging is manufactured and how that packaging can be processed after the consumer discards it.” 321 A.3d at 666, 671. In other words, the statements—on their face—discussed “Coca-Cola’s packaging,” which “is part of the product[] that it sells” to consumers. *Id.* at 671. Those statements have a far closer connection to consumer goods than the statements at issue here, which discussed alternative-energy technologies not sold to New York City consumers; never referred to the products that are sold to New York City consumers (gasoline products); and were not alleged to have been made at the point of sale of those products.

3. Finally on this point, appellant’s boundless construction of the Consumer Protection Law would sweep in non-commercial speech fully protected by the First Amendment.

As this Court has explained, non-commercial speech is “due the full protection of the First Amendment.” *New York Public Interest Research Group v. Insurance Information Institute*, 161 A.D.2d 204, 205 (1990) (*NYPIRG*). Although “purely commercial speech” can be “subject to scrutiny” under “deceptive practice[] statutes,” “general expressions of opinion about public matters” cannot be—“even where the views expressed are in support of a specific profit-making corporation or industry” but are “not aimed at promoting particular products or services.” *Id.* at 205-206. The “critical factor” in assessing whether a statement constitutes commercial speech under the First Amendment is “whether it proposes a commercial transaction.” *Id.* at 206. That is a “strict standard” that protects speech that “communicates information” or “expresses opinion.” *City of New York v. American School Publications*, 119 A.D.2d 13, 18-19 (1st Dep’t 1986). Speech does not lose its constitutional protection solely because “it is economically motivated or reflects the interest of a commercial enterprise.” *NYPIRG*, 161 A.D.2d at 206.

Appellant’s complaint targeted numerous statements that plainly did not propose commercial transactions. For example, appellant cited ExxonMo-

bil's expression of its opinion that the world faces the "dual challenge" of "finding ways to provide affordable energy to a growing population while addressing the risks of climate change." R. 481. Such non-commercial speech is entitled to full First Amendment protection. But under appellant's construction of the Consumer Protection Law, such a statement could result in civil liability. Indeed, under appellant's logic, a company could be subject to liability for consumer deception for expressing even political viewpoints unrelated to their products, as long as a plaintiff could sufficiently allege that consumers are motivated to buy products from companies that support their values. The First Amendment does not permit such blatant targeting of core protected speech.

"[A] statute should be construed, whenever possible, in a way that avoids placing its constitutionality in doubt." *People v. Viviani*, 36 N.Y.3d 564, 579 (2021). This Court should thus construe the Consumer Protection Law consistent with the trial court's interpretation, which would exclude from the law's reach any statements without a direct connection to a commercial transaction.

III. THE TRIAL COURT CORRECTLY HELD THAT COUNT 1 AGAINST SHELL WAS TIME-BARRED

Appellant's claims, all of which seek civil penalties, are subject to a three-year limitations period under CPLR 214(2), which applies to "an action to recover upon a liability, penalty or forfeiture created or imposed by statute." *Id.*; cf. *Morelli v. Weider Nutrition Group, Inc.*, 275 A.D.2d 607, 608 (1st Dep't 2000) (applying that limitations period to a claim under General Business Law

§ 349). Appellant agrees (Br. 56) that a three-year limitations period applies. Appellant also stipulated in the trial court that it “does not seek to hold [respondents] liable for [Consumer Protection Law] violations that occurred outside the limitations period,” and that it only seeks civil penalties for Consumer Protection Law violations occurring in the past three years. R. 24. The statute of limitations thus bars claims based on violations alleged to have arisen before April 22, 2018, which is three years before appellant filed the complaint. The trial court correctly recognized as much, *see* R. 24, and appellant does not challenge that ruling on appeal, *see* Br. 56-61.

As to Shell, Count 1 was correctly dismissed in its entirety. All of Shell’s allegedly deceptive statements about its V-Power NiTRO+ Premium Gasoline and Nitrogen Enriched Cleaning System were made on the internet and published in 2015. For online statements, New York courts have held that a legal violation occurs upon publication and that, as long as the statement is “never modified thereafter,” the limitations period does not run anew each time the statement is “accessed by an Internet user.” *See, e.g., Firth v. State*, 287 A.D.2d 771, 774 (3d Dep’t 2001) (internal quotation marks and citation omitted), *aff’d*, 98 N.Y.2d 365 (2002); *see also Rare 1 Corp. v. Moshe Zwiebel Diamond Corp.*, 13 Misc. 3d 279, 282-283 (Sup. Ct., N.Y. Cnty. 2006) (granting a motion to dismiss a defamation claim based on the “single publication” rule). To the extent that appellant seeks to impose civil penalties on Shell for online

statements published outside the limitations period, that stands in direct contradiction to “the parties’ agreement and [appellant’s] explicit statement that [respondents’] statute of limitations arguments are mooted by the parties’ [s]tipulation.” R. 24.

Appellant’s contrary arguments falter. Appellant contends that the trial court “mistakenly concluded that [appellant] sought civil penalties for violations occurring before this period,” rather than “only for deceptive advertisements that ran during the limitations period” but were published outside that period. Br. 56. Not so. The trial court merely interpreted the representations that appellant made to the court, including that respondents’ limitations arguments were “moot” in light of appellant’s position. R. 24. Appellant’s position also belies the plain text of the Consumer Protection Law, which provides that a violation occurs when the allegedly deceptive statement is “distributed, broadcast, posted, published, or otherwise exposed to the public.” N.Y.C. Admin. Code § 20-703(c). That language focuses on the defendant’s act of *distributing* or *publishing* the challenged statement, not the consumer’s act of *accessing* it.

Accordingly, the trial court correctly dismissed as time-barred Count 1 against Shell. And as already explained, those claims, as well as all of appellant’s others, fail as a matter of law because the challenged product statements were not misleading and the challenged corporate statements were not made

in connection with the sale of consumer goods or services. The trial court thus correctly dismissed the complaint.

CONCLUSION

The judgment of the trial court should be affirmed.

Respectfully submitted,

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