

Content Indication

“A number of KLM’s past advertisements are misleading and therefore unlawful”, the court ruled. This is the outcome in the collective action that the Fossielvrij foundation filed against KLM because it believes KLM is engaged in greenwashing. In these advertisements KLM makes environmental claims based on vague and general statements about environmental benefits and thus misleads consumers. In other advertisements, KLM paints too rosy a picture of the consequences of measures such as Sustainable Aviation Fuels (made from renewable resources) and reforestation. These measures only marginally reduce negative environmental aspects and falsely create the impression that flying with KLM is sustainable.

Authority

Amsterdam District Court

Judgment date

2024-03-20

Publication date

2024-03-20

Case number

C/13/719848 / HA ZA 22-524

Procedure

First instance – plural

Jurisdiction

Civil law

Locations

- [Rechtspraak.nl](https://rechtspraak.nl)

Verdict

Judgment

AMSTERDAM COURT

private law department

Case number / role number: C/13/719848 / HA ZA 22-524

Judgment of March 20, 2024

in the matter of

the foundation

STICHTING TER BEVORDERING VAN DE FOSSIELVRIJ-BEWEGING (en:FOUNDATION TO PROMOTE THE FOSSIL-FREE MOVEMENT), based in Amsterdam,
plaintiff,

attorney at law Mr. F.M. Peters in Amsterdam,

at

the limited liability company ROYAL AIRLINE N.V., based in Amstelveen, defendant, attorney at law Mr. B.M. Katan in Amsterdam.

The parties are hereinafter referred to as Fossielvrij (En: Fossil Free) and KLM.

What is this case about?

Fossielvrij (en: Fossielvrij) has filed a class action against KLM because it believes KLM is engaging in *greenwashing*. The court is of the opinion that a number of advertisements conducted by KLM in the past are misleading and therefore unlawful. For example, KLM makes environmental claims based on

vague and general statements about environmental benefits and thus KLM misleads consumers. In other communications, KLM paints overly positive consequences of measures such as **Sustainable Aviation Fuels** and reforestation. These measures only marginally reduce negative environmental aspects and falsely create the impression that flying with KLM is sustainable.

KLM thus failed to inform consumers fairly and concretely. KLM now no longer carries the advertisements, nor does it have to rectify the statements. KLM may continue to advertise flying and also does not have to warn consumers that current aviation is not sustainable. If KLM informs consumers about its ambitions in terms of CO2 reduction, for example, it must do so honestly and concretely.

1. The procedure

1.1.

The course of the proceedings is evidenced by:

- - the subpoena dated July 6, 2022, with exhibits 1 through 35;
- - the statement of reply under Section 1018c(5) Of Code of Civil Procedure, last sentence, with exhibits 1 through 25;
- - the interlocutory judgment of February 8, 2023;
- - the record of oral proceedings, held on April 20, 2023, and the documents referred to therein, including the deed of submission of additional exhibits, with exhibits 36 through 46, by Fossilvrij (En: Fossil Free) and the deed of submission of exhibits, with exhibits 26 through 30, by KLM;
- - the interlocutory judgment of June 7, 2023, declaring the Class Action Mass Claims Settlement Act applicable to Fossilvrij (En: Fossil Free) and Fossilvrij (En: Fossil Free)'s claims admissible;
- - the deed dated August 2, 2023, with exhibits 47 through 61, from Fossilvrij (En: Fossil Free);
- - the statement of reply, with exhibits 31 through 80;
- - the record of oral proceedings, held on December 19, 2023, and the documents mentioned therein, including the deed of submission of additional exhibits, with exhibits 62 through 86, from Fossilvrij (En: Fossil Free) and the deed of submission of production, with exhibit 81, from KLM;
- - Mr. Peters' letter dated January 16, 2024 with comments to the record of the oral proceedings;
- - the letter dated January 19, 2024, with an attachment, from Mr. Katan, with comments to the minutes of the oral proceedings.

1.2.

Judgment was then determined.

2. The parties

2.1.

Fossilvrij (En: Fossil Free) was founded on March 22, 2016. Its bylaws read as of June 23, 2022, to the extent relevant here:

Article 3. Purpose.

1. For the benefit of present and future generations, the foundation aims to: to promote, protect, support and bring about social, environmental and economic justice and health at the local, regional and national levels, to remove the social legitimacy of coal, oil and gas companies (so-called "fossil companies") and to bring about alternative uses of investments and resources in order to thereby accelerate the transition to a sustainable economy based on renewable energy.

2. The foundation tries to achieve this goal, among other things, by taking on all possible tasks that can further its goal. For example:

- Calling on public and private institutions and organizations such as universities, municipalities, insurers, banks, religious organizations and pension funds to sever their financial or other ties with coal, oil and gas companies and become "fossil-free".

- Prevent and counteract misleading, inaccurate, incomplete and/or unsubstantiated or insufficiently substantiated public statements on environmental and climate impact by the fossil industry and other companies and organizations, which statements, by their misleading nature, encourage, legitimize or encourage consumers to sell, purchase and/or use fossil products and services, thereby contributing to dangerous climate change.

(...)

- To investigate, initiate or participate in legal proceedings, whether or not as referred to in Article 305a of Book 3 of the Civil Code, which may benefit the purpose.

(...)

3. The foundation does not aim to make a profit.

Article 4. The Fossil-Free Movement.

The foundation stems from a growing movement: the "Fossil-Free Movement. This is a growing network of students, citizens and professionals, among others, who are calling on their own municipality, university or pension fund to sever their financial ties with the fossil fuel industry (so-called "divestment"), and/or cut other types of ties with the fossil fuel industry, in order to address climate change and accelerate the transition to a sustainable economy with renewable energy. This movement is part of the global divestment movement supported by the organization "350.org." The international Fossilvrij (En: Fossil Free) campaign originated in the U.S. in two thousand twelve and quickly grew into an international movement, including a Dutch branch. The foundation is aware of the history of the "Fossilvrij (En: Fossil Free) Movement" that led to Foundation for the Promotion of the "Fossilvrij (En: Fossil Free) Movement. Contact with and representation of the movement on the board is essential for the foundation.

2.2.

KLM is an airline company. According to its Climate Action Plan 2023, it aims to emit 30% less CO₂ relatively (per passenger kilometres) and 12% less in absolute terms by 2030, both compared to 2019. To achieve this CO₂ reduction, it focuses on three pillars, which amount to: (i) modernizing and renewing its fleet, (ii) using more sustainable aviation fuel (Sustainable Aviation Fuel, SAF) and (iii) improving operational efficiency. For the longer term (2030-2050), it is also counting on future technological developments in the aviation sector. KLM has had its targets validated by the Validation Team of the Science Based Targets initiative (SBTi), a partnership of non-governmental organizations.

3. The dispute

The progress of Fossilvrij (En: Fossil Free)

3.1.

The claims of Fossilvrij (En: Fossil Free) are reproduced in full in the appendix attached to this judgment. A (final) decision on part of these claims has already been rendered in the interlocutory judgment of June 7, 2023 (hereinafter: the interlocutory judgment) (see ECLI:RBAMS:2023:3499). Still to be considered - in summary - are the claims of Fossilvrij (En: Fossil Free), as far as possible provisionally enforceable:

IV that it be ruled that advertisements made by KLM which suggest that flying can be or become sustainable (expressions 1 to 13) and which suggest that the purchase of or contribution to a "compensation" product actually reduces, absorbs or compensates for part of the climate impact of flying (expressions 14 to 19) are misleading and unlawful and that KLM thereby violates fundamental rights and the Unfair Commercial Practices Directive;

V (i) That KLM is prohibited from public disclosure:

- expressions 1 through 19;

- advertisements with text identical or similar thereto, as well as suggesting by commendatory wording that flying, with or without KLM, can be "sustainable" or "responsible" from a climate change perspective;

(ii) That KLM be ordered to remove and keep removed from all media statements 1 to 19 and statements that vary therefrom but have substantially the same purport;

(iii) That KLM be ordered to rectify expressions 1 to 19 (in the manner set forth in the appendix to this judgment);

VI that KLM forfeits a penalty payment of €100,000 for each violation of the prohibition mentioned under V(i) and/or the injunctions mentioned under V(ii) and (iii);

VII that KLM be ordered to pay the legal costs and the (ii) full extrajudicial costs.

The court determines the content of the claim

3.2.

For the purpose of the assessment of the precise contents of the collective claim as prescribed by Section 1018e(2) of the Dutch Code of Civil Procedure, the District Court gave Fossielvrij (En: Fossil Free) the opportunity, on the basis of the interlocutory judgment, to comment on the question whether assessment of all nineteen expressions mentioned in the summons is still current and to adjust its claims accordingly, if necessary. Fossielvrij (En: Fossil Free) then stated that it had an interest in its original claims, including with respect to expressions mentioned in the subpoena that are no longer held by KLM and that for that reason it had not changed its claim or the grounds thereof.

3.3.

The Court observes that it appears from Fossielvrij's assertions that in claim IV it does not so much refer to the Unfair Commercial Practices Directive as to the Unfair Commercial Practices Act or Section 3A of Title 3 of Book 6 of the Civil Code (Sections 6:193a through 6:193j of the Civil Code). KLM's statements show that it too understood Fossielvrij (En: Fossil Free) in this way. This reading also fits the nature and purpose of a European directive and a national implementation law. Claim IV is therefore read as Fossielvrij intended.

3.4.

The court notes that only the description of the injunction claim expresses "advertisements containing text identical or similar thereto" and the description of the removal claim expresses "statements varying therefrom but having substantially the same purport". The claims for declaratory relief and injunctive relief are limited to the nineteen advertisements described in the subpoena. To the extent that Fossielvrij (En: Fossil Free) assumes that the claimed declaratory judgment and order for rectification also extend to "similar statements," the court does not go along with this. This is not part of the petition.

3.5.

The court thus determines the content of the class action under Section 1018e(2) of Code of Civil Procedure on the claims brought by Fossielvrij (En: Fossil Free), with the aforementioned observation.

Notes on the progress of Fossielvrij (En: Fossil Free)

3.6.

Fossielvrij (En: Fossil Free) states that the goal of its claims is to get KLM to stop misleading consumers, because KLM is using that deception to perpetuate the harmful growth of aviation. Fossielvrij also wants the damage, in the form of the false perception created by the campaigns, to be repaired. In doing so, Fossielvrij focuses on nineteen expressions KLM has made as part of its "Fly Responsibly" campaign and the "CO2ZERO" product and the marketing surrounding the "KLM Real Deal Days." The common denominator of the expressions, according to Fossielvrij (En: Fossil Free), sees three parts. First, KLM uses the term sustainable while its products are far from sustainable. Second, KLM states that it is addressing climate change when in fact it is committed to aviation growth. None of the measures KLM is betting on outweigh that growth. Third, KLM offers CO₂-compensating products while these do not validly compensate or reduce the climate impact of flying.

3.7.

Section 2.1 ("Core of the Case") of the subpoena was quoted in the interlocutory judgment. Among other things, Fossielvrij (En: Fossil Free) describes the following:

3. This case looks at the urgent duty of companies like KLM, which sell the most polluting products available today, to be honest about the extent to which they and their products contribute to harmful climate change.

4. The airline industry is a major consumer of fossil fuel, namely petroleum in the form of kerosene. KLM, as the largest airline in the Netherlands, has a very large impact on the climate, particularly through the CO₂ emissions from its aircraft when burning kerosene, the greenhouse gas emissions from

the entire kerosene supply chain, the other greenhouse gases emitted by aircraft, and the warming effect otherwise caused by its flights.

5. KLM misrepresents this in its advertisements and other communications to the public. In its communications, which reach thousands if not millions of people, KLM tells the public that it can "work with [us] to create a more sustainable future" and says that it is "on the road to sustainable travel together." When a customer buys a ticket online, they have the opportunity to "offset" and "reduce" their impact, with a product touted as "CO2ZERO." This marketing is laced with images of green leaves, younger generations and of futuristic aircraft.

6. These claims sound green, but are vague, fundamentally flawed and in violation of the Unfair Commercial Practices Directive (...) ("**OHP Directive**"). Anyone who bothers to look deep into KLM's website for substantiation will see that KLM tells people that it and the broader airline industry are on track to meet the internationally agreed-upon temperature target from the Paris Climate Agreement. However, KLM fails to mention, crucially, that both KLM and the airline industry are counting on further "business as usual" growth in air traffic, something completely contrary to the Paris target. Such growth is the opposite of KLM's "Fly Responsibly" claim and which it uses as a brand and logo - a claim that is both an invitation to the public and a eulogy of KLM's own responsibility. The claims suggest that KLM is fully committed to addressing the climate crisis and has the solutions to do so. In doing so, this advertising creates false confidence among passengers that flying can be done sustainably, even among people who are actually concerned about flying and the climate. Fossilvrij (En: Fossil Free) wants this "**greenwashing**" to stop.

8. (...) Regularly, and in 2022 it was for example on May 17, 2022, KLM launches a discount promotion where people are encouraged to fly at a discount to a range of destinations for several weeks. Since this year, this discount promotion has been called the "KLM Real Deal Days" (...). As part of this promotion, one can fly round trip to New York, for example, for only €349. KLM offered this year that if one books such a cheap flight and chooses to make a contribution to KLM's cost of adding SAF, KLM will "double" that amount. On balance, however, this only encourages more flying and puts far more CO2 into the atmosphere than if someone were to pass up this discount offer.

9. The sustainability claims KLM makes in the context of these campaigns are, in Fossilvrij's (En: Fossil Free) opinion, misleading. Fossilvrij (En: Fossil Free) therefore claims in this case that KLM rectifies these statements and no longer repeats them. (...)

11. Fossilvrij (En: Fossil Free) does not demand that flying be banned or that KLM close its doors. Fossilvrij (En: Fossil Free) does believe that the public is entitled to the truth about KLM and its product, and in particular the fact that, from a climate perspective, there is no such thing as "more sustainable" or "responsible" flying and that the only sustainable thing KLM can do is fly fewer planes. Fossilvrij (En: Fossil Free) believes that to bring aviation in line with the Paris goal, people need to be informed and social norms and awareness about flying need to change. Fossilvrij (En: Fossil Free) therefore wants the public not to be lulled to sleep by KLM with green talk, and then to actually believe that booking a flight with KLM actually contributes to countering the damage of climate change. The climate crisis is urgent, and the extent to which companies contribute to or stand in the way of achieving climate goals should not be disguised by companies such as KLM that cause serious pollution.

KLM's position

3.8.

KLM disputes that the expressions are misleading and believes that it is free to communicate about its sustainability efforts. KLM disputes that Fossilvrij (En: Fossil Free) still has an interest in having its claims upheld, in part because the nineteen expressions at issue are no longer being used. KLM therefore moved that Fossilvrij (En: Fossil Free) be declared inadmissible in its claims, and that Fossilvrij (En: Fossil Free) be ordered to pay the costs of the proceedings.

3.9.

Paragraph 1.1 ("The Stakes of these Proceedings") of KLM's Second Response states, in so far as relevant here:

1. KLM is working hard to make its operations more sustainable. KLM is replacing its current fleet with aircraft that emit tens of percent less CO2 than their predecessors. KLM is building a good position for purchasing more sustainable jet fuel - successfully. KLM is making all kinds of operational improvements, it is partnering with start-ups and research teams to drive innovation, and it is also working to make ground operations (including taxiing) and on-board services more sustainable.

2. KLM does this realising that it's main corporate activities are not sustainable and will not be sustainable with a push of the button. That is why it is working on many projects at once, each making a large or small contribution to its climate goals.

3. To ensure that KLM can achieve its climate ambitions, KLM needs the support of its (potential) customers, employees, governments and industry partners and even competitors. KLM therefore communicates its efforts and ambitions in the field of sustainability, including through a branding campaign. (...)

5. The assessment of whether an expression is misleading and thus an unfair trade practice (as referred to in Section 6:193a et seq. of the Dutch Civil Code) requires careful consideration of what the expression says, what the context of that expression is and how the average consumer will interpret it. Fossilvrij (En: Fossil Free) states virtually nothing concrete about this.

6. When the expressions of KLM that are central to these proceedings are considered in such a careful manner, it becomes clear that those expressions present an accurate picture, are nuanced and are sufficiently supported by facts.

(...)

11. KLM explained at the admissibility stage that Fossilvrij (En: Fossil Free) has no interest in its claims. First, because KLM no longer carries the nineteen expressions that the subpoena seeks to have banned. Second, because KLM's statements do not cause people who are considering flying less to be persuaded by the statements to fly anyway - at most, they are persuaded to travel with KLM instead of another airline.

3.10.

The contentions back and forth are discussed in more detail below, in the context of assessment.

4. The assessment

Sufficient importance

4.1.

Article 3:303 of the Civil Code provides that without a sufficient interest no one is entitled to a legal claim. The court must be reluctant to dismiss a claim on the ground that there is not a sufficient interest. In principle, it must be assumed that a sufficient interest exists. The following is considered in this regard.

4.2.

KLM argues that it has since ceased to carry the nineteen advertisements described in the summons and that it will no longer carry these advertisements. To the extent that the expressions can still be found, it is only in archives and the like, but that does not constitute "carrying advertising".

4.3.

Fossilvrij (En: Fossil Free) seeks an injunction against publication, removal or removal and rectification of (in summary) expressions 1 through 19 and "similar expressions". To assess this, an assessment must first be made of the legality of the nineteen expressions. The parties disagree on this point. Thus, Fossilvrij (En: Fossil Free) does have an interest in its claims, even if it is determined that KLM no longer carries any of these nineteen specific expressions.

4.4.

KLM further argues that the claims brought by Fossilvrij (En: Fossil Free) cannot lead to its ultimate goal, which is to prevent or at least limit climate change. According to Fossilvrij (En: Fossil Free), however, there is a connection between that ultimate goal and the KLM advertisements it challenges.

4.5.

In the interlocutory judgment, the court referred to Fossilvrij (En: Fossil Free)'s goal (as described above under section 2.1) and the avenues by which it seeks to achieve this goal. It further considered that Fossilvrij (En: Fossil Free) is pursuing one of these avenues with the claims brought in this case. At the oral hearing on December 19, 2023, Fossilvrij (En: Fossil Free) emphasized that (as the parties continue to disagree on this issue) it wants it to be made clear when an expression is misleading and that a court opinion on the expressions made is essential for this. In this the court sees sufficient interest.

4.6.

In conclusion, Section 3:303 of the Civil Code does not bar the claims brought by Fossilvrij (En: Fossil Free).

Basis: unfair trade practices

4.7.

The dispute focuses primarily on whether the nineteen KLM advertisements described in the summons violate the Unfair Commercial Practices Act, Sections 6:193a through 6:193j of the Civil Code.

It is true that Fossilvrij (En: Fossil Free) expressed in the petition that KLM is in violation of the fundamental rights referred to in the body of the summons and the Unfair Trade Practices Act, but at the oral hearing Fossilvrij (En: Fossil Free) explained that by fundamental rights it refers to the right not to be misled. This right is protected by the Unfair Commercial Practices Act, so the court assumes one and the same basis for the claim. No independent meaning is attributed to the reference to fundamental rights.

4.8.

According to Fossilvrij, KLM's advertising statements also constitute an independent unlawful act within the meaning of Section 6:162 of the Dutch Civil Code. This basis is disregarded because Fossilvrij has not explained, and moreover it is impossible to see, that this basis has independent meaning next to the basis of the Unfair Commercial Practices Act. Incidentally, this does not prevent the qualification of acting in violation of the Unfair Commercial Practices Act as "unlawful" (as Fossilvrij also does). An unfair trade practice is a species of tort.

4.9.

The court will outline the review framework below and then apply it to the specific advertisements.

Review framework

4.10.

The review framework applied by the court in assessing these advertisements is as follows.

4.11.

Article 1 ("Purpose") of the Unfair Commercial Practices Directive states that its purpose is to contribute to the proper functioning of the internal market and achieve a high level of consumer protection by approximating the laws, regulations and administrative provisions of the Member States on unfair commercial practices harming consumers' economic interests.

4.12.

The Directive has been implemented in the Netherlands in Section 3A ("Unfair Commercial Practices") of Book 6 of the Civil Code, the Unfair Commercial Practices Act (Articles 6:193a to 6:193j of the Civil Code). These articles in the Civil Code state that a consumer is a natural person not acting in the exercise of a profession or business. Furthermore, the articles state when a commercial practice is unfair and that the trader must prove that his information is correct.

4.13.

The European Commission formulated Guidelines on the interpretation and application of the Directive in late 2021, which should facilitate the proper application of the Directive. These Guidelines are therefore relevant when interpreting articles 6:193a-j of the Civil Code.

4.14.

Chapter 4 ("The Application of the Unfair Commercial Practices Directive in Specific Areas"), section 4.1 ("Sustainability"), paragraph 4.1.1 ("Environmental Claims") reads, in so far as relevant here:

An "environmental claim" or a "green claim" suggests or otherwise creates the impression (in commercial messages, marketing or advertising) that a product or service has a **positive or no impact on the environment or does less harm to the environment** than competing goods or services. The goods or services in question derive their environmentally friendly character, among other things, from their composition, the way they are produced, the way they can be disposed of, or the fact that their use is more energy-efficient or less polluting. Putting forward untrue or unverifiable claims of this type is often called "greenwashing." (...)

Depending on the circumstances, this may include all types of claims, information, symbols, logos, images and brand names, as well as their interaction with colors, on packaging, labels, advertising, in all media (including websites) and made by any organization, if it is considered a "trader" and engages in commercial practices towards consumers.

The Unfair Commercial Practices Directive does not provide specific rules on environmental claims. However, this Directive provides a legal basis to ensure that traders do not present environmental claims in a way that is unfair to consumers. As long as "green claims" are not unfair, the Directive does not prohibit their use. On the contrary, the Unfair Commercial Practices Directive can help traders who invest in the environmental performance of their products by enabling them to communicate these efforts to consumers in a transparent manner and by preventing competitors from presenting misleading environmental claims.

4.15.

Section 4.1.1.2 ("Main Principles") reads, insofar as relevant here:

Under **Articles 6 and 7 of the Unfair Commercial Practices Directive**, which deal with misleading acts and misleading omissions, green claims must be truthful, **must not be accompanied by false information, and must be presented in a clear, specific, accurate and unambiguous manner** so as not to mislead consumers.

Under **Article 12 of the Unfair Commercial Practices Directive**, traders **must be able to substantiate their claims with evidence** and present this evidence to the competent enforcement authorities in a comprehensible manner if the claim is disputed.

4.16.

Section 4.1.1.3 ("The application of Article 6 of the Unfair Commercial Practices Directive to environmental claims") reads, in so far as relevant here:

Consequently, **the visual material and overall product presentation** (i.e. design, color choice, graphics, pictures, photos, sounds, symbols and labels) should also be a true and accurate representation of the extent of the environmental benefit, and not paint an overly rosy picture of the benefit achieved. For implied claims, depending on the circumstances of the case, images (e.g., of trees, rainforests, water, animals) and colors (e.g., a blue or green background or letters) may be used that evoke associations with environmental sustainability.

Environmental claims can be misleading if they are based on **vague and general statements regarding environmental benefits**, without proper substantiation of the benefit and without stating what aspect of the product the claim refers to. Examples of such claims include "environmentally friendly," "eco," "green," "friend of nature," "ecological," "sustainable," "good for the environment," "climate-friendly" or "friendly to the environment," "non-polluting," "biodegradable," "emission-free," "low-carbon," "reduced CO2 emissions," "carbon-neutral," "climate-neutral," as well as the more generic claims "conscious" and "responsible."

In some cases, such unsubstantiated claims may give consumers the impression that a product or activity of a trader has no negative impact or only a positive impact on the environment. Such claims may fall under Article 6(1)(a) and (b) of the Unfair Commercial Practices Directive if they may deceive the

average consumer and cause him to make a transactional decision that he would not otherwise have made.

Because terms such as "conscious" and "responsible" can refer to many aspects, such as social or economic conditions, such claims, even if nuanced, can be considered misleading since they are vague and ambiguous terms.

4.17.

The interpretation of the notion of average consumer varies depending on the context. The recitals of the Directive and the case law of the European Court of Justice refer to the notional average consumer, i.e. the reasonably well-informed, prudent and observant consumer, also taking into account social, cultural and linguistic factors. The average consumer can be expected to be willing to delve into the information offered by the trader. In doing so, the average consumer is in principle expected to be able to appreciate the information provided and, if necessary, to seek further information and then relate the information from different sources. However, this does not mean that the average consumer is always considered capable of processing information from different sources. Whether this should be expected should be judged by the circumstances of the case.

4.18.

For the administrative enforcement of the Directive, the Authority Consumer and Market (hereafter ACM) has been designated as the competent authority for the Netherlands. The ACM has issued a Guideline on Sustainability Claims. In it, it has formulated rules of thumb to help companies formulate sustainability claims. These public law rules can serve as a source of inspiration when interpreting the civil law standards framework. The Sustainability Claims Guide issued by the ACM (version 2, 2023) provides - in summary - the following rules of thumb, among others: use correct, clear, specific and complete sustainability claims, substantiate sustainability claims with facts and keep them up to date, describe future sustainability ambitions concretely and measurably, and ensure that visual claims and labels are helpful to consumers and not confusing.

4.19.

The Advertising Code Foundation has drawn up the Dutch Advertising Code (hereinafter: the NRC) within the framework of self-regulation. These rules - and the rulings of the Advertising Code Committee and the Board of Appeal based on them - color the statutory civil law framework of standards. Edition 2020 of the NRC states (among other things) that advertising may not be unfair or misleading. The Environmental Advertising Code (hereinafter: the MRC) of the Advertising Code Foundation, which was amended as of October 1, 2000 and applied until February 1, 2023, describes that environmental claims may not contain statements, images or suggestions that may mislead consumers about environmental aspects of the advertised products, or about the advertiser's contribution to maintaining and promoting a clean and safe environment in general. Environmental claims must also be demonstrably accurate. The more absolutist the environmental claims are, the tougher the requirements for evidence become.

General comments for assessing KLM's nineteen expressions

4.20.

In testing these nineteen advertisements against the framework of standards set out above, what matters first is whether these advertisements are factually correct. Also important is whether the information provided and/or omitted is misleading. This includes the context in which the information was provided and/or omitted.

4.21.

KLM has ambitions in the field of CO₂ reduction and in that context is committed to (among other things) fleet renewal, the use of aviation fuel other than fossil fuel (SAF) and operational improvements. The court first of all stated that KLM is free to inform consumers about its ambitions and about the way in which KLM is committed to achieving its ambitions. KLM is also free to advertise flying with KLM. The use of the term "sustainable" is not automatically inadmissible, but when using such vague terms about environmental benefits with social connotations, it is up to the user (KLM) to make clear to the consumer what is meant by this in this specific case. Otherwise, there is a risk of creating the impression among consumers that a KLM product or activity has no (or a less) negative impact on the environment than it actually does. And that can be misleading. The above does not result in KLM having to warn

consumers by stating in its expressions that today's aviation is not sustainable. The bottom line is that consumers should be honestly informed.

4.22.

The court is mindful of the fact that consumers in this day and age like to be informed about the environmental aspects of the products they use. Consumers are concerned with sustainability and the desire to make better choices in this regard is increasingly playing a role in the decision to buy or not buy a particular product. This also applies to the decision to fly or not (and if so, under what conditions). Expressions that respond to this and create an impression about the "sustainability" of a product or the provider may therefore influence the decision to purchase a product from KLM.

4.23.

With regard to the nineteen KLM advertisements described in the subpoena, against this background, it is considered and ruled as follows.

4.24.

Advertisements 1 through 13 are part of the "Fly Responsibly" campaign, which KLM says is primarily an awareness campaign.

Expression 1 (finding place: social media)

Fortunately, the way we travel is changing

And together we are moving toward a more sustainable future

Because more sustainable travel is our greatest adventure ever

Together towards more sustainable travel

4.25.

This is the introduction that is part of an (advertising) video that can be found on KLM's Fly Responsibly website.

4.26.

Advert 1, according to KLM, involves an ambition that is recognizable as such and expressed in its pioneering role. An ambition accompanied by the repeated statement, "Yes, we are an airline, and we realize that aviation today is far from sustainable, despite the fact that we have been working hard for some time to improve every aspect of our operations."

4.27.

Nevertheless, this advertisement contains an environmental claim based on, what paragraph 4.1.1.3 of the European Commission Guidelines calls, vague and general statements regarding environmental benefits ("the way we travel (is) changing", "more sustainable" and "more sustainable"). This advertising is not sufficiently concrete about what environmental benefit will be achieved and to which aspects of (flying with) KLM this then refers. Nor does it make clear to consumers what KLM has in mind specifically to achieve certain objectives. The fact that additional information can be found on KLM's Fly Responsibly website does not change this. Especially since it is insufficiently clear from the advertisement that this is merely an ambition of KLM. KLM states quite firmly that consumers will travel with it to a more sustainable future, while it is not clear whether and if so how flying with KLM contributes to this.

4.28.

Therefore, advertisement 1 is misleading and qualifies as a prohibited trade practice.

Expression 2 (location: physical advertising)

Join us in creating a more sustainable future

4.29.

This concerns a poster on a billboard (at the time) at Schiphol Airport showing a child sitting on a swing, against a background of sky, water and mountains.

4.30.

In fact, KLM's advertisement here (just like in advertisement 1) contains the message that consumers will join KLM on the road to a more sustainable future. The expression is considered misleading for the same reasons as mentioned above for expression 1. In addition, the background reinforces the impression that there are environmental benefits to be gained by "joining KLM" without making it clear in what way.

Expression 3 (find location: "Fly Responsibly" website)

With Fly Responsibly, KLM is taking the lead in creating a more sustainable future for aviation. We recognize the urgent need to limit global warming. That is why we are committed to the goals of the Paris Climate Accord. But we can only succeed if we all work together. So join us today for a more sustainable future.

4.31.

Advert 3 opens and ends with a vague and general statement about environmental benefits ("With Fly Responsibly, KLM is taking the lead to realize a more sustainable future for aviation" and "So join us today for a more sustainable future" respectively). It lacks sufficient clarity about the (concrete) environmental benefits and to which aspects of the product they relate.

4.32.

In recognition of the urgent need to limit global warming, KLM has, according to this advertisement, committed itself to the goals of the Paris Climate Agreement. This can mean nothing other than that KLM has endorsed these objectives in the sense that it has aligned its own objectives with them. It is clear that the realization of the goals of the Paris Climate Agreement does not, at least not solely, depend on KLM and the realization of its goals. But advertisement 3 does suggest that the realization of KLM's own objectives - in line with the Paris Climate Agreement - is feasible. While this feasibility is made contingent on cooperation with others ("all of them"), it is not fleshed out concretely, measurably and specifically. How consumers can "connect" and how this contributes to "a more sustainable future" remains entirely undefined.

4.33.

In view of the foregoing, advertisement 3 is misleading and a prohibited trade practice.

Expression 4 through 10 on the "Fly Responsibly" website at "What we do"

4.34.

Advertisements 4 through 10 from the "Fly Responsibly" campaign concern KLM's own measures.

Expression 4

The aviation industry's ambition is to achieve net zero CO2 emissions by 2050, and to underscore this promise, we are developing our own path based on the Science Based Targets initiative.

This path consists of several measures, each of which will help reduce our CO2 emissions. Such as fleet renewal, operational improvements and CO2 offsetting. But by far the biggest contribution will come from replacing fossil aviation fuel with sustainable aviation fuel, or SAF (Sustainable Aviation Fuels).

Expression 5

KLM Group's CO2 emissions have been steadily decreasing.

Expression 6

Sustainable jet fuel: a promising solution.

[...] So why doesn't KLM just switch to SAF? Unfortunately, it's not that simple. Global production of SAF covers only about 0.1% of the airline industry's total fuel consumption and is inhibited by a status quo: there is very little manufacturing capacity available worldwide

As a result, SAF is at least 2 to 3 times more expensive than regular kerosene because of high prices, very few airlines are willing - and able - to buy SAF, and because there is so little demand, production capacity is not being scaled up

To break this deadlock, a strong signal is needed from the aviation industry to ramp up and boost SAF production, and ultimately drive prices down. SAF is a crucial component of the aviation industry's trajectory to achieve zero CO2 emissions by 2050. So it is important that we succeed.

Therefore, KLM decided to act as an industry leader in creating this demand-driven signal. KLM currently has a significant share of the global SAF market, but this still covers less than 1% of our entire fuel consumption. To meet our climate ambitions, we want to use 10% SAF by 2030. To this end, we are working with SkyNRG to build Europe's largest SAF plant. Moreover, since January 2022, we have been blending a small percentage of SAF on KLM flights departing from Amsterdam.

Yes, right now we are talking about small amounts of SAF, which produce only small reductions in CO2 emissions. Not only can we create this market, but we can - and will - lead the way.

Expression 7

First passenger flight on sustainable synthetic kerosene.

[...] This first flight is an important milestone in the development of sustainable synthetic kerosene as a viable alternative to fossil fuels. In addition, it is a major step toward a sustainable future for the aviation industry.

Expression 8

Smaller carbon footprint, more forests.

For ten years we have offered you a simple service that allows you to offset your personal share of your flight's CO2 emissions. With our CO2ZERO service, you can reduce the impact of your flight on the environment (...).

Expression 9

Together, we can make your business travel more sustainable.

KLM is not alone in its desire to do business more sustainably. Many other companies, in a wide range of industries, feel the same way. We are partnering with such companies to encourage the widespread availability of sustainable jet fuel and to make that fuel more economically competitive with fossil kerosene.

Expression 10

STEP BY STEP TO A SUSTAINABLE FUTURE.

PROMOTING SUSTAINABILITY CAN BE DONE IN ALMOST EVERY ASPECT OF OUR OPERATIONS. FOR EXAMPLE, EVEN A SMALL REDUCTION IN FLIGHT WEIGHT HAS A NOTICEABLE EFFECT.

4.35.

The court considers these expressions on the website in context, interrelationship and context, and then addresses specific parts of them.

4.36.

KLM expresses an ambition in these expressions and mentions at a number of points what it is doing to achieve this ambition. The goal (expressions 4 and 6) is to achieve "net zero CO2 emissions" by 2050. KLM has sufficiently explained that it is actually making efforts to reduce CO2 emissions (or their consequences). The fact that KLM is not focusing on flying less, but rather on reducing the harmful effects cannot be objected to. Nevertheless, the Court has come to the conclusion that KLM has insufficiently substantiated that the solutions it has mentioned are of such a nature that they justify the text of the claims and the statements (also seen together). To this end, the following is of importance.

4.37.

KLM uses terms like "an important milestone" and "promising solution" and "a big step toward a sustainable future." KLM lists measures such as fleet renewal, operational improvements and CO2 offsetting and then states "but by far the largest contribution will be made by SAF." This suggests that a great deal can already be expected from the other measures KLM is deploying and that SAF will contribute much more to the goal of achieving "net zero CO2 emissions" by 2050. This paints too rosy a picture, since it follows from the explanations accompanying the measures that at present they are only marginally reducing CO2 emissions and the negative environmental aspects of flying. It cannot be excluded that this will improve in the future, but given all the uncertain factors in that area, it does not

benefit KLM to paint the overly positive picture it did in the expressions. With that, the expressions are, with one exception, misleading.

Expression 4

4.38.

Expression 4 states that the measures KLM is taking "all contribute" to reducing CO2 emissions. CO2 compensation is also listed as an example of the measures. This refers to an amount that customers can pay to contribute to reforestation (carbon credits). KLM recognizes that measures that see CO2 compensation (at best) have the effect of reducing the negative aspects of CO2 emissions. CO2 emissions themselves are not reduced by something like reforestation. Thus, this part of the statement is factually incorrect. It creates a false impression about the product's climate impact that may influence the consumer's decision and is thus misleading.

4.39.

The court does not consider decisive in this regard that KLM underscores the ambition of "net zero CO2 emissions by 2050" by developing its own pathway based on the *Science Based Targets* initiative. Indeed, KLM does not base specific claims on the SBTi validation.

Expression 5

4.40.

The table outlines the KLM Group's CO2 emissions over the period from 2005 to 2020 and an ambition for 2030. Fossilvrij (En: Fossil Free) has not sufficiently highlighted why this table would be inaccurate or misleading. The text accompanying the table that CO2 emissions have been steadily decreasing is not incorrect in light of the statistics. Therefore, the statement cannot be considered an unfair trade practice.

Expression 6

4.41.

SAF is presented here as "sustainable" aviation fuel. Although SAF can contribute to reducing the harmful environmental aspects of flying, the term "sustainable" here is too absolute and not concrete enough. The statement that it is a "promising solution" also paints too rosy a picture. KLM then does nuance the share of SAF and its application on a larger scale to some extent, but given the firm starting claim "Sustainable jet fuel: a promising solution" it does not do so sufficiently. At present, SAF's share in total fuel consumption (and thus in the reduction of CO2 emissions) is still very limited for various reasons. A more substantial share can only be expected in the distant future, and thus uncertain. The expression is therefore misleading.

Expression 7

4.42.

KLM reports that "the first" passenger flight has taken place on synthetic kerosene and it describes this as an "important milestone" in the development of a viable alternative to fossil fuels. It is "a major step toward a sustainable future for the aviation industry." All this raises positive consumer expectations about flying on synthetic kerosene. KLM explained at the oral hearing that after this one flight there were no more (passenger) flights on synthetic kerosene. It was an experiment. Nor are any new flights on synthetic kerosene planned at this time. This is not clear to the person reading the expression. The advertisement therefore suggests more than is actually the case and thus paints an overly positive picture. The expression is therefore misleading.

Expression 8

4.43.

KLM uses this expression to highlight the possibility for KLM customers to make a financial contribution to a reforestation project selected by KLM (*carbon credits*). The term CO2ZERO service thereby creates the impression that customers thereby (can) contribute in a relevant way to "CO2ZERO" or "zero CO2 emissions. This is an absolute and far-reaching term. This impression is not justified and may well be essential for the choice of the product. Added to that, the statement says "with our CO2ZERO service you can reduce the impact of your flight on the environment." And it talks about your share of your flight's emissions. This suggests that there is a link between the customer's contribution and reducing the negative environmental aspects of the customer's own flight. It gives the impression that the customer can completely erase the negative effects of CO2 emissions caused by him. This is not the

case. Although the system of more forests is to be welcomed in itself, its effect is uncertain because, for example, it is not clear whether the trees will remain permanently. To the extent that the reforestation project makes some contribution to reducing the impact of CO₂ emissions on the environment, there is no direct link between the customer's tangible contribution and the impact of the CO₂ emissions of its flight. Against this background, the statement is misleading.

Expression 9

4.44.

This expression is not directed at consumers within the meaning of the Unfair Commercial Practices Act and therefore falls outside the framework of standards outlined above. Insofar as the claims relate to this expression, they are therefore dismissed.

Expression 10

4.45.

The expression begins with "step by step to a sustainable future." In this context, the court refers to its earlier considerations about vague and general statements about environmental benefits. KLM then describes what it apparently has in mind when moving toward a "more sustainable future," namely "Promoting sustainability can be done in almost all aspects of our business". KLM does not make sufficiently clear what concrete steps it is taking and how these will lead to environmental benefits. The advertisement does mention the noticeable effect of a small decrease in flight weight, but specifications are lacking, as is the marginal effect on "sustainability". The advertisement is thus misleading.

Expressions 11 through 13 on the "Fly Responsibly" website under "What can you do?"

4.46.

Advertisements 11 through 13 from the "Fly Responsibly" campaign deal with consumer action. These expressions address the consumer directly. They are not about aspirations, but about what the consumer can actually expect when purchasing a particular product.

Expression 11

What you can do

[...] If you do decide to fly, there are always ways to reduce your impact on the environment.

Expression 12

CO2ZERO

[...] If you want to further reduce the environmental impact of your flight, our CO2ZERO offering now allows you to choose a number of other sustainable jet fuel options in addition to the refueling program.

Reforestation can naturally offset CO₂ emissions from the airline industry. With reforestation, you pay a small fee to offset (part of) the environmental impact of your flight. This does not affect the direct emissions of the flight itself, but you help by planting trees that reabsorb the CO₂ from your flight.

The new SAF-based options in CO2ZERO have a dual environmental benefit. First, you directly reduce the net CO₂ emissions of a flight. Second, you help grow the SAF market.

With these initiatives, KLM aims to make flying more sustainable in a fully transparent way. [...] Of the SAF revenues received through ticket prices and the expanded CO2ZERO program, 100% will be used directly, transparently and exclusively to purchase new SAF and promote the production of SAF worldwide.

Expression 13

Together we can make a bigger difference

Only if we all work together can we really make a difference. All aviation industry stakeholders, all airlines, all manufacturers - the whole business community. Together we can advance the production of sustainable jet fuel, accelerate our fleet renewal, and achieve more faster and better. That is why we have launched this initiative calling on everyone to fly responsibly: "Fly Responsibly." We kindly invite you to join us in making aviation more sustainable.

Expression 11

4.47.

This expression is not factually incorrect and Fossilvrij (En: Fossil Free) has also not sufficiently explained why this expression is in violation of the standards framework outlined above. The expression does not imply a claim and is not misleading or unfair.

Expression 12

4.48.

In this expression, KLM discusses the possibilities of contributing to SAF and a reforestation project. In doing so it uses a number of absolute and/or vague terms, namely "CO2ZERO" and "sustainable aviation fuel". The Court refers to what it noted on this subject in the previous expressions. The options KLM describes in the advertisement do not result in zero CO2 emissions or undo the harmful environmental aspects of flying to such an extent that the use of the heading "CO2ZERO" is justified. The options mentioned by KLM currently achieve a marginal effect. In addition, here too a direct link is wrongly suggested between a customer contribution and the impact of his flight on the environment. The expression is thus misleading.

Expression 13

4.49.

KLM is in fact making a call here for all stakeholders to take steps to make aviation more sustainable. The expression contains no claim about KLM or its products. Fossilvrij (En: Fossil Free) has not provided sufficient evidence for the opinion that the expression is nevertheless misleading or unfair.

Expression 14 to 16: CO2ZERO

4.50.

Advertisements 14 through 16 are part of CO2ZERO marketing, which KLM says is not an advertising campaign (nor a branding campaign), but the name of an optional product that allows consumers to contribute to reforestation projects and SAF.

Expression 14

CO2ZERO

Reduce your impact

Expression 15

CO2ZERO

At KLM, we are investing in a range of initiatives to reduce our footprint. You too can do your part to make aviation a more sustainable industry. Let's change the future together!

With our reforestation program, you offset (part of) the environmental impact of your flight. It doesn't affect the direct emissions of the flight itself, but your contribution helps restore forests that absorb CO2.

How you can help [...] And, you can do more: get involved by contributing to one (or both!) of our sustainable programs so that together we can create a better future. Reforestation is a contribution from nature that reduces CO2 emissions outside the aviation industry, but SAF has a direct impact on making flights more sustainable.

Restore forests to absorb [x] kg of your CO2 emissions

Contribute to sustainable jet fuel and reduce your CO2 emissions by [x] kg Your CO2 absorbed by reforestation 0 kg CO2

Your CO2 reduced by SAF 0 kg CO2

Expression 16

Within our CO2ZERO program is not only SAF, but also our reforestation project. You are in control: choose whether you want to contribute fully to SAF or prefer a mix of both initiatives.

Expressions 14 through 16

4.51.

KLM here uses the absolute designation "CO2ZERO" and the stilted "Reduce your impact" (with an image of green leaves around an airplane). In this context, the court refers to its previous considerations on expressions that state "CO2ZERO" or "zero CO2 emissions." The expressions in this case also suggest more than can be realized. KLM encourages consumers to "change the future together" and "create a better future together." This creates the impression that with the reforestation program offered by KLM and its contribution to SAF when flying, important steps are being taken to make a positive contribution to the future, in that aviation is becoming a "more sustainable industry." In doing so, KLM paints too rosy a picture of the (small) environmental benefits that can be achieved with a customer contribution to reforestation or SAF. Moreover, again, a direct link between a customer's contribution and the environmental impact of their flight is wrongly suggested.

Expressions 17 through 19: KLM Real Deal Days

4.52.

Advertisements 17 through 19 are part of the "KLM Real Days" marketing.

Expression 17

The Real Deal Days are all about traveling for moments that really matter. Because when we travel more consciously, all moments are even more beautiful.

KLM is investing heavily in sustainable fuel and we invite you to help us do so. If you choose this option during the Real Deal Days, KLM will double this amount with the Sustainable Fuel Bonus.

Expression 18

What are the KLM Real Deal Days?

KLM Real Deal Days is a 2-week price promotion by KLM. This promotion offers discounts on more than 50 destinations worldwide. During the promotion, the Sustainable Fuel Bonus also applies: if you book a ticket during the Real Deal Days and choose to invest in sustainable fuel, KLM will invest with you and double your contribution. Because when we travel more consciously, all moments are even more beautiful.

What is the Sustainable Fuel Bonus?

KLM is taking the lead for a more sustainable future for aviation. That is why we are investing heavily in sustainable fuel (also known as Sustainable Aviation Fuel or SAF for short). If you choose to contribute to our sustainable fuel program during the Real Deal Days, KLM will double this amount with the Sustainable Fuel Bonus. Select one of the three options that Sustainable Aviation Fuel is part of and reduce your expected CO2 emissions. KLM will double every euro you contribute to SAF.

Is KLM also doubling your contribution to reforestation?

Fantastic if you choose to contribute to reforestation, only here the Sustainable Fuel Bonus does not apply. That applies during the Real Deal Days promotion only to sustainable aviation fuel (Sustainable Aviation Fuel or SAF for short)....

Does the Sustainable Fuel Bonus also apply on KLM Holidays package tours?

The Bonus applies only to airline ticket bookings. Package travel is excluded from the Sustainable Fuel Bonus, as a different sustainability offer applies to KLM Holidays bookings. Are you booking a complete package trip through KLM Holidays? KLM accounts for the expected CO2 impact of your share of the flight by default. All amounts are invested by us directly in the CO2OL Tropical Mix reforestation project in Panama.

Why is KLM taking this initiative?

We believe it is important for our customers to make a conscious choice to fly. We understand that people are concerned about climate change and take responsibility to reduce the impact of our operation on our environment. In addition to fleet renewal and improving operational innovation and

efficiency, we want to reduce emissions by encouraging the production of renewable fuel. This is why we have chosen to blend 0.5% SAF as standard on flights out of Amsterdam. Customers who want to do something extra can contribute to the purchase of even more sustainable fuel through CO2ZERO.

How is KLM reducing its carbon footprint?

A major contribution to the sustainability policy is KLM's major investment in fleet renewal, with the introduction of more fuel-efficient and quieter aircraft. In addition, KLM saves fuel through operational efficiency, including the optimization and reduction of on-board weight. The use of electric ground equipment is key to reducing CO2 emissions from ground processes. KLM is also a pioneer in sustainable jet fuel, which reduces CO2 emissions by at least 75% compared to standard fossil fuel. We are also working with many different parties to shape the future of flying, for example through the development of new, energy-efficient aircraft, the use of 100% renewable energy; climate-neutral logistics operations of aviation and the impact of sustainable aviation on the passenger. Encouraging entrepreneurship and training new talent is also an important pillar.

What else is KLM doing in the area of sustainability?

See more at Fly Responsibly | KLM.com

Expression 19 (during a radio broadcast)

0:05:10

It's Real Deal Days at KLM, deals for moments that really matter. Like having adventures together on Aruba. Starting at 599 euros.

*There are only two real deal days left.
So take a quick look, at KLM.com*

0:05:36

If you choose sustainable fuel during the KLM Real deal days, KLM will double your contribution. Because when we travel more consciously, all moments are even more beautiful.

Expressions 17 through 19

4.53.

KLM is free to express its ambitions and to advertise flying. Yet these expressions are misleading on a number of points. KLM states in the communications that it is investing heavily in sustainable fuel. The term "sustainable fuel," which often appears in the expressions, is too absolute. Furthermore, KLM does not make sufficiently clear to consumers what it is investing in SAF and what environmental benefits can be achieved. In essential parts of these communications KLM creates too rosy a picture and makes (implicit) claims that are insufficiently substantiated. Such as that "sustainable jet fuel" reduces CO2 emissions by "at least 75%" compared to fossil fuel. KLM uses the term "more conscious travel" and creates the impression that flying with KLM is sustainable, when in fact it is a price stunt. Although the statements are correct and informative in parts, the Court concludes that the statements are misleading when viewed in their entire context.

Manipulation requirement

4.54.

KLM made the nineteen statements so that its public would consider them in its decision-making. In other words, it was reasonably foreseeable to KLM that the economic behavior of its public would be disrupted in the event of factually incorrect, incomplete and/or misleading information. It is sufficiently plausible that in the event of such information, the average consumer takes or could take a decision about an agreement with KLM that he would not have taken otherwise. Partly important here is that the average consumer, from an alertness to climate-related issues, is sensitive to "green" claims.

Statement of law: fifteen statements misleading

4.55.

From what has been considered and ruled above, it follows that the claimed declaratory judgment is admissible in the sense that advertisements 1, 2, 3, 4, 6, 7, 8, 10 and 12 (as described above and suggesting that flying can be or become sustainable) and advertisements 14, 15, 16, 17 18 and 19 (as described above and suggesting that the purchase or contribution to a "compensation" product actually reduces, absorbs or compensates for part of the climate impact of flying) are misleading and unlawful and that KLM thereby violates the Unfair Commercial Practices Act.

Ban on expressions

4.56.

The dispute then focuses on the question of civil penalties for these prohibited business practices by KLM.

4.57.

The Court finds, in the absence of sufficient evidence to the contrary, that KLM no longer carries any of the fifteen advertisements assessed as misleading. For this reason, the claim seeking an injunction against publication of these fifteen advertisements is not allowable. Although KLM maintains that (also) these advertisements were made lawfully, it has decided, after reconsideration, to "sit on the safe side" and no longer carry them. There are no indications that KLM does intend to carry the 15 unlawful expressions again in the future. There is thus no threat of violation of its legal duty necessary for an injunction.

4.58.

Similarly, the claim seeking an injunction against the publication of the expressions that are similar or similar to the expressions found to be misleading is also not allowable. This is because it is not possible to determine in advance which "similar expressions" fail the test under the Unfair Commercial Practices Act. In this regard, it is particularly important that the outcome of this test always depends on the circumstances of the case. Fossilvrij (En: Fossil Free) claims a prohibition that is unlimited in time, while it cannot be excluded that developments will take place as a result of which (parts of) the fifteen expressions can no longer be considered misleading. Imposing a ban on "similar expressions" is so broad that it cannot pass the test of Article 10 ECHR. In the absence of clarity about the scope, the measure could have a chilling effect, causing KLM to refrain from making statements more than necessary. In view of this, the requested measure is not proportionate.

No removal order and no rectification

4.59.

The order to remove the nineteen expressions and expressions varying therefrom is not admissible. To this end, reference is made to what was considered and ruled above under 4.57 and 4.58. An order to remove advertisements no longer carried is meaningless. To the extent the claimed injunction concerns advertisements similar to the misleading advertisements assessed, it cannot be awarded. The debate in this case did not concern expressions other than the nineteen disputed expressions.

4.60.

With regard to the claim for an order for rectification, the following is considered. Section 6:167 of the Dutch Civil Code provides, in so far as relevant here, that when a person is liable towards another under Title 3 of Book 6 of the Dutch Civil Code in respect of an incorrect or by incompleteness misleading publication of information of a factual nature, the court may order him, at the request of that other person, to publish a rectification in a manner to be specified by the court. It is established that KLM no longer (publicly) carries the fifteen misleading advertisements. Fossilvrij does not explain, or at least not sufficiently, that because of these advertisements from the past, the average consumer still makes or can make a decision about an agreement that he otherwise would not have made. That the expressions, according to Fossilvrij, contributed to the prevailing incorrect image of flying in general is insufficient to justify the requested rectification. In this connection, it is also important that this case (and thus the inadmissibility of the fifteen expressions) is expected to receive plenty of media attention. The claimed order for rectification is therefore rejected.

4.61.

The claim for an injunction against a warning text is also rejected. The Unfair Trade Practices Act provides no basis for such an order.

Litigation Costs

4.62.

With respect to part (i) of claim VIII ("litigation costs and fees"), the following is considered. Fossilvrij (En: Fossil Free) does not explain, or at least not sufficiently, that it incurred reasonable costs as referred to in Section 6:96(2) of the Dutch Civil Code.

Section 1018l(2) of the Code of Civil Procedure can only be applied in the case of a judgment pursuant to Section 1018i of the Code of Civil Procedure, that is, a judgment establishing a class action for damages. This is not the case in this instance.

4.63.

KLM, as the party mainly found against, will be ordered to pay the costs of the proceedings. These are estimated on the side of Fossilvrij up to this judgment at € 125.03 for summons costs, € 2,837.00 for court registry fees and € 15,249.50 for attorney's fees (three and a half points, rate VIII), in total € 18,211.53. The subsequent costs are awarded in the manner stated in the decision.

5. The decision

The court:

5.1.

Declares that the advertisements 1, 2, 3, 4, 6, 7, 8, 10 and 12 described in this judgment suggesting that flying can be or become sustainable and the advertisements 14, 15, 16, 17, 18 and 19 suggesting that the purchase or contribution to a "compensation" product actually reduces, absorbs or compensates for part of the climate impact of flying are misleading and unlawful and that KLM thereby violates the Unfair Trade Practices Act;

5.2.

orders KLM to pay the costs of the proceedings, estimated to date at € 18,211.53 on the part of Fossilvrij, to be paid within fourteen days of the summons to that effect; if KLM fails to comply with this order in time and the judgment is served thereafter, it must

Pay an additional €92.00, plus costs of service;

5.3.

Declares this order for costs enforceable;

5.4.

Dismisses the more or otherwise claimed.

This judgment has been rendered by M.R. Jöbbsis, J.W. Bockwinkel and R.C.J. Hamming, Judges, assisted by A.A.J. Wissink, Registrar, and publicly pronounced on March 20, 2024.

Appendix referred to in 3.1 (the claims brought by Fossilvrij (En: Fossil Free))

Fossilvrij (En: Fossil Free) demands that the court rule, to the extent feasible enforceable:

claim I: exclusive advocacy group

That Fossilvrij (En: Fossil Free) is admissible in this class action lawsuit and is appointed as exclusive advocacy group;

requisition II: definition narrowly defined group

if the court is of the opinion that it must determine for which narrowly defined group of persons the exclusive representative represents the interests in this collective action within the meaning of Section 1018e(2) of the Code of Civil Procedure: that this collective action relates to the following group of natural persons, namely all natural persons residing in the Netherlands at the time the summons is issued, and those who are born and come to reside in the Netherlands after the date of this summons;

claim III: opt-out possibility

That any person residing or domiciled in the Netherlands for a period of three months after the announcement within the meaning of Section 1018f(3) of the Code of Civil Procedure of the judgment designating the exclusive representative of interests, shall have the opportunity, by written notice to the registry of the court, to withdraw from the representation of their interests in this collective action;

claim IV: declaratory judgment

That it be declared that:

I. the advertising -promotions #1 through #13 made by KLM as described in Chapter 5 of the body of the subpoena suggesting that flying can be or become sustainable, for reasons stated in the body of the subpoena, are misleading and unlawful and that KLM is thus in violation of the fundamental rights referred to in the body of the subpoena and the OHP Directive; and

the advertisements #14 through #19 made by KLM as described in Chapter 5 of the body of the subpoena, suggesting that the purchase or contribution to a "compensation" product actually reduces, absorbs or offsets some of the climate impact of flying for reasons stated in the body of the subpoena, are misleading and unlawful and that KLM is thus in violation of the fundamental rights referred to in the body of the subpoena and the OHP Directive;

claim V: prohibition and injunction

(i) That KLM be prohibited from, at the latest, commencing one week from the date of the judgment to be rendered in this matter:

a. to make public or cause to be made public in any form or manner the advertisements #1 through #19 as described in Chapter 5 of the body of the subpoena or advertisements with text equal or similar thereto, as well as in which it is suggested by commendatory wording that flying, whether with KLM or not, can be done in a manner from a climate change "sustainable" or "responsible" point of view;

(ii) That KLM be ordered to:

a. within one week after the date of the judgment to be rendered in this matter, to remove and keep removed, at its own expense, advertising statements #1 through #19 as described in Section 5 of the body of the subpoena, and statements varying therefrom but having substantially the same purport, from all media on which such statements have been disseminated, including but not limited to KLM's website, its social media channels, leaflets, flyers and time sheets circulated by KLM itself, (video) advertisements online or in print media, or otherwise; and

b. within one week of the date of the judgment to be entered in this matter, rectify at its own expense the advertisements #1 through #19 as described in Section 5 of the body of the subpoena by:

i. sending letters to all persons and institutions to whom KLM issued tickets between December 1, 2021 and May 23, 2022, on KLM letterhead, using KLM's usual house style for correspondence with its customers, by mail and by e-mail containing, except for addressing dating and closing, otherwise only the text as shown in Annex A to the summons, or such other text of the same nature and purport as the Court may deem appropriate, and without in any other way detracting in any way from the purpose and purport of the (knowability of the) rectification;

ii. the placing of a clear and legible half-page rectifying advertisement to be prepared in KLM's house style in five national daily newspapers (Trouw, AD, Telegraaf, Volkskrant and NRC) on the back

page of those newspapers, without any comments or additions in any form with the text as shown in Appendix B to the summons, or such other text of the same nature as the court deems appropriate, formatted in accordance with good printing practice, in a red frame with KLM's logo, under the heading "RECTIFICATION."

iii. for four weeks, or such period of time as the court deems appropriate, to post a clear and legible corrective text to be created in KLM's house style on all of its online marketing communications including banners and all social media accounts (Instagram, Twitter, LinkedIn, etc.) , which will remain visible while scrolling in any direction, with the text and in the form as included in Exhibit C to the subpoena, or such other text of the same nature as the court deems appropriate;

c. within three days after sending the above-mentioned rectification letters, to send to counsel for Fossilvrij (En: Fossil Free) a copy of one of the rectification letters sent, dated but in which the particulars pertaining to the addressee have been rendered illegible, accompanied by a confirmation issued by a Dutch bailiff or notary public that the rectification was sent in that form by KLM to the group of persons and institutions specified in the judgment; and

d. within one week of the date of the judgment to be rendered in this matter, to display or cause to be displayed, at its own expense, in a prominent place on the home page of the KLM website, the website booking tool and on the airline tickets issued for its flights, an easily readable warning text reading "Airplanes consume fossil fuel and contribute to climate change", in KLM's house style and in a font larger than the smallest font displayed in the same place;

claim VI: penalty

that which is claimed under V, on pain of forfeiture of a penalty payment of EUR 100,000.00, or such other amount as the Court considers appropriate, for each time that KLM acts in violation of (one or more parts of) the prohibition and/or (one or more) orders claimed under V, in such a way that this penalty payment will be due as many times as (parts of) the said prohibition is violated and/or (parts of) the said orders are not complied with, as well as a penalty payment of EUR 25.000.00 or such other amount as the Court may deem fit, per day that the violation or non-compliance in question continues, counting each part of a day as a whole;

claim VII: litigation costs and fees

Order KLM to compensate Fossilvrij (En: Fossil Free) for the extrajudicial costs and (litigation) expenses (Section 6:96 of the Civil Code and Section 1018l (2) of the Code of Civil Procedure), being:

(i) the full extrajudicial costs incurred by Fossilvrij (En: Fossil Free), to be increased by the statutory interest from the date of the judgment to be rendered in these proceedings until the day of payment in full, to be made out by statement if necessary and to be settled according to law; and

(ii) the costs that Fossilvrij (En: Fossil Free) will incur in connection with the actions that Fossilvrij (En: Fossil Free) will be expected to perform in its capacity as (co-)exclusive advocate until the final judgment, to be increased by the statutory interest from the date of the final judgment to be rendered in these proceedings until the day of payment in full, to be made up by statute, if necessary, and to be settled in accordance with the law; which amounts (i) and (ii) are to be further budgeted.

The annexes referred to in subsection (b) of subdivision (ii) of claim V shall read:

APPENDIX A

Text proposal for rectification letters KLM should send to its customers.

Subject: rectification regarding our sustainability claims

Dear [NAME].

KLM apologizes for making incorrect and misleading statements about the sustainability of flying and about the possibility of so-called CO2 compensation in its advertisements and on its website. With this letter KLM wants to correct the incorrect impression created by its marketing and advertising.

Scientific consensus: flying harms the climate

There is scientific consensus that a rapid and drastic reduction of greenhouse gas emissions, such as CO2, in all sectors is necessary to maintain a reasonable chance of limiting global warming to 1.5°C as agreed in the Paris Climate Agreement. The next few years will be decisive in this regard.

Dangerous climate change is already being felt around the world. However, global emissions of greenhouse gases continue to rise, and the world is headed for catastrophic warming. More information can be found here.

Burning fossil fuels, such as kerosene in aircraft engines, releases a lot of CO2. This is the main cause of dangerous climate change. So, flying exacerbates climate change. Flying also has other effects, such as nitrogen emissions and condensation trails, which have a significant impact on the climate. Booking a flight is the highest-emitting product for consumers to buy.

Flying less is the only thing KLM can do to limit climate damage

Alternative fuels (including "sustainable aviation fuels" or "SAF") and future technology cannot make flying "sustainable" in time, in line with the climate goal of the Paris Climate Agreement. Flying must be reduced immediately to meet that climate goal. It was therefore incorrectly misleading for us to speak of "sustainable flying." More information on the need to reduce flying is available here.

However, KLM's policy is to grow and emit more CO2.

KLM plans to continue to grow. As long as we grow, our total CO2 emissions will increase. Our suggestion that our emissions will decrease and that flying can be done "sustainably" or "responsibly," and by flying KLM a "more sustainable future" is closer to being achieved, was false and misleading.

Climate damage is not mitigated by making a financial contribution to KLM's CO2ZERO program.

We ran a marketing campaign called "CO2ZERO." In that context, we campaigned consumers to make small financial contributions to reforestation projects or the cost of using small amounts of alternative fuels. We said this would "offset", "reduce" or serve as an "offsetting" the negative climate effect of flying. That's just not true. The payments do not contribute to achieving the climate goal of the Paris Climate Agreement. The name "CO2ZERO" of our marketing campaign, was false and misleading.

The only way to meaningfully reduce the climate impact of flying and contribute to meeting climate goals is to not fly.

Sincerely,

[name and signature CEO]

APPENDIX B

Text proposal for rectification to be published by KLM in Dutch newspapers

RECTIFICATION

KLM has made incorrect and misleading statements about the sustainability of flying and about the possibility of so-called CO2 compensation in its advertisements and on its website. In this place KLM wants to correct the incorrect impression created by its marketing and advertising.

Scientific consensus: flying harms the climate

There is scientific consensus that a rapid and drastic reduction of greenhouse gas emissions, such as CO2, in all sectors is necessary to maintain a reasonable chance of limiting global warming to 1.5°C, as agreed in the Paris Climate Agreement. The next few years will be decisive in this regard.

Dangerous climate change is already being felt around the world. However, global greenhouse gas emissions continue to rise, and the world is headed for catastrophic warming. More information can be found here .

Burning fossil fuels, such as kerosene in aircraft engines, releases a lot of CO2. This is the main cause of dangerous climate change. So flying exacerbates climate change. Flying also has other effects, such as nitrogen emissions and condensation trails, which have a significant impact on the climate. Booking a flight is the highest-emitting product for consumers to buy.

Flying less is the only thing KLM can do to limit climate damage

Alternative fuels (including "sustainable aviation fuels" or "SAF") and future technology cannot make flying "sustainable" in time, in line with the climate goal of the Paris Climate Agreement.

Flying must be reduced immediately to meet that climate goal. It was therefore incorrectly misleading for us to speak of "sustainable flying." More information on the need to reduce flying is available here.

However, KLM's policy is to grow and emit more CO2.

KLM plans to continue to grow. As long as we grow, our total CO2 emissions will increase. Our suggestion that our emissions will decrease and that flying can be done "sustainably" or "responsibly," and by flying KLM a "more sustainable future" is closer to being achieved, was false and misleading.

Climate damage is not mitigated by making a financial contribution to KLM's CO2ZERO program.

We ran a marketing campaign called "CO2ZERO." In it, we asked consumers for small financial contributions to reforestation projects or the cost of using small amounts of alternative fuels. We said this would "offset", "reduce" or serve as an "offsetting" the negative climate effect of flying. That's just not true. The payments do not contribute to achieving the climate goal of the Paris Climate Agreement. The name "CO2ZERO" of our marketing campaign, was false and misleading.

The only way to meaningfully reduce the climate impact of flying and contribute to meeting climate goals is to not fly.

Sincerely,

[name and signature CEO]

APPENDIX C

Text proposal for the correction/banner KLM should publish/display on social media

Correction to KLM ads: There is no such thing as "sustainable" flying - flying must be reduced immediately to be in line with the goal of the Paris Climate Agreement.

1 Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market, OJEU L 149

2 Guidelines on the interpretation and application of Directive 2005/29/EC of the European Parliament and of the Council concerning unfair business-to-consumer commercial practices in the internal market, OJ C 526/1

Disclaimer:

The information presented above is an unofficial translation. The text is for information purposes only, it does not constitute legal advice. We disclaim all liability regarding decisions taken or not taken relying on the contents of this translation.