UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

#134/135/168/169/192/197/207/210

CIVIL MINUTES - GENERAL

Case No.	SACV 20-1431 PSG (KESx)	Date	April 6, 2022
Title	FTC v. QYK Brands LLC, et al.		

Present: The Honorable	Philip S. Gutierrez, United States District Judge

Wendy Hernandez	Not Reported
Deputy Clerk	Court Reporter
Attorneys Present for Plaintiff(s):	Attorneys Present for Defendant(s):
Not Present	Not Present

Proceedings (In Chambers): **Order GRANTING the FTC's motion for summary judgment and DENYING Defendants' motion for partial summary judgment**

Before the Court are two motions for summary judgment. Plaintiff, the Federal Trade Commission ("FTC"), filed a motion for summary judgment. *See generally* Dkt. # 168 ("*Mot. I*"). Defendants QYK Brands LLC d/b/a Glowyy ("QYK"); DRJSNATURAL LLC ("Dr. J's Natural"); Rakesh Tammabattula ("Tammabattula"); Jacqueline Thao Nguyen a/k/a Dr. J ("Dr. J"); EASII, Inc. ("EASII"); and Theo Pharmaceuticals, Inc. ("Theo") (collectively, "Defendants") opposed.[1] *See generally* Dkt. # 198 ("*Opp. I*"). The FTC replied.[2] *See generally*

[1] The FTC and Defendants both filed motions to exceed the 25-page limit set by the Local Rules. *See generally* Dkts. # 134, 197. The length of the briefing is unsurprising given the voluminous and unfiltered state of the FTC's supporting evidence. But because neither motion to exceed the page limit was opposed, the Court **GRANTS** both motions and accepts as filed both the FTC's motion and Defendants' opposition.

[2] The FTC also filed a 25-page reply. It subsequently realized that the Court's Standing Order requires reply briefs not to exceed 12 pages and so applied ex parte to exceed the page limit after the fact. *See generally* Dkt. # 207. Defendants opposed, arguing that the FTC does not meet the ex parte standard, does not establish good cause for the extra page limit, prejudices Defendants by raising new arguments for the first time in the reply, and should be sanctioned. *See generally* Dkt. # 208. True, the FTC does not meet the traditional *Mission Power* test for ex parte relief, but the test also permits relief where, as here, the movant is guilty of only excusable neglect. *See Mission Power Eng'g Co. v. Continental Cas. Co.*, 883 F. Supp. 488, 493 (C.D. Cal. 1995). Because the Court has already permitted the parties to exceed the page limit in their other briefs, there is no reason to disregard a majority of the FTC's reply at this point. And the Court fails to see how Defendants would be prejudiced by the extra pages simply because they allegedly raise

Dkt. # 205 ("*Reply I*"). Defendants also filed a motion for partial summary judgment. *See generally* Dkt. # 196 ("*Mot. II*"). The FTC opposed. *See generally* Dkt. # 196 ("*Opp. II*"). Defendants replied. *See generally* Dkt. # 203 ("*Reply II*").

The Court finds these matters appropriate for decision without oral argument. *See* Fed. R. Civ. P. 78; L.R. 7-15. Having considered the moving, opposing, and reply papers, the Court **GRANTS** the FTC's motion for summary judgment and **DENIES** Defendants' motion for partial summary judgment.

I. Background

This case concerns the sale of hand sanitizer and other health products that were in high demand at the outset of the COVID-19 pandemic. Defendants view themselves as heroes who worked around the clock to meet the needs of the American public during a global pandemic. *Opp. I* 1:2 20. The FTC views things differently, accusing Defendants of deceiving a frenzied public by soliciting orders for hand sanitizer that they neither had in stock nor could timely ship and claiming without support that a protein powder product could protect users from COVID-19. *Mot. I* 1:3 2:19.

A. Hand Sanitizer Sales

The facts are largely undisputed. Tammabattula and Dr. J own and operate several businesses, including QYK, Dr. J's Natural, Theo, and EASII. *Plaintiff's Statement of Undisputed Facts*, Dkt. # 136 ("*PSUF*"), ¶¶ 10, 13, 26 31, 35, 38. Tammabattula and Dr. J run these businesses as a tight-knit, joint enterprise that shares employees and office locations.[3] *Id.* ¶¶ 40 42.

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new arguments for the first time. As the Court previously explained to Defendants when they tried to raise a new argument in a reply brief, such arguments generally will not be considered even if made within the page limit. *See* Dkt. # 127 at 1 n.1 (citing *FT Travel-N.Y., LLC v. Your Travel Ctr., Inc.*, 112 F. Supp. 3d 1063, 1079 (C.D. Cal. 2015)). Accordingly, the Court **GRANTS** the FTC's ex parte application, accepts the reply brief as filed, and **DENIES** Defendants' request for sanctions.

[3] As such, the parties have stipulated that the corporate Defendants are a "common enterprise" and that each is jointly and severally liable for the actions of the others. *See* Dkt. # 164, ¶¶ 16 17.

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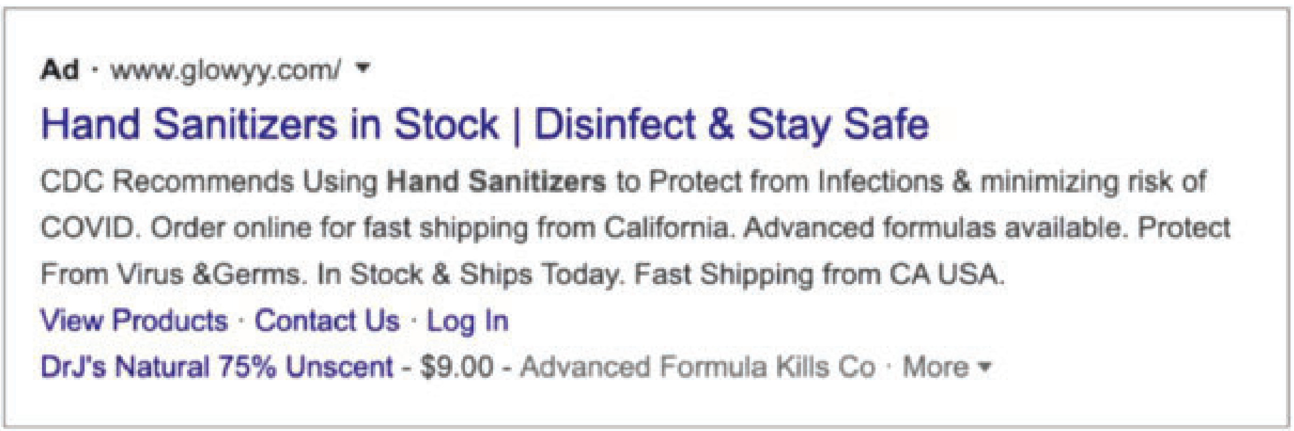
In March 2020, to meet a pandemic-driven swell in demand for disinfectants, Defendants began offering various hand sanitizer products on their Glowwy and Dr. J's Natural websites. *Id.* ¶¶ 52 53, 55 57. Defendants attracted customers by launching a "Google AdWords" campaign that would return an advertisement, similar to the one pictured below, in response to a web search for terms like "human coronavirus" or "hand sanitizer in stock." *Id.* ¶¶ 63 64. Defendants also ran other online advertisement campaigns on platforms like Facebook, Instagram, Reddit, and Bing. *Id.* ¶¶ 66 68, 265.



Between March 4 and March 18 alone, Defendants sold nearly 150,000 bottles of hand sanitizer. *Id.* ¶ 80. And between March and August 2020, Defendants' hand sanitizer sales totaled over $3.3 million. *Id.* ¶¶ 279, 391. The FTC attributes this sales boom in part to Defendants' fast shipping promises. For example, one Google advertisement that was live from March 4 to 18 prominently stated, "Hand Sanitizers in Stock" and "Ships Today." *Id.* ¶¶ 64, 77. And another Google advertisement that ran from April to mid-May 2020 boasted that hand sanitizer "Ships Fast from CA Today." *Id.* ¶ 191. It is unclear what, if any, shipping promises Defendants' advertisements on other platforms made. But between March and May 2020, Defendants' websites offered shipping times between three to ten days. *Id.* ¶¶ 171 77.

Defendants did not always follow through on their shipping promises. Of the 43,633 orders Defendants received between March and August 2020, the FTC claims that 39,724 were shipped late. *Id.* ¶ 390. This figure assumes that all sales made between March 4 to 18 and April 1 to May 18 promised one-day shipping, while orders placed between March 19 to 31 and May 19 to December 29 promised ten-day shipping. *Id.* But this assumption is not entirely supported by the record, as the FTC's only evidence of one-day shipping promises comes from Defendants' Google AdWords advertisements, which accounted for only 10 to 11% of Defendants' total hand sanitizer sales. *See* Dkt. # 199-3, Ex. C. In any event, it is undisputed

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that over 30,000 orders took more than 10 days to ship for orders placed between March and May 2020, *id.* ¶ 179, and over 10,000 orders took more than 30 days to ship, *id.* ¶ 394.[4]

The FTC avers that shipping was delayed in part because Defendants' inventory was woefully insufficient to meet demand. Throughout March and April 2020, Tammabattula publicly announced that Defendants lacked ingredients and packaging to keep up with demand. *PSUF* ¶¶ 331 33, 341 51. For example, from March 4 to 9, Defendants sold over 18,000 bottles of hand sanitizer but did not receive any stock from suppliers during that time. *Id.* ¶¶ 113 14. To be sure, Defendants tried to restock their inventory. *See id.* ¶ 116. But in early March 2020, India banned hand sanitizer exports, blocking important supply shipments from two producers. *Id.* ¶¶ 126 27. So Defendants turned their attention to China, ordering several thousand bottles of hand sanitizer that ultimately did not arrive until almost a week into Defendants' advertisement campaign. *Id.* ¶¶ 128 30. Despite known supply chain obstacles and a dwindling or nonexistent inventory, Defendants did not always indicate on their websites when products were sold out, *id.* ¶ 121, and instead continued to sell products that they did not have with the hope that their suppliers would deliver more inventory soon, *see DRPSUF* ¶ 121.

Defendants did not regularly notify their customers of the resulting shipping delays. On March 11, Defendants sent customers an "order processing time update," citing "longer than normal processing times" for "outbreak preparedness products." Dkt. # 162, Ex. 16, Att. W. Defendants stated that, "[i]f this delay is not acceptable, you may cancel your order for a full refund anytime before we ship." *Id.* But unless consumers contacted Defendants' customer service team, Defendants provided no other notice of shipping delays. *See PSUF* ¶ 214; *DRPSUF* ¶ 214.

Some customers voiced their dissatisfaction with the shipping delays and demanded refunds. *See PSUF* ¶¶ 258, 381. Defendants' return policy generally permitted customers to request a refund while the product was still in the "preshipment" stage i.e., before it had been placed in the mail carrier's possession. *Id.* ¶ 245. But at times, Defendants refused to issue

[4] Defendants argue that this figure is not accurate because postal workers would not always scan an order indicating that it had been picked up i.e., shipped until days after they actually picked it up. *See Defendants' Response to Plaintiff's Statement of Undisputed Facts*, Dkt. # 202 ("*DRPSUF*"), ¶ 394 (citing *Declaration of Rakesh Tammabattula*, Dkt. # 199 ("*Tammabattula Decl.*"), ¶ 34). But Tammabattula's speculative statements in declaration unsupported by any actual evidence are insufficient to create a genuine factual dispute. *See Thornhill Publ'g Co. v. Gen. Tel. & Elecs. Corp.*, 594 F.2d 730, 738 (9th Cir. 1979).

refunds once a shipping label had been generated and instead required customers to wait to receive the package and then reject it before receiving a refund. *See* Dkt. # 162, Ex. 16, Att. X, at 1 ("We can[']t cancel because it is already labelled. Your order will be scheduled for shipping within the week or early next week.").

B. Protein Powder as a COVID-19 Preventative

Defendants also sold a product called "Basic Immune IGG" that they offered through the Dr. J's Natural website. *PSUF* ¶¶ 280 81. Basic Immune IGG is a protein powder that is supposed to promote healthy digestion and immune function. *Id.* ¶¶ 286 87. It is not FDA-approved to treat or prevent COVID-19. *Id.* ¶ 309. During a Vietnamese language broadcast, Dr. J encouraged people to wash their hands regularly and use Basic Immune IGG. As a result, she "guaranteed" that people would "stay safe," citing the product's "FDA[] verification and approval." Dkt. # 144, Ex. 8, Att. A, at 14 15. She went on to explain that the protein powder could increase the user's total antibody count, giving them a better chance to "cling to and bite that coronavirus, push it out and kill it." *Id.* at 15. The broadcast host then said that, since Dr. J had taken the protein powder already, people "d[id not] have to be afraid of [her] anymore" and that people "c[ould] get close to [her]." *Id.* Dr. J confirmed: "Yes, you're right." *Id.* Dr. J also posted two English language videos on YouTube that made similar claims but with more muted language. *See PSUF* ¶¶ 299 308; Dkt. # 137-1, Ex. 1, Att. H, at 11 (explaining that Basic Immune IGG could help users "fight back and destroy all of the coronavirus that is entering into your body").

C. Procedural History

In August 2020, the FTC filed a complaint and an ex parte application for a temporary restraining order against Defendants. *See generally* Dkts. # 1, 6. The parties then stipulated to, and the Court approved, both a temporary restraining order and a preliminary injunction. *See generally* Dkts. # 28, 30. The FTC's operative first amended complaint asserts four claims:

> Count One Failure to Timely Ship Goods and Issue Refunds: Violation of the Mail, Internet, or Telephone Order Merchandise Rule ("MITOR"), 16 C.F.R. § 435.2(a) (c). *First Amended Complaint*, Dkt. # 73 ("*FAC*"), ¶¶ 72 73.
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> Count Two Deceptive Shipping Claims: Violation of § 5 of the FTC Act, 15 U.S.C. §§ 45(a), 52. *FAC* ¶¶ 77 79.

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Count Three Deceptive COVID-19 Prevention Claims: Violation of § 5 of the FTC Act, 15 U.S.C. §§ 45(a), 52. *FAC* ¶¶ 80 82.

Count Four False Establishment Claims: Violation of § 5 of the FTC Act, 15 U.S.C. §§ 45(a), 52. *FAC* ¶¶ 83 85.

The FTC now moves for summary judgment on each of its four claims, seeking monetary relief for consumers and a permanent injunction. *See generally Mot. I.* Defendants also move for partial summary judgment to bar the FTC from seeking what Defendants classify as a punitive disgorgement remedy. *See generally Mot. II.*

II. Legal Standard

"A party may move for summary judgment, identifying each claim or defense or the part of each claim or defense on which summary judgment is sought. The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a).

The party seeking summary judgment bears the initial burden of informing the court of the basis for its motion and identifying those portions of the pleadings and discovery responses that demonstrate the absence of a genuine issue of material fact. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). If the moving party meets its initial burden, the nonmoving party must set forth, by affidavit or as otherwise provided in Rule 56, "specific facts showing that there is a genuine issue for trial." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

In judging evidence at the summary judgment stage, the court does not make credibility determinations or weigh conflicting evidence. Rather, it draws all reasonable inferences in the light most favorable to the nonmoving party. *See T.W. Elec. Serv., Inc. v. Pac. Elec. Contractors Ass'n*, 809 F.2d 626, 630 31 (9th Cir. 1987). The evidence presented by the parties must be capable of being presented at trial in a form that would be admissible in evidence. *See* Fed. R. Civ. P. 56(c)(2). Conclusory, speculative testimony in affidavits and moving papers is insufficient to raise genuine issues of fact and defeat summary judgment. *See Thornhill Publ'g Co.*, 594 F.2d at 738.

III. Evidentiary Objections

The FTC asserts various evidentiary objections along with its reply. *See generally* Dkt. # 206. If the Court relies on any objected-to evidence, it relies only on admissible evidence and thus overrules the corresponding objection. *See Godinez v. Alta-Dena Certified Dairy LLC*, No. CV 15-01652 RSWL (SSx), 2016 WL 6915509, at *3 (C.D. Cal. Jan. 29, 2016).

IV. Discussion

The Court first addresses whether the FTC has carried its burden of proof as Plaintiff at summary judgment to prevail on its (A) MITOR claim and (B) FTC Act claims. The Court then turns to (C) the remedies the FTC is entitled to seek.

A. First Cause of Action: MITOR Violation

The FTC argues Defendants violated the MITOR for several reasons, namely by soliciting hand sanitizer orders without a reasonable basis to believe they could ship the orders as promised. *Mot. I* 26:3 35:13. The Court agrees.

The MITOR proscribes three distinct practices relating to shipping merchandise and refunding consumers. *See* 16 C.F.R. § 435.2. First, a seller may not solicit orders for merchandise "unless, at the time of the solicitation, the seller has a reasonable basis to expect that it will be able to ship any ordered merchandise to the buyer." *Id.* § 435.2(a). Shipment must be either within the time "clearly and conspicuously stated" in the solicitation or, if no time is specified, within 30 days after a buyer's order. *Id.* § 435.2(a)(i) (ii). Shipment means physically placing the merchandise "in the possession of the carrier." *Id.* § 435.1(e). Second, if the seller cannot ship within these timeframes, the seller must offer the buyer, "clearly and conspicuously and without prior demand," the option to either consent to delayed shipping or cancel the order and receive a "prompt refund." *Id.* § 435.2(b)(1). Third, sellers must issue a prompt refund if, (1) prior to shipment, the buyer cancels the order; or (2) the seller fails to offer the buyer the option to consent to the delay and has not timely shipped the goods. *Id.* § 435.2(c)(1), (5).

Defendants' hand sanitizer sales between March and August 2020 violated all three of the MITOR's proscribed practices. First, Defendants solicited orders for hand sanitizer that they did not have in stock and had no "reasonable basis" to believe would be available to ship on Defendants' advertised timelines. *See id.* § 435.2(a). Throughout March and April 2020, Tammabattula publicly acknowledged that Defendants lacked ingredients and packaging to keep up with demand. *PSUF* ¶¶ 331 33, 341 51. And Defendants knew that the COVID-19 pandemic had disrupted the global supply chain, resulting in delayed sometimes indefinitely shipments that they needed to meet an ever-growing demand for hand sanitizer. *Id.* ¶¶ 113 14, 126 30. This strongly suggests that Defendants had no "reasonable basis" to continue offering one to ten-day shipping or indicating that hand sanitizer was still in stock on their website. *See* 16 C.F.R. § 435.2(a). Additionally, over 10,000 orders took longer than 30 days to ship. *PSUF* ¶ 394. At bottom, these orders ran afoul of the MITOR because they exceeded both the "clearly and conspicuously stated" shipping timelines in some of Defendants' advertising as well as the MITOR's maximum 30-day shipping timeline when no specific shipping speed is stated. *See* 16 C.F.R. § 435.2(a)(i) (ii).

Second, Defendants failed to "clearly and conspicuously and without prior demand" give consumers the option either to consent to delayed shipping or to cancel their orders and receive a refund. *Id.* § 435.2(b)(1). On only one occasion in March 2020, Defendants notified consumers that orders were taking longer than expected to process and offered refunds if orders had not yet shipped. *See PSUF* ¶¶ 210 11; Dkt. # 162, Ex. 16, Att. W. But Defendants provided no other notice of shipping delays unless customers contacted Defendants' customer service team. *PSUF* ¶ 214; *DRPSUF* ¶ 214. In other words, any other notice of shipping delays was not offered "without prior demand." *See* 16 C.F.R. § 435.2(b)(1).

Third, Defendants did not always issue refunds much less "prompt" refunds when customers requested one before their order had shipped. *See, e.g.*, Dkt. # 162, Ex.1 16, Att. X, at 1 ("We can[']t cancel because it is already labelled. Your order will be scheduled for shipping within the week or early next week.").

Accordingly, the FTC's undisputed evidence reveals that Defendants violated multiple provisions of the MITOR between March and August 2020.[5] As such, the Court **GRANTS** the FTC's motion for summary judgment as to its first cause of action.

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[5] Additionally, because this action is brought by the FTC, Defendants' failure to maintain adequate records indicating when shipments were actually placed in the mail carrier's possession, *PSUF* ¶¶ 153, 207, 406, yields a rebuttable and, here, unrebutted presumption that Defendants violated the MITOR, *see* 16 C.F.R. § 435.2(a)(4).

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B. Second, Third, and Fourth Causes of Action: FTC Act Violations

The FTC claims it is entitled to summary judgment on its three FTC Act causes of action. *Mot. I* 35:14 39:19. The Court agrees.

The FTC Act prohibits, among other things, "unfair or deceptive acts or practices in or affecting commerce." 15 U.S.C. § 45(a)(1). A statement can be "unfair or deceptive" if it is likely to mislead reasonable consumers under the circumstances in a way that is "material." *FTC v. Gill*, 265 F.3d 944, 950 (9th Cir. 2001). Whether a statement is misleading may be based on the "net impression" it creates or the "failure to disclose material information." *FTC v. Cyberspace.com LLC*, 453 F.3d 1196, 1200 (9th Cir. 2006); *Sterling Drug, Inc. v. FTC*, 741 F.2d 1146, 1154 (9th Cir. 1984). A misleading statement is material if it "involves information that is important to consumers and, hence, likely to affect their choice of, or conduct regarding, a product." *Cyberspace.com LLC*, 453 F.3d at 1201 (quoting *Cliffdale Assocs., Inc.*, 103 F.T.C. 110, 165 (1984)). Materiality is presumed when statements "significantly involve health, safety, or other issues that would concern reasonable consumers." *FTC v. Wellness Support Network, Inc.*, No. 10-CV-04879-JCS, 2014 WL 644749, at *17 (N.D. Cal. Feb. 19, 2014).

Here, Defendants' shipping speed and "in stock" representations were "unfair or deceptive" and thus in violation of the FTC Act. Defendants advertised shipping speeds ranging anywhere from one day on Google to as many as ten days on their websites. *PSUF* ¶¶ 64, 77, 171 77. When Defendants made some of these shipping claims, they had already publicly acknowledged that they lacked ingredients and packaging to keep up with demand and faced obstacles in the supply chain that delayed shipments necessary to restock their inventory. *Id.* ¶¶ 126 27, 128 30, 331 33, 341 51. Yet Defendants continued to accept orders from customers, representing either implicitly or explicitly that they had hand sanitizer in stock and could ship it. *See id.* ¶¶ 113 14, 121. Such representations were also material because, as Defendants' former marketing director testified, at least some customers' decisions to order hand sanitizer turned on whether the product was actually in stock. *See Deposition Transcript of Danielle Paulo*, Dkt. # 161, Ex. 16, Att. U ("*Paulo Depo.*"), at 88:9 19 ("So I think it really shocked everybody else in the U.S. that we even had them, so [customers] just wanted to confirm first that we had them in stock. And when we did confirm that, they would place their order.").

Defendants' representations that Basic Immune IGG protein powder could protect users from COVID-19 and that it was FDA approved for that purpose were also "unfair or deceptive" and thus in violation of the FTC Act. Dr. J represented in both Vietnamese and English language broadcasts that Basic Immune IGG could help users strengthen their immune system and thus "cling to and bite that coronavirus, push it out and kill it" or "fight back and destroy all of the coronavirus that is entering your body." Dkt. # 144, Ex. 8, Att. A, at 15; Dkt. # 137-1, Ex. 1, Att. H, at 11. Defendants argue that, when viewed in context with the entire video, these representations were not misleading. *See Opp. I* 22:6 25:11. Viewed in the light most favorable to Defendants, the Court agrees that Dr. J's statements could be reasonably interpreted to mean only that Basic Immune IGG helps boost users' immune systems, which is exactly what the product was designed to do. *See PSUF* ¶¶ 286 87.

But Dr. J went much further than that. In a Vietnamese language broadcast, Dr. J represented that, by taking Basic Immune IGG, people did not have to be afraid to stand close to her anymore. Dkt. # 144, Ex. 8, Att. A, at 14 15. And she "guaranteed" that users would "stay safe" if they washed their hands and used Basic Immune IGG, citing the product's "FDA[] verification and approval."[6] *Id.* To be sure, Dr. J did not say that users would "stay safe" from COVID-19 specifically or that Basic Immune IGG was FDA approved to protect against COVID-19. But even when read in the light most favorable to Defendants and in context with the entire broadcast, the clear "net impression" was that Dr. J misleadingly implied that Basic Immune IGG users would stay safe from COVID-19 and that it was FDA approved for that purpose. *See Cyberspace.com LLC*, 453 F.3d at 1200; *Sterling Drug, Inc.*, 741 F.2d at 1154. These misleading statements were also material because they "significantly involve[d] health, safety, or other issues that would concern reasonable consumers." *Wellness Support Network, Inc.*, 2014 WL 644749, at *17.

Accordingly, the FTC has established that Defendants violated the FTC Act by making materially misleading statements about (1) their hand sanitizer stock and shipping capabilities, (2) Basic Immune IGG's ability to prevent COVID-19 infection and transmission, and (3) Basic Immune IGG's FDA approval. As such, the Court **GRANTS** the FTC's summary judgment motion as to their second, third, and fourth causes of action.

[6] Defendants challenge the accuracy of the FTC's certified translation of these statements. *See* Dkt. # 200, ¶¶ 16 18. But Dr. J's own alternative translation of the same passage is not enough to create a genuine factual dispute because she does not even attempt to establish her competence to testify as a Vietnamese to English translator. *See* Fed. R. Civ. P. 56(c)(4). Absent a properly authenticated alternative translation, it is well established that the non-moving party cannot manufacture a genuine factual dispute with conclusory statements in a declaration. *See Thornhill Publ'g Co.*, 594 F.2d at 738.

C. <u>Remedies</u>

The FTC seeks both (i) monetary relief for consumers and (ii) a permanent injunction. The FTC also requests that (iii) the individual Defendants Tammabattula and Dr. J be held personally liable for their companies' violations. *Mot. I* 39:20 50:5. The Court addresses each issue in turn.

i. Monetary Relief for Consumers

The FTC seeks over $3 million in refunds for consumers i.e., Defendants' net revenue, minus any already issued refunds, from March to August 2020. *Mot. I* 42:11 14. Defendants separately filed a motion for partial summary judgment, arguing that the FTC should take nothing without showing that shipping delays actually injured consumers, and if injury is established, that the Court should limit the monetary relief to Defendants' net profits, not their net revenue. *Mot. II* 13:5 18.

Section 19 of the FTC Act permits the FTC to seek monetary relief "necessary to redress injury to consumers" resulting from any rule violation i.e., the MITOR. *See* 15 U.S.C. § 57b(b). The FTC must establish consumer injury but need not prove individual reliance to do so. *FTC v. Figgie Int'l, Inc.*, 994 F.2d 595, 605 (9th Cir. 1993) (per curiam) ("[P]roof of individual reliance by each purchasing consumer is not needed."); *accord United States v. MyLife.com, Inc.*, __ F. Supp. 3d. __, No. CV 20-6692 JFW (PDx), 2021 WL 4891776, at *13 (C.D. Cal. Oct. 19, 2021). Instead, if the FTC demonstrates that a defendant made material representations that were widely disseminated, there is a presumption of actual reliance. *Figgie Int'l, Inc.*, 994 F.2d at 605 06; *see also id.* at 606 ("The same reasoning is applicable to Section 19."). Unless the defendant can rebut that presumption, injury to consumers is decisively established. *Id.* at 606.

Defendants rely on an Arizona district court case for the proposition that the FTC cannot seek redress for shipping delays under the MITOR without proving individual consumer injury. *See Mot. II* 5:12 10:20. In *FTC v. Noland*, the court addressed a MITOR violation for late-shipped products. No. CV-20-00047-PHX-DWL, 2021 WL 5493443, at *3 (D. Ariz. Nov. 23, 2021). The district court held that the FTC was not entitled to the refunds it requested because it failed to carry its burden of proof at summary judgment of demonstrating that customers were actually injured by the shipping delays. *Id.* However, the court reached this conclusion without addressing whether the FTC was entitled to a presumption of reliance that, if applicable, would have overcome any concerns with individual injury. *See id.* at *3 4. This is presumably because the FTC's MITOR theory was based on violations that arose only *after* the contract was consummated. *See* 16 C.F.R. § 435.2(b) (c).

Noland's concerns with consumer injury do not readily translate here. Critically, the FTC has established a MITOR violation for conduct that occurred *before* any contract was consummated. *See* 16 C.F.R. § 635.2(a) (solicitation of merchandise orders is prohibited "unless, *at the time of the solicitation*, the seller has a reasonable basis to expect that it will be able to ship any ordered merchandise to the buyer" within the timeframe "clearly and conspicuously" stated (emphasis added)). Accordingly, because the FTC's theory of MITOR liability here turns on Defendants' pre-purchase, materially misleading shipping promises, the presumption of actual reliance standard can apply here. *See Figgie Int'l, Inc.*, 994 F.2d at 605. And given Defendants' widely disseminated materially misleading claims that they had hand sanitizer in stock and ready to ship, the Court finds that the FTC is entitled to a presumption of actual reliance in this case. *See id.* Because Defendants have "presented no evidence to rebut the presumption of reliance, injury to consumers has been established." *Id.* at 606.

Once consumer injury is established, the FTC Act permits monetary relief "necessary to redress" that injury, including refunds and damages. *See* 15 U.S.C. § 57b(b). Defendants propose that the Court follow a "net profit" redress approach described in *Figgie*. *See Mot. II* 11:17 12:13. There, the Ninth Circuit approved, with some modification, the district court's monetary redress model. *Figgie, Int'l, Inc.*, 994 F.2d at 609. The court upheld the portion of the plan requiring the defendant to pay its net profits during the relevant time period into an escrow account managed by the FTC. *Id.* at 605. Customers could then make claims for a full refund from the account. *Id.* Assuming that customer refund claims exceeded the defendant's net profits, the defendant was then required to add additional funds to the escrow account not to exceed its net revenue during the relevant time period. *Id.* at 608. The district court found this model necessary because the defendant sold its products to distributors for cash who then marked up the price at unknown rates and sold directly to consumers. *Id.* at 606. As such, the price customers actually paid for the product was uncertain and could be ascertained only by having customers make individual refund claims. *See id.*

Here, the Court does not find it necessary to implement the same recovery plan because Defendants sold products directly to consumers rather than through a distributor. As such, the refund due to each customer is clear from Defendants' records, and the appropriate measure of consumer redress is net revenues, not net profits. *See MyLife.com, Inc.*, __ F. Supp. 3d. at __, 2021 WL 4891776, at *13. Outside of the unique circumstances presented in *Figgie*, the Court sees no justification and Defendants suggest none for arbitrarily capping available refunds at the Defendants' net profit. And, in any event, *Figgie* did not cap refunds at the defendant's net profits; it simply used that as a starting point, subject to increase depending on the volume of refund requests. *See* 994 F.2d at 608.

Defendants also claim that depriving them of their net revenue for hand sanitizer is an impermissible form of disgorgement. *Mot. II* 4:5 17. To be sure, the Ninth Circuit has held that disgorgement and other forms of punitive or exemplary damages are not authorized here. *See Figgie Int'l, Inc.*, 994 F.2d at 607. But the FTC does not seek disgorgement; it seeks refunds to customers explicitly authorized by the FTC Act. *See* 15 U.S.C. § 57b(b) ("Such relief may include . . . the refund of money or return of property."). Simply because the value of refunds due to consumers is unsurprisingly equal to Defendants' total hand sanitizer revenue does not transform otherwise permissible refunds into impermissible disgorgement.

Finally, Defendants argue that to be entitled to a refund, customers should be required to return the hand sanitizer or else they will receive a "windfall" by retaining their hand sanitizer and receiving a refund. *Reply II* 10:18 25. It does not follow that a refund exceeds necessary consumer redress simply because the product the consumer purchased has some value too. The Ninth Circuit rejected a similar argument in *Figgie*, explaining that the amount of redress due to a consumer need not be decreased by the fair market value of the product or service received. 994 F.2d at 606. To illustrate why, the Ninth Circuit raised the hypothetical case of a "dishonest rhinestone merchant" who sold customers diamonds that were in fact rhinestones. *Id.* The court explained that it "would not limit [customers'] recovery to the difference between what they paid and a fair price for rhinestones" because, had the customers known the truth, they might never have purchased rhinestones at all. *Id.* In other words, customers are not owed a refund because they received hand sanitizer that may or may not have been useful to them after Defendants' shipping delays; customers are owed a refund because Defendants' deception induced the sale in the first place. *See id.* ("The fraud in the selling, not the value of the thing sold, is what entitles customers in this case to full refunds or to refunds for each [product] that is not useful to them.").

In short, the Court agrees with the FTC that consumers are entitled to redress in the form of full refunds not to exceed Defendants' total hand sanitizer revenue from March to August 2020 i.e., $3,086,238.99. However, given that some customers may have been satisfied with their hand sanitizer orders even if delayed the Court prefers to implement a redress plan requiring customers to make refund requests rather than receiving the funds outright. *See Mot. II* 11:17 13:2; *Opp. II* 13:13 n.21. The FTC is to hold this sum in an escrow account, and Defendants' customers may seek refunds directly from the FTC. Funds must be returned to

Defendants, less the FTC's costs to administer the refund process, if they remain unclaimed 120 days after consumers are notified. *See Figgie Int'l, Inc.*, 994 F.2d at 607 08 (modifying the district court's plan to ensure that unclaimed funds be returned to the defendant, less the FTC's administration costs).

Accordingly, the Court **GRANTS** the FTC's requested monetary relief for consumers stemming from Defendants' violation of the MITOR and **DENIES** Defendants' motion for partial summary judgment that seeks to bar such relief.

ii. Permanent Injunctive Relief

The FTC seeks a permanent injunction to prevent Defendants from advertising or selling "protective goods and services," including products designed or represented to detect, treat, prevent, mitigate, or cure COVID-19 or any other infection or disease. *Mot. I* 44:6 9; *see also Proposed Judgment*, Dkt. # 168-1, ¶ O. The FTC also seeks to implement various monitoring measures to ensure Defendants' compliance with the permanent injunction. *Mot. I* 46:11 20.

The FTC is authorized to seek a permanent injunction for violation of "any provision of law enforced by the" FTC. 15 U.S.C. § 53(b). Injunctive relief under this section "cannot be used to remedy past behavior and can only be granted where wrongdoing is ongoing or likely to recur." *FTC v. Cardiff*, No. EDCV 18-2104 DMG (PLAx), 2021 WL 3616071, at *7 (C.D. Cal. June 29, 2021). To determine whether wrongdoing is likely to recur, courts consider several factors, including "[1] the degree of scienter, [2] frequency of violative acts, [3] the defendant's ability to commit future violations, [4] the degree of harm consumers suffered, and [5] the defendant's recognition of his own culpability." *United States v. Zaken Corp.*, 57 F. Supp. 3d 1233, 1242 (C.D. Cal. 2014). The scope of an injunction depends on the circumstances of each case but must bear "a reasonable relationship to the violation." *FTC v. John Beck Amazing Profits LLC*, 888 F. Supp. 2d 1006, 1012 (C.D. Cal. 2012).

Based on the factors outlined above, the FTC is entitled to the permanent injunction it seeks. First, Defendants had a high degree of scienter. Regarding hand sanitizer sales, Tammabattula publicly acknowledged that Defendants lacked supplies to keep up with demand. *PSUF* ¶¶ 331 33, 341 51. Yet Defendants continued to solicit orders from customers when they had insufficient sanitizer inventory on hand and were well aware of the global supply chain disruptions that hindered Defendants' ability to restock their inventory. *See id.* ¶¶ 113 14, 121, 126 27. Additionally, Defendants had at least some notice that their advertisements were problematic because their Google advertising account was suspended for "potentially profit[ing] from or exploit[ing]a sensitive event with significant social, cultural or political impact." *Id.* ¶¶ 189 94. Defendants' Facebook account suffered a similar fate, but Defendants sought out a freelancer to advertise for them to circumvent the suspension. *Id.* ¶¶ 436 38. Turning to Basic Immune IGG sales, Dr. J is a licensed pharmacist who had her pharmacy license suspended for "Unprofessional Conduct Involving Acts of Dishonesty, Fraud, or Deceit," among other things. *Id.* ¶¶ 20 23. Undeterred by this punishment, Dr. J nevertheless continued her apparent streak of dishonesty and deceit by misrepresenting on a Vietnamese language broadcast that Basic Immune IGG could prevent or at least minimize the risk of COVID-19 infection and was FDA approved for that purpose. *See* Dkt. # 144, Ex. 8, Att. A, at 14 15. Based on the foregoing, Defendants have exhibited a high degree of scienter, and this factor weighs in favor of finding that wrongdoing is likely to recur. *See Zaken Corp.*, 57 F. Supp. 3d at 1242.

Second and third, there was a high frequency of violative hand sanitizer sales, and Defendants retain the ability to commit future violations. As discussed above, between March and August 2020 Defendants violated the FTC Act by repeatedly soliciting hand sanitizer orders when Defendants had insufficient inventory or none at all. *See PSUF* ¶¶ 126 27, 128 30, 331 33, 341 51. And Defendants still sell hand sanitizer, personal protective equipment like face masks, and dietary supplements. *Id.* ¶ 427. As such, Defendants retain the ability to commit future violations even though they recently changed their business model to sell directly to wholesale retailers instead of individual consumers. *See Tammabattula Decl.* ¶ 42. Accordingly, the second and third factors weigh in favor of finding that wrongdoing is likely to recur.

Fourth, neither party explicitly addresses the relative degree of harm to consumers. Accordingly, this factor is neutral.

Fifth, Defendants have shown no recognition of their own culpability. They dispute that any wrongdoing took place. *See Tammabattula Decl.* ¶ 26 (blaming delays on the "unforeseen and unprecedented" COVID-19 pandemic); *id.* ¶ 33 (everyone received the hand sanitizer they ordered or received a refund); *id.* ¶ 46 (not aware of the law); Dkt. # 200, ¶¶ 16 18 (Dr. J disputing that she ever said Basic Immune IGG could ward off COVID-19 infection and was FDA approved for that purpose). Accordingly, this factor weighs in favor of finding that wrongdoing is likely to recur.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No.	SACV 20-1431 PSG (KESx)	Date	April 6, 2022
Title	FTC v. QYK Brands LLC, et al.		

In sum, the foregoing factors support the conclusion that Defendants' wrongdoing is likely to recur. *See Cardiff*, 2021 WL 3616071, at *7. Accordingly, the Court **GRANTS** the FTC's requested permanent injunction and its associated compliance-monitoring measures.[7]

iii. Liability for Individual Defendants

The FTC claims that the individual defendants Tammabattula and Dr. J should also be held personally liable for both the monetary and injunctive relief it seeks. *Mot. I* 47:1 50:5. Defendants do not dispute this in their opposition, so the Court deems the issue conceded. *See Tapia*, 2015 WL 4650066, at *2.

V. <u>Conclusion</u>

For the foregoing reasons, the Court **GRANTS** the FTC's motion for summary judgment and **DENIES** Defendants' motion for partial summary judgment. The FTC is **ORDERED** to file a revised proposed judgment consistent with this order no later than **<u>April 22, 2022</u>**.

Additionally, the Court **DENIES AS MOOT** the FTC's pending motion to strike Defendants' jury demand, as well as the parties' subsequent stipulation to strike the jury demand. *See generally* Dkts. # 192, 210.

IT IS SO ORDERED.

[7] Defendants do not address or otherwise dispute the injunction's proposed compliance monitoring measures, so the Court deems that issue conceded. *See Tapia v. Wells Fargo Bank, N.A.*, No. CV 15-03922 DDP (AJWx), 2015 WL 4650066, at *2 (C.D. Cal. Aug. 4, 2015) (arguments to which no response is supplied are deemed conceded).