No. 22-55446

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FEDERAL TRADE COMMISSION,
Plaintiff-Appellee,

v.

QYK BRANDS LLC, et al.,
Defendants-Appellants.

On Appeal from the United States District Court
for the Central District of California,
No. 8:20-cv-01431 (Hon. Philip S. Gutierrez)

BRIEF OF THE FEDERAL TRADE COMMISSION

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INTRODUCTION

At the beginning of the COVID-19 pandemic, at the height of public fear of infection and shortages of safety equipment, appellants Rakesh Tammabattula, Jacqueline Thao Nguyen, and their companies exploited consumers' fear for their own profit. They sold a product falsely claimed as FDA-approved to protect against COVID-19, but it was nothing more than a protein powder with no anti-viral properties. Appellants also sold hand sanitizer to consumers with the promise that the product was "in stock" and "ships today," but they lacked sufficient inventory to satisfy even a fraction of the orders they solicited. They nonetheless continued taking orders and making the same false promises of fast shipping speed. When consumers complained, appellants refused to cancel the orders or offer refunds, citing bogus excuses. Between March and August 2020, appellants reaped over $3 million from these sales.

The Federal Trade Commission charged appellants with violating the FTC Act, which prohibits deceptive advertising, and the FTC's Mail, Internet, or Telephone Order Merchandise Rule, which prohibits false shipping claims online. The district court held that appellants violated both provisions and ordered appellants to refund the unlawful revenue. The court also permanently enjoined them from selling "protective goods and services" after finding that appellants had shown a pattern of deceitful conduct and would likely violate the law again.

Appellants claim that the redress order gives consumers a windfall, that the court improperly ignored evidence, and that the injunction is unwarranted and overbroad. But the district court's rulings were well-grounded in both the facts and the law. Appellants exploited a public health crisis for their own profit, harming thousands of consumers in the process. The monetary redress ordered simply returns purchasers to the position they would be in had appellants not lured them in with deceptive claims; indeed, the district court limited refunds to only those customers who make an affirmative claim of injury. The disregarded "evidence" was mere conjecture or irrelevant to the issues at hand.

The district court's finding that appellants' wrongdoing will likely recur and its choice of what injunction best protects consumers going forward are entitled to substantial deference. There is no reason to second guess the court's careful consideration of appellants' high degree of scienter and repeat violations. Moreover, the injunction is tailored to prevent future violations only in the "protective goods or services" sector in which appellants have proven themselves untrustworthy. Appellants have shown no abuse of the district court's ample discretion or other reversible error. This Court should affirm.

JURISDICTION

The FTC agrees with appellants' jurisdictional statement.

QUESTIONS PRESENTED

1. Did the district court err in ordering consumer redress in an amount up to appellants' total revenues for the products they deceptively advertised?

2. Was the permanent injunction an abuse of discretion?

3. Did appellant Nguyen's unsupported declaration purporting to translate statements from a Vietnamese-language advertisement create a factual dispute that precludes summary judgment?

4. Did supply chain problems and shipping delays that arose during the COVID-19 pandemic excuse appellants' misrepresentations and other misconduct?

RELEVANT STATUTES

Relevant statutes and regulations are set forth in the addendum hereto.

STATEMENT OF THE CASE

A. Appellants' Deceptive Practices

Appellants Tammabattula and Nguyen own and operate several businesses, including appellants QYK Brands LLC (QYK), DRJSNATURAL LLC (DJN), EASII, Inc., and Theo Pharmaceuticals. Until 2020, their companies sold primarily beauty, health, and skin care products. When the COVID-19 pandemic hit in March 2020, appellants pivoted to capitalize on the swelling demand for products such as hand sanitizer, facemasks, and disinfecting wipes. That month, appellants began selling hand sanitizer online using an aggressive marketing campaign that claimed they had "Hand Sanitizer in Stock" that "Ships Today," and that

consumers could "Order online for fast shipping from California." *See* 2-SER-289–300 (¶¶ 58-76).[1] Appellants made similar "in stock" and "ships today" claims on social media, including Facebook, Instagram, Twitter, and Reddit. *See* 2-SER-299–300, 397–98 (¶¶ 76, 265-67); 3-ER-179 (Instagram: "available for shipping"), 3-ER-180 (Instagram: "fully stocked and ready to ship out"); 1-SER-38 (Twitter: "if ordered today we can ship today!"), 1-SER-39 (Twitter: "in-stock today"); 1-SER-40 (Facebook: "available on our website right now!"); 2-SER-296 (¶ 68) (Reddit). And on their websites, appellants claimed sanitizer shipped in three to five days. 2-SER-322, 343–44, 350 (¶¶ 120-21, 168-78, 185-87).

At a time when consumers were desperate, store shelves were empty, and many retailers had run out of inventory, the "in stock" and fast-shipping claims were wildly successful. Within days, consumers ordered thousands of bottles of hand sanitizer from appellants' sites; sales reached nearly 150,000 bottles by mid-March. From March through August 2020, appellants reaped more than $3 million in sanitizer sales. 1-SER-155 (¶ 58); 2-SER-462–65 (¶¶ 398-401).

[1] "Dkt." refers to district court docket number; "DE," to appellate docket number; "Op.," to the summary judgment order below (1-ER-2–17); "Stay Op.," to the district court's order denying a stay (2-SER-503–13); "SUF," to the FTC's Reply to Defendants' Response to the FTC's Statement of Undisputed Facts (2-SER-271–494); "Br.," to appellants' brief (cites refer to the brief's own numbering at the page bottom).

Despite their successful sales pitch, appellants knew they did not have – and could not get – sufficient inventory to fulfill these orders on time. For example, at the same time appellants took consumers' money for those 150,000 bottles of sanitizer (March 4-18), they had fewer than 9,000 bottles in stock – and knew additional inventory shipments would not be arriving for weeks. *See* 2-SER-287 (¶ 53), 302 (¶ 80), 321 (¶ 116), 422–23 (¶ 316); *see also* 2-SER-335 (¶ 149). Indeed, in press interviews and news articles in March and April, appellants publicly acknowledged the major supply chain issues and delays they were facing.[2] Yet they continued advertising that sanitizer was "In Stock & Ships Today," or that it would ship within mere days – spurring even more orders and worsening the backlog. *See* 2-SER-290–91 (¶ 59), 293–94 (¶¶ 62-64) (Google ad: "In Stock & Ships Today"); 346 (¶ 175) (website: ships within three days); 345–46 (¶¶ 171, 173, 176) (website: three to five days); 345–46 (¶¶ 172, 174, 177) (website: three to ten days). Almost no orders shipped within the promised timeframes; many shipped only weeks later. *See* 2-SER-355–58 (¶¶ 197-99); 1-SER-143–44 (¶ 27, Table 3); 1-SER-156.

[2] 2-SER-427–33, 442–43 (¶¶ 330-50, 369-71); 3-ER-127 (¶ 22) and 1-SER-2 (Apr. 7, 2020 article); 3-ER-132 (¶ 46) and 3-ER-232 (March 26, 2020 article); 3-ER-133 (¶ 47) and 3-ER-238 (Apr. 1, 2020 article); 3-ER-133 (¶ 48) and 3-ER-240 (Apr. 8, 2020 article); 1-SER-180–81 (Resp. to RFA Nos. 57-58).

Appellants never stopped or paused the Google advertising campaigns making the most egregious claims, persisting with the ads despite knowing full well sanitizer was not "in stock" and would not "ship today." 2-SER-350 (¶ 184). Indeed, on March 18, 2020, Google suspended appellants' account for violating its advertising policies, but appellants circumvented that suspension by creating a new account under different credentials. 2-SER-351–52 (¶¶ 189-90); 1-SER-5-6. They continued to run ads claiming "Ships Fast from CA Today" throughout April and most of May 2020, until Google suspended that account, too. 2-SER-352–54 (¶¶ 191-94); 1-SER-204–05, 206–12, 213–17. When their Facebook account was cut off for similar reasons, appellants likewise tried to hire a front man to advertise for them. 2-SER-488–90 (¶¶ 436-39); 1-SER-4, 200–03. Shopify, appellants' online vendor, also became concerned about the mounting number of unfulfilled orders and placed multiple holds on their account. 2-SER-438–39 (¶¶ 354-58). Another search engine, Bing, disabled appellants' ad account, too. 2-SER-423–24 (¶ 317).

Consumer complaints poured in. 2-SER-448 (¶ 381); 3-ER-134–50 (¶¶ 53-79). For example, consumers reported receiving "[n]o response to my multiple inquiries when the item never shipped 5 weeks later," 3-ER-143 (¶ 66); that "they keep telling me they are shipping it and they don't," 1-SER-13; being told "various excuses from the USPS being delayed to having too many orders but each time I'm

assured my order is 'next to ship' for 3 weeks," 1-SER-16; and that the "company has lied and told me the product is shipping" when it was not, 1-SER-25. *See also* 3-ER-247–80, 1-SER-7–27 (compiling complaints). But when consumers demanded refunds, appellants refused to cancel orders, falsely telling the victims that returns were impossible once shipping labels had been created – even though the products were not even in stock yet. *See* 2-SER-361–65 (¶¶ 203-09). In other instances, they told customers that to receive a refund, the customer herself would have to physically intercept the package when it was delivered by the shipping carrier. 2-SER-386 (¶ 246).

Appellants also hawked a protein powder product, "Basic Immune IGG," that they "guaranteed" would allow users to "stay safe" from COVID-19. 1-ER-6 (Op. 5); 2-SER-504 (Stay Op. 2). They promoted Basic Immune IGG principally through television appearances and videos in which Nguyen plugged the product's COVID-protecting benefits, including in a popular Vietnamese language broadcast that aired in April 2020.[3] 2-SER-409–10 (¶ 292). As a certified translation of that broadcast showed (1-SER-114–34), Nguyen touted the product's "FDA[] verification and approval" and clearly implied that the FDA had approved the

[3] The broadcast was not in "late June or early July" as appellants claim, Br. 13.

product to prevent COVID-19.[4] 1-SER-123–24, 127–33; 1-ER-6 (Op. 5). Basic Immune IGG, she claimed, would ensure antibodies "cling to and attack the coronavirus" and would allow other people to safely "get close" to the user without "be[ing] afraid." 1-SER-132–33; 1-ER-6 (Op. 5).

In other promotional videos – in English – Nguyen made similar claims. For example, she claimed that Basic Immune IGG could help users "fight back and destroy all of the coronavirus that is entering into your body." 3-ER-212. She likewise asserted that the product was a "prevention" for COVID-19, had a "patent" from the FDA, and was formulated to be "especially" effective at targeting the coronavirus. 3-ER-218, 220. In truth, the product gives no proven protection against COVID-19 and was not approved by the FDA to treat or prevent COVID-19. 1-ER-10–11 (Op. 9-10); 2-ER-114 (Answer, ¶ 6); 2-SER-420–21, 446–47 (¶¶ 309, 312-13, 377-78).

B. The FTC's Enforcement Lawsuit

The Federal Trade Commission sued to stop further deception and to secure refunds to consumers under three provisions. Section 5 of the FTC Act prohibits "unfair or deceptive acts or practices in or affecting commerce." 15 U.S.C. § 45(a)(1). A statement is deceptive if it is likely to mislead reasonable consumers

[4] The certified translation was prepared by a professional Vietnamese-English translator whose native language was Vietnamese. 1-SER-114.

in a way that will likely affect purchasing decisions. *FTC v. Gill*, 265 F.3d 944, 950 (9th Cir. 2001). Section 12 of the FTC Act likewise prohibits false and misleading advertising, including claims the advertiser lacks a reasonable basis to make. 15 U.S.C. § 52(a).

The FTC's Mail, Internet, or Telephone Order Merchandise Rule (MITOR) prohibits sellers from soliciting online, phone, or mail order sales "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 stated timeframe. 16 C.F.R. § 435.2(a)(1). Under MITOR, sellers who cannot ship on time must promptly notify customers of the delay and allow them either to cancel and obtain a refund or consent to a later shipping date. 16 C.F.R. § 435.2(b)(1). MITOR also requires sellers to honor any refund demands made any time before products are in the possession of the shipping carrier. 16 C.F.R. § 435.2(c), § 435.1(e).

The FTC charged appellants with violating those provisions. The district court granted summary judgment for the FTC, finding that appellants violated MITOR in three ways: (1) soliciting hand sanitizer orders without a reasonable basis to timely ship them; (2) failing to notify customers of delays; and (3) failing to issue prompt refunds. 1-ER-8–9 (Op. 7-8). The court further found that appellants violated the FTC Act by (1) making materially misleading shipping promises; (2) advertising their protein powder as a COVID-19 preventative; and

(3) indicating that the protein powder was FDA-approved to prevent COVID-19. 1-ER-10–11 (Op. 9-10).

The district court next assessed the amount of monetary relief appropriate for the MITOR violations under Section 19 of the Act. 15 U.S.C. 57b. When the FTC sues for violation of a rule such as MITOR, Section 19 empowers a court to "grant such relief as the court finds necessary to redress injury to consumers . . . resulting from the rule violation." *Id*. § 57b(a)(2); (b). That relief may include "the refund of money or return of property," among other forms of redress. *Id*. In making its determination, the court found that appellants' misrepresentations were material to consumers' purchasing decisions and widely disseminated. 1-ER-12–15 (Op. 11-14). It therefore applied a well-established presumption of consumer reliance, under which widespread, material misrepresentations give rise to a presumption that consumers relied on them and were harmed. 1-ER-12–13 (Op. 11-12) (citing *FTC v. Figgie Int'l*, 994 F.2d 595, 605-06 (9th Cir. 1993)).

Appellants presented no evidence, such as declarations from consumers who did not rely on the claims, to rebut that presumption. 1-ER-13 (Op. 12). The district court therefore concluded that "injury to consumers has been established" for all sales. *Id.* The court ordered appellants to pay $3 million – the undisputed amount of total revenues during the relevant period – into a redress fund. 1-ER-14 (Op. 13). The court did not order an automatic refund to every customer, but

required customers to make refund requests to the FTC. 1-ER-12–15 (Op. 11-14). This approach, the court explained, would ensure proper redress by excluding customers who were satisfied with their sanitizer orders despite the shipping delay.[5] 1-ER-14–15 (Op. 13-14).

The district court determined that appellants' wrongdoing was likely to recur, and it therefore permanently enjoined similar conduct under Section 13(b) of the Act. 1-ER-15–17 (Op. 14-16). Examining the established factors for injunctive relief, the district court found that appellants had a "high degree of scienter," having solicited orders and repeated false claims, and even circumvented suspensions of their Google and Facebook accounts, all while knowing they could not satisfy their promises. 1-ER-15–16 (Op. 14-15). The violations were frequent, inducing tens of thousands of hand sanitizer sales. 1-ER-16 (Op. 15).

With respect to Nguyen, the hand sanitizer program was just the latest installment of a "streak of dishonesty and deceit." 1-ER-16 (Op. 15). Earlier, her pharmacy license had been suspended for twelve counts of unprofessional conduct, including conduct "Involving Acts of Dishonesty, Fraud or Deceit." *Id.*; 3-ER-282–349 (license suspension documents). Among other misconduct, Nguyen excessively furnished controlled substances that lacked legitimate medical purpose,

[5] Such customers were hypothetical: appellants presented no reliable evidence identifying anyone who received a delayed shipment but was nonetheless satisfied.

dispensing large quantities of oxycodone to cash-paying customers despite clear irregularities in the prescriptions. 3-ER-322–25, 338–39. She stole dangerous prescription drugs from her previous employer, stored them improperly such that they became adulterated (and thus should have been returned to the manufacturer), and then resold them months later to unsuspecting customers at another pharmacy. 3-ER-313–22, 337–41. To cover up her theft, Nguyen impersonated a technician at her previous pharmacy to place a nonrefundable phone order for over $13,000 of prescription drugs to replace the ones she stole – all on the pharmacy's expense account. 3-ER-314, 339. These repeated violations took place over a year-long period. 3-ER-337–41.

Nguyen admitted all of these charges before the California Board of Pharmacy. 3-ER-286 (¶ 9). Her pharmacy license was suspended, her conduct was sharply restricted, and she was ordered to "obey all state and federal laws and regulations" going forward. 3-ER-289, 285–301. The district court found that Nguyen was "undeterred by this punishment" when she went on to mislead consumers about Basic Immune IGG's ability to prevent or mitigate COVID-19 infection. 1-ER-16 (Op. 15).

The court further found that although appellants shifted their business model while the case was pending to focus on wholesale customers, they retained the ability to commit future violations because they still sold sanitizer, personal

protective equipment (PPE), and other health-related products. *Id.* Moreover, appellants refused to recognize their own culpability. *Id.* They continued to dispute "that any wrongdoing took place," blaming the pandemic for their problems and claiming to be unaware of the law. *Id.* That failure to take responsibility for their actions made future violations more likely. *Id.*

To protect consumers from further harm, the court permanently enjoined appellants from (among other things) selling "protective goods and services," defined as "any good or service designed, intended, or represented to detect, treat, prevent, mitigate, or cure COVID-19 or any other infection or disease." 1-ER-24, 26. We refer to that restriction as the "protective goods restriction."

This appeal followed. Both the district court and this Court declined to stay the injunction pending appeal. DE 9, 10, 15, 17.

SUMMARY OF ARGUMENT

1. The district court's redress order was well within the court's discretion to craft appropriate relief. The court properly applied a long-established presumption, first articulated by this Court in *FTC v. Figgie Int'l*, 994 F.2d 595 (9th Cir. 1993), that consumers rely on and are thus harmed by widely disseminated, material misrepresentations. Appellants' advertisements of hand sanitizer "in stock" that would ship "today" were untrue; desperate consumers plainly relied on them in deciding to purchase from appellants; and the claims were widely disseminated to

millions of consumers through multiple online sources. This case is tailor-made for application of a presumption of consumer reliance.

Appellants did nothing to rebut the presumption. They offered no evidence that consumers did not rely on the false claims or that some of their sales resulted from truthful ads. They are wrong that evidence showing a Google ad campaign accounted for only 11% of their sales proves that the remainder of sales cannot be presumed compensable. In fact, numerous other ads across multiple platforms contained similar misrepresentations, and appellants presented no evidence to counter that showing.

The *Figgie* presumption of consumer reliance and harm has not been undone by a district court decision that assessed a different fact scenario. District courts cannot overrule Circuit precedent. No matter what, that case, unlike this one, did not involve the type of fraud in the inducement that the Court addressed in *Figgie* and that clearly warrants a presumption of reliance here.

The court did not have to deduct the value of the sanitizer from the redress amount, or force customers to return the products. Customers were promised and paid for hand sanitizer *now*, not in weeks or months. They did not get the benefit of their bargain, making full refunds an appropriate remedy under *Figgie*. That is especially so since the cost of returning the product could well exceed its original sales price. Appellants did not show that the district court's redress plan would

give consumers a windfall; indeed, the district court required consumers to apply for refunds, ensuring that only dissatisfied consumers would get their money back.

2. The permanent injunction barring appellants from selling protective goods also was comfortably within the district court's discretion. After weighing all pertinent factors, the court determined that appellants' wrongdoing was both egregious and likely to recur. Appellants exploited consumer fear in the midst of a deadly pandemic. They sold a protein powder through blatantly false claims of immunity. They knowingly solicited tens of thousands of sanitizer orders on the promise of immediate shipping of products they did not have and knew they could not get. Even after Google and Facebook suspended their advertising accounts, appellants proceeded under other names and proxies. Nor was this case the first time appellants put the public at risk. As a pharmacist, Nguyen had engaged in serious, repeated misconduct involving dishonesty. Even suspension of her pharmacy license and an order to comply with all laws did not deter her. In short, appellants cannot be trusted, and the district court had ample justification for fencing in their future conduct to protect the public from further violations.

3. The district court correctly determined that undisputed facts showed that appellants deceptively marketed a protein powder product as an FDA-approved COVID-19 preventative. A certified, professional translation of a Vietnamese language broadcast featuring Nguyen showed that she told viewers that the product

could prevent or mitigate COVID-19 and was FDA approved for that purpose. The district court properly rejected a declaration supplied by Nguyen, presenting a different translation of a few sentences of the lengthy broadcast, on the ground that Nguyen did not show that she was a competent translator. Even if her declaration were credited, the undisputed portions of the broadcast plainly show Nguyen claiming that the product protected against COVID-19 and was approved by the FDA. Other videos, in English, show Nguyen making similar false claims.

4. Pandemic supply chain disruptions do not excuse appellants' misconduct. They knew full well at the time they made their "in stock" and fast shipping claims that they could not timely fulfill the orders that predictably resulted. Appellants were not innocent victims of unforeseen circumstances; they purposefully exploited consumer fear to line their own pockets.

STANDARD OF REVIEW

The Court reviews a district court's grant of summary judgment de novo to determine "whether, viewing the evidence in the light most favorable to the non-moving party, there are genuine issues of material fact and whether the lower court correctly applied the relevant substantive law." *FTC v. Network Servs. Depot*, 617 F.3d 1127, 1138 (9th Cir. 2010). The judgment may be affirmed on any ground supported by the record. *Dietrich v. John Ascuaga's Nugget*, 548 F.3d 892, 896 (9th Cir. 2008).

"[T]he mere existence of *some* alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no *genuine* issue of *material* fact." *Anderson v. Liberty Lobby*, 477 U.S. 242, 247-248 (1986). Moreover, "bald assertions or a mere scintilla of evidence in [a party's] favor are both insufficient to withstand summary judgment." *FTC v. Stefanchik*, 559 F.3d 924, 929 (9th Cir. 2009). Rather, the party opposing summary judgment "must show a genuine issue of material fact by presenting affirmative evidence from which a jury could find in [the party's] favor." *Id.* (citing *Anderson*, 477 U.S. at 257).

The grant of injunctive and monetary relief is reviewed for abuse of discretion. *Sandpiper Vil. Condo. Ass'n v. Louisiana-Pacific Corp.*, 428 F.3d 831, 840 (9th Cir. 2005) (injunction); *Stefanchik*, 559 F.3d at 931 (monetary relief). The same goes for evidentiary rulings. *Las Vegas Sands, LLC v. Nehme*, 632 F.3d 526, 532 (9th Cir. 2011).

ARGUMENT

I. THE DISTRICT COURT PROPERLY CALCULATED CONSUMER REDRESS.

Appellants do not dispute the district court's finding that their claims of immediate shipping were false. The district court presumed that consumers who bought appellants' hand sanitizers had relied on those false promises, and it directed the establishment of a redress fund to allow dissatisfied consumers to seek

refunds of their purchase price, up to appellants' total revenue of $3 million. Appellants challenge the monetary judgment on two main grounds. First, they contend that the ordinary presumption of reliance does not apply here. Br. 26-39. Second, they claim that the district court should have either required customers to return the product before qualifying for a refund, or it should have reduced the redress by the sanitizer's "value." Br. 21-26. Neither argument has merit.

A. In FTC cases, courts may presume that consumers relied on and were harmed by widespread, material misrepresentations.

In FTC cases where large groups of consumers are deceived by widespread false advertisements, "proof of individual reliance by each purchasing consumer is not needed." *FTC v. Figgie Int'l*, 994 F.2d 595, 605-06 (9th Cir. 1993). Rather, the FTC need only show that "the defendant made material misrepresentations, that they were widely disseminated, and that consumers purchased the defendant's product," which gives rise to "a presumption of actual reliance." *Id.*; *accord FTC v. Sec. Rare Coin & Bullion Corp.*, 931 F.2d 1312, 1316 (8th Cir. 1991). This approach stands in contrast to traditional fraud cases, where private plaintiffs must prove reliance upon a defendant's misrepresentations in order to recover money. *See Figgie*, 994 F.2d at 605; *Rare Coin*, 931 F.2d at 1316.

Courts have established such a presumption because the FTC Act "serves a public purpose by authorizing the Commission to seek redress on behalf of injured

consumers," and "[r]equiring proof of subjective reliance by each individual consumer would thwart effective prosecutions of large consumer redress actions and frustrate the statutory goals" of the Act. *Figgie*, 994 F.2d at 605-09; *see also Rare Coin*, 931 F.2d at 1316. The Second Circuit has similarly recognized the "inherent difficulty of demonstrating individual harm in FTC cases," which would be "an onerous task with the potential to frustrate the purpose of the FTC's statutory mandate." *FTC v. Blue Hippo Funding*, 762 F.3d 238, 243-46 (2d Cir. 2014).

Courts have applied this presumption in a variety of FTC cases to determine what compensation is due to large numbers of harmed consumers. This Court first relied on the presumption in a case, like this one, brought under Section 19 of the FTC Act. *Figgie*, 994 F.2d at 606. Other courts have invoked the same presumption in calculating compensatory monetary contempt remedies. *See, e.g.*, *McGregor v. Chierico*, 206 F.3d 1378, 1388 (11th Cir. 2000); *FTC v. Kuykendall*, 371 F.3d 745, 765-66 (10th Cir. 2004); *Blue Hippo*, 762 F.3d at 243-46. Courts apply a similar presumption under other statutes meant to redress harms to large numbers of consumers. *See, e.g.*, *CFPB v. Gordon*, 819 F.3d 1179, 1196 (9th Cir. 2016) (presuming that those who used defendant's services did so in reliance on his misrepresentations). And many courts, including this one, had for years invoked the presumption of consumer reliance in cases brought under Section

13(b) of the FTC Act.[6] *See, e.g.*, *FTC v. Commerce Planet, Inc.*, 815 F.3d 593, 603-05 (9th Cir. 2016); *Rare Coin*, 931 F.2d at 1316; *FTC v. Moses*, 913 F.3d 297, 310-11 (2d Cir. 2019). In all cases, the underlying rationale remains the same: that requiring the agency to prove harm as to individual victims would thwart its ability to fulfill its public law enforcement mission. *See, e.g.*, *Gordon*, 819 F.3d at 1196; *McGregor*, 206 F.3d at 1388.

B. The district court properly applied the presumption of reliance.

The district court found that appellants made repeated material misrepresentations about their hand sanitizer products, including that the products were in stock and would ship immediately. 1-ER-4–5, 8–9 (Op. 3-4, 7-8). Appellants did not seriously dispute that the false statements were disseminated to hundreds of thousands of consumers through internet search engine advertisements and appellants' own websites; they likewise did not dispute that tens of thousands of consumers purchased the products. *See* 1-ER-4–5 (Op. 3-4); 2-SER-300-01, 354 (¶¶ 78, 195). On that record, the district court correctly determined that "the FTC is entitled to a presumption of actual reliance in this case" and that proof of injury by each consumer was not necessary. 1-ER-13 (Op. 12).

[6] While the Supreme Court held in *AMG Capital Management, LLC v. FTC*, 141 S. Ct. 1341 (2021), that Section 13(b) does not authorize equitable monetary relief, *AMG* did not affect the presumption of reliance, which is not tied to Section 13(b) but rather – as discussed – is a tool courts use in myriad contexts.

A defendant may rebut the presumption by presenting evidence showing that consumers did not in fact rely on the misrepresentations or were not actually injured. *See Figgie*, 994 F.2d at 605-06; *Commerce Planet*, 815 F.3d at 603-05; *Blue Hippo*, 762 F.3d at 243-46. Appellants could have come forward with such evidence, but they did not. 1-ER-13 (Op. 12). Indeed, appellants cited almost no facts at all in their briefing on redress below. *See* 1-SER-254–63 (QYK Opp. to FTC SJ Mot.). The district court unsurprisingly concluded that appellants "'presented no evidence to rebut the presumption of reliance, [so] injury to consumers has been established.'" 1-ER-13 (Op. 12) (quoting *Figgie*, 994 F.2d at 606).

Appellants therefore are wrong that the district court ordered redress "without analyzing" consumer injury, Br. 26. The district court faithfully applied this Court's precedent to presume consumer reliance, and "injury to consumers [is] established" where that presumption is unrebutted – as it was here. *Figgie*, 994 F.2d at 606.

1. The FTC did not have to prove individualized injury.

Relying on a single district court decision, *FTC v. Noland*, No. CV-20-00047, 2021 U.S. Dist. LEXIS 226238 (D. Ariz. Nov. 23, 2021), appellants argue that the presumption of consumer reliance reflects an improper "all-or-nothing" methodology for assessing redress. Br. 29-37. They contend that *Noland*

establishes the FTC must prove individualized injury for each consumer harmed by their practices. Br. 32, 29-37; *see also, e.g.*, 3-ER-368.

The principal problem with this argument is that this Court flatly rejected it nearly 30 years ago in *Figgie*. There, the defendant argued – just as appellants do here – that "only those consumers that can prove" that they relied on the misrepresentations in purchasing the products "should be entitled to redress." 994 F.2d at 605. But the Court found that contention "incorrect as a matter of law." *Id.* As discussed, it explained that where the Commission seeks redress for large groups of harmed consumers, requiring proof of individual reliance is impracticable and would interfere with the effective enforcement of the law. *Id.* The Court therefore held that presuming consumer reliance when certain prerequisites are met – where the misrepresentations are material and widely disseminated, and consumers purchased the product – is an appropriate way to establish injury and determine redress in these cases. *Id.* at 605-06.

Appellants ignore *Figgie*'s holding on this point, instead relying on *Noland*, where – on different facts – a district court required more specific proof of consumer injury. Br. 29-37; *see Noland*, 2021 U.S. Dist. LEXIS 226238 at *11-15. Of course, to the extent there is any conflict between *Figgie* and *Noland*, *Figgie* plainly controls. But *Noland* is inapposite because the FTC's summary judgment case there "d[id] not turn on the presence of material misrepresentations" that were

widely disseminated, as that court acknowledged in distinguishing *Figgie*. *See* 2021 U.S. Dist. LEXIS 226238 at *23-24. The rule violations addressed in *Noland* involved the failures to notify customers of shipping delays, to offer refunds, and to inform consumers of their right to cancellation. *See id.* Those violations by definition took place *after* the initial representations; there was nothing for the court to presume that consumers relied on when they agreed to purchase the goods, so the traditional presumption of reliance did not apply.[7] The district court here correctly distinguished *Noland* on that very basis. 1-ER-13–14 (Op. 12-13).

While we believe *Noland* was wrongly decided, the district court's distinction was not "meaningless," as appellants improperly claim. Br. 34. Rather, it goes to the heart of the rationale behind the typical presumption of reliance: that where sellers make widespread false claims about important aspects of their products, and consumers then buy the products, it is safe to presume that consumers relied on those claims in making their purchases. *See, e.g.*, *Figgie*, 994 F.2d at 605. On that reasoning, the district court properly found that individualized injury was not required. *See* 1-ER-12–14 (Op. 11-13).

[7] The *Noland* court did not consider whether reliance may be presumed under an alternative theory that those victims should be presumed to have relied on later misrepresentations about their refund rights – an issue to be tried before that court. Here, though, the facts fit the classic presumption scenario: widespread false claims that induced purchases.

2. Appellants' misrepresentations were widely disseminated.

The district court also correctly determined that appellants' misrepresentations were widely disseminated, triggering the presumption of reliance. Appellants cannot dispute that millions of consumers viewed the ads that the district court found violated MITOR. *See* 2-SER-300–01 (¶ 78); 2-SER-354 (¶ 195); 1-SER-197 (third row). Rather, appellants contend that the refund of all sales was not justified because the Google ads that made the most egregious claims ("In Stock & Ships Today" and "Ships Fast from CA Today") resulted in only 11% of their total sales. This statistic, they claim, means the ads were not "widely disseminated" and thus that the presumption of reliance could not apply.[8] Br. 29. The argument fails.

To begin, it ignores that the Google campaigns were not appellants' only means of deceptive advertising. Their false shipping claims were rampant, spanning numerous online platforms (including appellants' own websites), and were made throughout the relevant time period. *See* 1-ER-4–5, 8–10 (Op. 3-4, 7-9). For example, appellants made false "in stock" and "ships today" claims on social

[8] The 11% number likely is a significant underestimate of the sales resulting from the Google ads. It includes only those consumers who clicked on the ad's link to make their purchase; many more people likely viewed the ad and later purchased through appellants' websites.

media platforms including Facebook, Instagram, Twitter, and Reddit.[9] Appellants' websites admittedly claimed sanitizer shipment in one to two days, three to five days, and three to seven days. 2-SER-322, 343–44, 350 (¶¶ 120-21, 168-78, 185-87). All these claims were false: appellants admitted that no orders were shipped in seven days or less. 2-SER-347–48 (¶ 180), 1-ER-119–20 (Answer ¶¶ 77-78). And the district court found that appellants had no reasonable basis to advertise shipping times of ten days or less, given their lack of inventory and that appellants "knew that the COVID-19 pandemic had disrupted the global supply chain." 1-ER-9 (Op. 8). On that record, appellants' claim that only 11% of their sales could be linked to deceptive advertising is simply wrong.

In any event, the Google ads sufficed on their own to meet the "widely disseminated" requirement. The "In Stock & Ships Today" Google ad was viewed by 395,865 consumers (as measured by impressions), and directly led to at least 15,469 visits to appellants' website. 2-SER-300–01 (¶ 78) (Google metrics). The "Ships Fast From CA Today" Google ad was viewed 8,067,289 times and resulted in 124,588 website visits. 2-SER-354 (explaining numbers in SUF ¶¶ 78 and 195). Consumers driven to appellants' website were then exposed to the similarly false

[9] *See* 2-SER-299–300, 397–98 (¶¶ 76, 265-67); 3-ER-189 (Instagram: "available for shipping"), 3-ER-190 (Instagram: "fully stocked and ready to ship out"); 1-SER-38 (Twitter: "if ordered today we can ship today!"), 39 (Twitter: "in-stock today"); 1-SER-40 (Facebook); 2-SER-296 (¶ 68) (Reddit).

claims there. Displaying a false advertisement to millions of consumers plainly counts as "widely disseminated" as this Court and other courts of appeals have applied that test. *See, e.g.*, *Rare Coin*, 931 F.2d at 1316 (ads distributed to 32,000 newspaper subscribers held "widely disseminated"); *FTC v. World Travel Vacation Brokers, Inc.*, 861 F.2d 1020, 1030 (7th Cir. 1988) (ads leading to hundreds of thousands of sales held widely disseminated).

There is no authority, and appellants cite none, for the idea that misrepresentations need to account for *all* of a defendant's sales to trigger the presumption. If appellants believed some of their sales resulted from perfectly lawful advertisements, they could have put forward evidence of such advertising – and any connected sales – to reduce the presumed redress amount. That is the very purpose of the rebuttal step once the FTC shows the presumption is triggered. *See Figgie*, 994 F.2d at 605-06; *Commerce Planet*, 815 F.3d at 603-05; *Blue Hippo*, 762 F.3d at 242-46. Instead, appellants essentially asked the court to assume that all sales not specifically linked to the Google ads resulted from unspecified truthful advertising they never documented or identified to the court. Br. 28. In any event, as discussed, the record refuted this theoretical idea, showing that appellants' misrepresentations spanned multiple platforms and were pervasive.

Appellants assert that none of their other ads contained shipping claims, but they cite only to Tammabattula's declaration for this point. Br. 28. Significant

record evidence, including appellants' own admissions discussed above, showed that the other ads in fact contained shipping claims. *See supra*, at 24-25. In response, Tammabattula's declaration makes the bare-bones claim that that "to [his] knowledge," the ads on other platforms "made no shipping claims at all." 3-ER-388 (¶ 12). But unsupported, conclusory statements in an affidavit are insufficient to create a dispute of material fact in the face of substantial contrary evidence. *Gordon*, 819 F.3d at 1194 (defendant's declaration was "insufficient to raise a triable issue of fact" because it lacked "'detailed facts and any supporting evidence'"); *FTC v. Publ'g Clearing House, Inc.*, 104 F.3d 1168, 1171 (9th Cir. 1997); *FTC v. Neovi, Inc.*, 604 F.3d 1150, 1159 (9th Cir. 2010) (declaration that "put forward nothing more than a few bald, uncorroborated, and conclusory assertions rather than evidence" did not defeat summary judgment). Tammabattula's assertion was "utterly discredited by the record," and the district court properly disregarded it. *Scott v. Harris*, 550 U.S. 372, 380-81 (2007).

3. Appellants failed to rebut the presumption with probative evidence showing any lesser injury.

The district court properly found that because appellants did not present any evidence rebutting the presumption that consumers relied on their false claims, the court could properly presume that all consumers were harmed. Appellants now contend that the district court ignored evidence that supposedly raises a triable issue of fact as to the amount of consumer injury. Br. 37-39. But appellants'

argument fails because the "evidence" appellants identify is nothing more than conjecture; consists of appellants' own conclusory, unsupported statements; or simply does not show an absence of injury. At summary judgment, appellants could not "proceed in the hope that something can be developed at trial in the way of evidence to support [their] claim"; they had the burden to set forth "specific facts" that a rational factfinder could rely on to return a verdict in their favor. *T.W. Elec. Serv., Inc. v. Pac. Elec. Contractors Ass'n*, 809 F.2d 626, 630-31 (9th Cir. 1987); *Anderson*, 477 U.S. at 252. Appellants utterly failed to meet this test, and none of their arguments show otherwise.

Appellants miss the mark in asserting that the unlawful Google ads only accounted for 11% of sales and that this means "the other 89% did not rely on the ad." Br. 38. As shown above, undisputed evidence showed that appellants' false shipping claims pervaded their advertising and extended beyond the Google ads. *See supra*, at 24-25. The 11% argument assumes, rather than proves, that all remaining sales were the product of lawful advertising, when the record forecloses that conclusion. *See id.* This kind of theoretical rebuttal – ungrounded in actual evidence – is insufficient to defeat summary judgment. *See Anderson*, 477 U.S. at 252; *T.W. Elec.*, 809 F.2d at 630-31.

Nor does the claim of "hundreds of repeat customers," Br. 38, show any error by the district court. "Repeat customers" apparently refers to customers who

placed multiple orders, potentially on the same day. That does not mean the customers received their order, were satisfied with their purchases, and ordered again, and thus were unharmed by appellants' practices. *See FTC v. AMG Capital Mgmt., LLC*, 910 F.3d 417, 427-28 (9th Cir. 2018) (rejecting argument that revenue from repeat customers should be excluded from a monetary judgment in the absence of "specific evidence that indicates one way or another whether repeat customers were actually deceived"), *reversed on other grounds*, 141 S. Ct. 1341 (2021). For example, given the frenzied demand at that point in the pandemic, repeat orders may have been placed before the purchasers could have known that shipment of their first order would not be made as promised. Appellants' claim boils down to the very one the Court has rejected: a rule presuming that repeat customers are not injured. *See AMG*, 910 F.3d at 427-28; *see also Commerce Planet*, 815 F.3d at 603-05 (holding that defendants failed to sufficiently support their claim that "not all" customers were deceived).

Tammabattula's speculation that some customers might have been satisfied with their purchase notwithstanding the false shipping claims, Br. 38, likewise does not raise a triable issue of fact. Appellants offered no customer declarations or other probative evidence showing "which or how many consumers were 'satisfied.'" *Gordon*, 819 F.3d at 1196. By contrast, the FTC submitted extensive undisputed evidence, including consumer declarations and hundreds of consumer

complaints, showing that appellants' customers were harmed by their deceptive shipping claims. *See, e.g.*, 2-SER-448 (¶ 381); 3-ER-134–150 (¶¶ 53-79), 3-ER-247–80, 1-SER-7–27. Appellants' contrary "evidence" boils down to Tammabattula's own say-so, 5-ER-886 (¶¶ 19-20), 3-ER-354–55 (¶¶ 15-16), which is insufficient to create a dispute of material fact.[10] *See, e.g.*, *Gordon*, 819 F.3d at 1194; *Publ'g Clearing House*, 104 F.3d at 1171. In any event, the district court addressed appellants' concern about satisfied customers in the redress program, which requires consumers to submit claims to receive refunds rather than directing refunds to every purchaser. *See* 1-ER-14-15 (Op. 13-14). That approach, the court explained, will ensure that satisfied consumers do not automatically receive refunds. *Id.*

Appellants also offered no evidence to back up their contention that many orders "received timely shipment." Br. 27. As the district court found, appellants failed to maintain adequate records indicating when orders were actually shipped, and what shipping times had been promised for those orders. *See* 1-ER-9 (Op. 8) n.5; 2-SER-466–69 (¶¶ 405-10). They likewise submitted *no* consumer declarations at all (including from anyone who received a timely order), instead

[10] That a handful of customers complimented the company in customer service messages, 5-ER-885, does not constitute the significant probative evidence needed to raise a triable issue of fact. *See Anderson*, 477 U.S. at 257.

relying on a few conclusory statements by their own executive. *See* Br. 27; 3-ER-392 (Tammabattula Decl. ¶ 30). By contrast, relying on the FTC's evidence, the district court found that the vast majority of orders – 30,000 out of 43,633 orders – took more than ten days to ship, and more than 10,000 orders took more than 30 days to ship.[11] 1-ER-4–5, 9 (Op. 3-4, 8); 2-SER-347 (¶ 179) (more than ten days), 455–60 (¶¶ 389-91, 394) (more than 30 days); 1-SER-170–71 (QYK RFA Resp. No. 117).

C. The district court was not required to order product returns or to incorporate credits for the sanitizer's "value."

The district court allowed any consumer who purchased hand sanitizer from appellants to apply for a full refund of the purchase price, ordering appellants to pay an overall amount up to their net revenues. 1-ER-13–14 (Op. 12-13). Given the dearth of rebuttal evidence, that ruling was proper. This Court did the same in *Figgie*, approving redress up to the defendant's total revenue where the presumption of reliance went unrebutted. 994 F.2d at 606-08. So did the Second Circuit in *Moses*, holding that when the FTC establishes a presumption of reliance, a court can use "gross receipts as a baseline for calculating damages." 913 F.3d at 310-11; *see also Commerce Planet*, 815 F.3d at 605 (noting "court could simply

[11] These estimates were based on appellants' Shopify records combined with UPS and USPS data. 1-SER-135–47 (Gieran Decl. ¶¶ 8-35) (explaining methodology).

have awarded [total revenues] and been done with it" given defendant's failure to rebut the presumption).

Appellants contend that the district court should have either required consumers to return the sanitizer products to QYK before receiving money back or reduced any refund by the products' "value." Br. 21-26. They contend that the court's approach resulted in an improper "windfall" to customers and made the redress order "punitive." Br. 24. The argument has no basis in law or fact.

For starters, the law is clear that where unlawful or fraudulent conduct "taint[s] the customers' purchasing decisions," courts need not deduct the value of products consumers received in calculating a compensatory award. *Figgie*, 994 F.2d at 606. Thus, the Court explained in *Figgie*, where a dishonest merchant falsely sells rhinestones as diamonds, the victims' recovery is not limited "to the difference between what they paid and a fair price for rhinestones." *Id.* That is because the misrepresentations "tainted the customers' purchasing decisions": "[i]f they had been told the truth, perhaps they would not have bought rhinestones at all." *Id.* Because the fraud was "in the selling, not the value of the thing sold," customers would be entitled to full refunds – regardless of any "value" the rhinestones might have. *Id.*

That logic applies foursquare here. At a time of unprecedented, emergency demand for hand sanitizer, when many retailers had run out of inventory or were

facing shipping delays, appellants promised consumers they had sanitizer in stock ready to ship immediately. It is obvious from the overwhelming response to appellants' advertisements that these claims were important to consumers' purchasing decisions, especially in the early months of the pandemic – as the record amply demonstrates (contrary to appellants' claim that there is "[n]o such evidence," Br. 36). Appellants' own marketing director testified that consumers' purchasing decisions turned on whether sanitizer was actually in stock. 1-ER-10 (Op. 9); 1-SER-220 (Paulo Dep. Tr. 88:9-19). Four consumers testified via declaration that they ordered from appellants "only . . . because it had advertised that it had hand sanitizer in stock." 1-SER-76–77 (Kalmeta Decl. ¶ 2, 7); *accord* 1-SER-66 (LeSage Decl. ¶¶ 2-3); 1-SER-41–42 (Breier Decl. ¶¶ 2, 9); 1-SER-90 (Askins Decl. ¶¶ 2-4); 1-SER-112. Tammabattula himself told customer service representatives that "90%" of people will want to know "if product is available." 1-SER-195. Consumer complaints likewise show that customers relied on the ad claims, ordering from appellants because they believed products were in stock and would be shipped within a specific period. 3-ER-135–6 (¶ 56) (eleven complaints to FTC stating as much), 3-ER-140 (¶ 62) (twenty TrustPilot complaints), 3-ER-147 (¶ 71) (nine Better Business Bureau complaints), 3-ER-150 (¶ 77) (fourteen Shopify complaints); 2-SER-449 (¶ 382).

In other words, what consumers wanted and what they ordered was hand sanitizer *now*, as promised. When appellants sold hand sanitizer *later*, consumers did not get the benefit of their bargain; the purchasing decision was tainted from the get-go. Even if consumers ultimately received sanitizer (the rhinestone), they did not receive what they were promised – sanitizer shipped quickly (the diamond). As in *Figgie*, the fraud was "in the selling, not the value of the thing sold." 994 F.2d at 606. The district court thus properly recognized that full refunds were appropriate "because Defendants' deception induced the sale in the first place." 1-ER-14 (Op. 13).

The same reasoning has led other courts of appeals to reject the idea that compensatory awards must be reduced by the value of the products received. The Tenth Circuit held that in calculating contempt sanctions for magazine sales that violated an injunction, "the district court need not offset the value of any product the defrauded consumers received." *FTC v. Kuykendall*, 371 F.3d 745, 766 (10th Cir. 2004). The Eleventh Circuit likewise affirmed a compensatory contempt award for fraudulent print toner sales in the amount of gross revenue without deducting the value of the toner. *McGregor*, 206 F.3d at 1388-89.

Moreover, it is not clear that the sanitizer had meaningful value by the time of the district court's April 2022 order, which was entered roughly two years after most of the original sales. Sanitizer is a consumable product with a limited shelf

life, and appellants' sanitizer typically expired in two years.[12] Requiring consumers to return the likely expired, two-year-old sanitizer products would have been a burdensome exercise with little practical purpose. Appellants do not assert they could or would have resold the sanitizer, or that it had any monetary value by that point. It was appellants' burden to demonstrate the value of any deductions to net revenues, and they failed to meet it. *See Moses*, 913 F.3d at 310-11; *Gordon*, 819 F.3d at 1194. The district court was well within its discretion when it declined to require defrauded customers to jump through further hoops to get refunds. *See Kuykendall*, 371 F.3d at 766-67 (not requiring return of magazines); *McGregor*, 206 F.3d at 1388-89 (not requiring return of printer toner).

In *Figgie*, the Court required customers to return the products at issue, but that fact-bound determination does not affect the analysis here. *Figgie* involved heat-detection devices that sold for $170 apiece and had significant residual value. That situation bears little resemblance to small bottles of hand sanitizer, which sold between $5.99 and $12.99 and had looming (or passed) expiration dates. Indeed, the cost of shipping the product back could easily exceed the original price of the product itself. Furthermore, in *Figgie* the Commission had determined as fact that the heat detectors retained meaningful value, 994 F.2d at 606, whereas here the

[12] *See* 1-SER-37 (showing expiration date of April 4, 2022, for sanitizer produced April 5, 2020); 1-SER-194 (Tammabattula: "expiration is 2 years").

record is devoid of such evidence and there is considerable cause for doubt. *See Moses*, 913 F.3d at 310-11; *see also Gordon*, 819 F.3d at 1194 (defendant failed to meet burden to show value of any deductions to presumed award).

Nor was there any windfall as a matter of law. Under MITOR and the Unordered Merchandise Statute, 39 U.S.C. § 3009, merchandise (like the hand sanitizer here) shipped after a seller fails to provide the required notices of shipping delays and the option to cancel for a refund is deemed a gift. *See* 39 U.S.C. § 3009; 16 C.F.R. § 435.2 (b)(1). Recipients may keep the merchandise and "have the right to retain, use, discard, or dispose of it in any manner [they see] fit without any obligation whatsoever to the sender." 39 U.S.C. § 3009(b). In that situation, a full refund awarded under Section 19 need not take into account the value of the gift, since the appellants relinquished any entitlement to it when they violated MITOR.

II. THE PERMANENT INJUNCTION WAS PROPER.

Appellants concede that the district court applied the correct legal standards in deciding to enter a permanent injunction. They assert, however, that the district court erred in finding that wrongdoing is likely to recur, Br. 43-46, and they contend that the protective goods restriction is overbroad and violates the requirement that an injunction be "tailored" such that it bears "a reasonable relationship" to the violation, Br. 46-51. Neither argument has merit.

A. The district court properly determined that wrongdoing would likely recur.

Appellants have a high hurdle for their claim that the district court abused its discretion when it determined that appellants' wrongdoing was likely to recur. Br. 43-46. A reviewing court will reverse only if it has a definite and firm conviction that the district court's conclusion reflects a clear error of judgment, *SEC v. Coldicutt*, 258 F.3d 939, 941 (9th Cir. 2001), such as "when the record contains no evidence on which [the court] rationally could have based [its] decision," *Oregon Nat. Res. Council v. Marsh*, 52 F.3d 1485, 1492 (9th Cir. 1995).

Appellants cannot come close to meeting this high bar. To determine whether wrongdoing is likely to recur, courts consider five core factors: the degree of scienter, frequency of violations, ability to commit future violations, degree of harm suffered, and defendants' recognition of their own culpability. *SEC v. Murphy*, 626 F.2d 633, 654-56 (9th Cir. 1980) (affirming permanent injunction where factors were mixed). The district court carefully analyzed all five factors and determined that four showed a likelihood of recurrence and one was neutral. 1-ER-15–17 (Op. 14-16); 2-SER-506–09 (Stay Op. 4-7). It therefore determined that a permanent injunction was necessary to protect consumers from future harm.

The record firmly supported that conclusion. Appellants admitted they knew they could not ship product as promised, yet continued soliciting orders using "in stock" and "ships today" claims. 1-ER-4 (Op. 3). Worse yet, after their Google and

Facebook accounts were suspended for problematic practices, they tried to hire a third-party advertiser and set up a different account to "circumvent the suspension." 1-ER-15–16 (Op. 14-15); 1-SER-4, 5–6, 200–03; 2-SER-351–52 (¶ 189-90), 488–90 (¶¶ 436-39). Similarly, Nguyen blatantly misrepresented that appellants' protein powder could prevent or mitigate COVID-19, knowing it had no such effect. 1-ER-6, 16 (Op. 5, 15).

Nor was such dishonest conduct unprecedented. Nguyen's pharmacy license had been suspended for repeated violations of California law, including "Unprofessional Conduct Involving Acts of Dishonesty, Fraud or Deceit." 1-ER-16 (Op. 15). Her misconduct went well beyond "a single incident," Br. 49: Nguyen engaged in a series of violations that took place over the course of a year, included stealing dangerous drugs from her previous employer; impersonating a pharmacy technician to order replacement drugs to cover up her theft; selling the stolen drugs to customers of her new pharmacy, in violation of storage, recall, and labeling requirements; and dispensing large quantities of oxycodone that lacked legitimate medical purpose, despite ample red flags. 3-ER-313–25, 337–41.

The district court properly concluded that together, these facts showed a "high degree of scienter," suggesting that "wrongdoing is likely to recur." 1-ER-15–16 (Op. 14-15). The high frequency and volume of violative sanitizer sales, and appellants' remaining in the PPE business, compounded this likelihood. 1-ER-16

(Op. 15). The risk of recidivism was high given appellants' refusal to acknowledge their own culpability and complete "lack of remorse." *Id.*; *see also* 2-SER-507–09 (Stay Op. 5-7).

Appellants claim that in considering scienter, the district court misinterpreted an April 2020 podcast in which Tammabattula admitted to lacking supplies to keep up with customers' demand for sanitizer. Br. 45. According to appellants, Tammabattula was discussing "the industry in general" and not QYK in particular. *Id.* But that is not a plausible interpretation of his plain words in context. Responding to questions about "any of your brands," Tammabattula admitted to "major issues in the supply chain for the hand sanitizers" and "obvious challenges in importing" the bottles needed. *See* Daily Caller interview, https://youtu.be/ulsq18k8whM, at 6:19-7:35. Apart from the podcast, Tammabattula admitted in discovery that he knew throughout April 2020 that QYK was facing severe shortages of critical supplies, and that there were "major issues" in the supply chain. 1-SER-180–86 (Resp. to RFA Nos. 57-72). He likewise admitted that he was aware of the "full gravity of the situation" regarding shipping delays by March 12th or 13th, 2020. 2-SER-427–28 (¶ 331). Ample other undisputed evidence confirmed that appellants knew full well that it was impossible to live up to their advertising promises, but continued making them anyway. *See, e.g.*, 2-SER-320,

327–30, 428, 431–35 (¶¶ 113-14, 126-30, 333, 341-51). All of this evidence supported the district court's scienter determination. 1-ER-5, 8–9 (Op. 4, 7-8).

Appellants also are not correct that the court should have ignored their past conduct and examined only whether their *current* business model allows them to commit future violations. Br. 44, 49-50. That is not the law. Past violations may give rise to an inference of future violations, *Murphy*, 626 F.2d at 655, and appellants' record supports such a prediction. Courts often reject even "'sincere assurances' against future violations" when a defendant's past conduct shows "an ongoing risk to consumers." *Gordon*, 819 F.3d at 1197; *accord SEC v. Fehn*, 97 F.3d 1276, 1295-96 (9th Cir. 1996); *Murphy*, 626 F.2d at 655-56.

For similar reasons, "mere voluntary cessation of allegedly illegal conduct" does not moot the need for an injunction, because "the defendant could simply begin the wrongful activity again." *FTC v. Affordable Media, LLC*, 179 F.3d 1228, 1238 (9th Cir. 1999); *see also United States v. W.T. Grant Co.*, 345 U.S. 629, 633 (1953) ("[T]he court's power to grant injunctive relief survives discontinuance of the illegal conduct."). The district court found that going forward appellants retain the ability to violate the FTC Act in similar ways and that their track record made recidivism likely. 1-ER-15-16 (Op. 14-16). That determination rested on sound evidence and was well within the court's discretion. *See W.T. Grant*, 345 U.S. at 633 (need only "some cognizable danger of recurrent violation").

Appellants' shift to a different business model – selling to governments and businesses rather than to individuals – does not make future violations impossible as they wrongly claim. Br. 44, 49-50. The FTC Act applies to all behavior "in or affecting commerce." 15 U.S.C. § 45(a)(1); *see also, e.g.*, *FTC v. Cyberspace.com, LLC*, 453 F.3d 1196, 1198-99 (9th Cir. 2006) (deceptive practices aimed at businesses violated the FTC Act). And when it promulgated MITOR, the FTC saw "no compelling reason to treat [businesspeople] differently from other members of the consuming public." 40 Fed. Reg. 51582, 51594 (1975). The district court was well within its discretion to determine that giving appellants another chance to deceive would be unwise.[13] *See Gill*, 265 F.3d at 957.

B. The injunction is sufficiently tailored to appellants' violations.

The district court properly restricted appellants from selling protective goods in the future. District courts enjoy "broad latitude" in determining an injunction's scope. *High Sierra Hikers Ass'n v. Blackwell*, 390 F.3d 630, 641 (9th Cir. 2004). When it comes to enforcement of the FTC Act, "those caught violating the Act must expect some fencing in," so injunctions may prohibit conduct that goes beyond the specific wrongdoing in the case. *FTC v. Nat'l Lead Co.*, 352 U.S. 419,

[13] That payment occurs after delivery, Br. 44, does not affect appellants' ability to violate the FTC Act in myriad other ways. And appellants' recent conduct is hardly reassuring: they admit that their performance under a major retail contract has been "a complete debacle," because of QYK's apparent knowing shipment of defective products. *See* 2-SER-517 (Balaji Tammabattula Decl. ¶ 18).

431 (1957). Injunctions in FTC cases may be framed "broadly enough to prevent respondents from engaging in similarly illegal practices." *FTC v. Colgate-Palmolive Co.*, 380 U.S. 374, 394-95 (1965). "Appellate review of [an injunction's] terms is correspondingly narrow." *Lamb-Weston, Inc. v. McCain Foods, Ltd.*, 941 F.2d 970, 973-74 (9th Cir. 1991) (cleaned up). The injunction need only "bear a 'reasonable relation to the unlawful practices found to exist.'" *Litton Indus., Inc. v. FTC*, 676 F.2d 364, 370-71 (9th Cir. 1982).

To determine the scope of an injunction, courts consider (1) the seriousness and deliberateness of the violation; (2) the ease with which the violation could be transferred to other products; and (3) any history of past violations. *See Litton*, 676 F.2d at 370-71. "Where a fair assessment of [a defendant's] conduct shows a ready willingness to flout the law, sufficient cause for concern regarding further, additional violations exists." *Sears, Roebuck & Co. v. FTC*, 676 F.2d 385, 391-92 (9th Cir. 1982); *Lamb-Weston*, 941 F.2d at 973-74 (affirming worldwide injunction even though misconduct took place only in the United States).

On that test, the protective goods restriction fell comfortably within the district court's discretion. Appellants may not evade the consequences of their illegality because their unlawful practices allegedly lasted only a few months, their protein powder product purportedly resulted in minimal sales "before it was pulled," or they changed their business model. Br. 47, 49-50. As the district court

emphasized, this framing "eschews essential context": that appellants' "unfair and deceptive sales practices took advantage of consumers during an unprecedented public health crisis." 2-SER-510 (Stay Op. 8). Preying on vulnerable consumers in the midst of a deadly pandemic was sufficiently egregious to demonstrate a general disregard for legal guardrails, and called for especially rigorous fencing-in. The same goes for claims that a protein powder would protect against a deadly virus, which gave the illusion of "false safety 'guarantees'" that "could have had fatal or life-altering consequences for consumers," 2-SER-509 (Stay Op. 7), no matter how short-lived the sales campaign. And all this misconduct followed the "streak of dishonesty and deceit" shown by Nguyen's serious and repeated violations of state law, which resulted in the suspension of her pharmacy license. 1-ER-16 (Op. 15).

The record therefore showed "a real likelihood of recurring violation," and there is "no basis for disturbing the district court's prudent assessment that giving [appellants] another chance might prove to be unwise." *Gill*, 265 F.3d at 957. In the absence of any remorse, behavioral restrictions were plainly required. 1-ER-16 (Op. 15); 2-SER-509 (Stay Op. 7). Appellants appear to contend that broad relief is appropriate only where misconduct occurred over a longer time period, Br. 48, 50, but duration is only one consideration. Other factors – including the pandemic context, appellants' scienter, and the potentially life-altering impact of some deceptive claims – justify the restriction here. The district court correctly

determined that a "prophylactic measure is necessary to prevent [appellants] from exploiting customers now and during any future public health crisis." 2-SER-510 (Stay Op. 8). The injunction "does just that" by preventing appellants from selling products to prevent, detect, or mitigate COVID-19 or other conditions. *Id.* Appellants remain free to participate in many other industries and to sell a wide variety of products – including beauty products, the cornerstone of their pre-pandemic business.

Rather than showing future violations are unlikely (Br. 44, 49-50), appellants' activities during this litigation confirm their disregard for responsible business practices and fair dealing. Appellants finalized a $2.2 million government contract to supply protective goods the *day after* the district court issued its summary judgment decision against them. *See* 2-SER-520–21 (Letter from U.S. Department of Veterans Affairs). By that time, they knew full well that the district court might ban them from such business, yet they proceeded anyway. *See* 1-SER-227–28; 1-SER-268; DE 15 at 17-19 (FTC Stay Opp.). Even after the injunction issued, appellants apparently did not tell their contracting partner about it, instead asking this Court to stay the injunction and allow them to fulfill the contract. *See* DE 9 (QYK Stay Mot.), 10 (QYK Em. Stay Mot.). Appellants also exaggerate their compliance with the preliminary injunction (Br. 43-44, 49): the FTC received

multiple complaints about deceptive practices surrounding their wipes products. *See* 2-SER-479–85 (¶¶ 428-30).

Nor was it error for the district court to enjoin the conduct of *all* appellants even though only Nguyen is a proven recidivist with a propensity for violative conduct. Br. 20, 46-47, 49. Tammabattula and Nguyen are a married couple who admit to working together closely in numerous business ventures, including those here. *See* SUF ¶¶ 32. The parties agreed that the corporate appellants operated as a "common enterprise" such that each is jointly and severally liable for the actions of the others. 1-ER-3 (Op. 2) n.3; 2-SER-281–2 (¶¶ 40-42); 1-SER-224 (¶¶ 16-17). And appellants did not ask for different treatment for different appellants when the district court was considering the scope of the injunction. *See* 1-SER-264–69 (QYK Opp. to FTC SJ Mot.). On that record, the district court did not abuse its discretion in making all appellants subject to the injunction.

Finally, appellants get no help from their contention that they lacked sufficient notice that the court might enter an injunction like the one it did. Br. 47-48. For one thing, even if the claim were factually true, it would present no reason to reverse an appropriate injunction grounded in the record. The claim is false anyway.

The Complaint and Amended Complaint both sought "a permanent injunction to prevent future violations of the FTC Act," and all "such other and

additional" proper relief. 2-ER-62, 102. In May 2021 FTC staff specifically told appellants' counsel that in keeping with the requested relief the Commission would seek a permanent industry ban going forward, including "business to business sales." 2-SER-497 (¶ 6). Appellants' lawyer admitted as much below, noting that he "recall[ed] some discussion regarding a potential permanent ban that occurred in May of 2021." 2-SER-501 (Defendants' Reply ISO Mot. for Partial Stay). In February 2022, the FTC formally requested the protective goods restriction in its summary judgment motion, including the provision in the accompanying draft proposed order, 1-SER-226–28; in response, appellants recognized that "the FTC wants to ban the defendants from an entire industry." 1-SER-268; *see also* 4-ER-396 (Tammabattula Decl. ¶ 46). Appellants had plenty of notice that their ability to sell protective goods in the future might be restricted.

III. NGUYEN'S UNSUPPORTED, SELF-SERVING INTERPRETATION OF HER OWN VIETNAMESE-LANGUAGE BROADCAST DID NOT CREATE A DISPUTED ISSUE OF FACT.

The district court found as undisputed fact that a Vietnamese-language broadcast interview featuring appellant Nguyen told listeners that her protein-powder product could prevent and mitigate COVID-19 and was FDA approved for that purpose. 1-ER-11 (Op. 10). The court relied on a translation of the broadcast provided by the FTC from a certified Vietnamese-English translator, and found that when assessed in "context with the entire broadcast," there was no doubt about

what Nguyen was conveying. *Id.* The court rejected a declaration supplied by Nguyen herself purporting to translate a few specific sentences of the broadcast as having a different, and more innocent, meaning from the certified translation. Appellants are incorrect that the Nguyen declaration created a dispute of material fact regarding the proper translation of Nguyen's statements and that the court therefore erred in granted summary judgment to the FTC on the point. Br. 39-42.

Nguyen's declaration does not dispute the translation of the broadcast beyond a few specific sentences, and as the district court found she clearly conveyed throughout the broadcast that the product – Basic Immune IGG – would protect users from COVID-19 and that it was FDA approved. There is no dispute, for example, about the meaning of a lengthy discussion between Nguyen and the interviewer about the "Covid-19 pandemic" that "has been raging in the United States," 1-SER-117, during which Nguyen claimed that Basic Immune IGG could ward off COVID-19 infections even if the user were sitting next to an infected person. 1-SER-124. Nguyen stated, again without dispute, that users of the supplement will have more antibodies that "cling to and attack the coronavirus." *Id*. After that background, Nguyen then launched into a specific discussion of the product, again disputed neither below nor before this Court. She stated, "For this product, I must say that, first, **it was FDA registered and approved** via Company [Entera] Health that makes this product." 1-SER-127 (emphasis added). She later

said that because she had taken Basic Immune IGG, people did not "have to be afraid of [her] anymore" and could "get close to" her. 1-SER-130–31.

The disputed exchange took place in the middle of that discussion. According to the FTC's certified translator, Nguyen and her questioner stated:

> Do Dung [Host]: And we should still wash our hands for two Happy Birthday songs' time, and use this product for a month as well. Is it guaranteed that we will stay safe? Guaranteed?
>
> Thu Thao [Nguyen]: It's guaranteed, because there is FDA's verification and approval.

1-SER-130–31.

According to Nguyen, the exchange was:

> Host: We tried our best to avoid and wash your hands often via singing the "Happy Birthday song" in addition, add on to take this bottle supplement for 1 month to guarantee something? Does it guarantee for better health?
>
> Nguyen: This bottle supplement is guarantee [sic] to make in FDA facility and it has all the certifications

5-ER-677 (¶17). Appellants are mistaken in two respects in their argument that Nguyen's translation creates a dispute of fact regarding whether she claimed that the product was FDA-approved to prevent COVID-19.

First, no matter what the meaning of the disputed sentences, there is no dispute as to the remainder of the discussion, which plainly supports the district court's conclusion that "the clear 'net impression'" was that "Basic Immune IGG users would stay safe from COVID-19 and that it was FDA approved for that

purpose." 1-ER-11 (Op. 10). Indeed, Tammabattula admitted that Nguyen claimed that the product was FDA-approved to treat, prevent, or reduce the risk of COVID-19. 1-SER-191 (Resp. to RFA No. 87); 2-SER-407 (¶ 291), 446–47 (¶¶ 377-78). Thus, any dispute over these few sentences is immaterial because Nguyen's translation of them does not change the unmistakable thrust of the entire discussion.

Second, the district court acted within its discretion in rejecting Nguyen's translation. Nguyen did not claim to be a certified translator or even fluent in the language, but simply "of Vietnamese descent." 5-ER-676. The district court properly determined that the declaration was "not enough to create a genuine factual dispute" because it lacked any foundation establishing "her competence to testify as a Vietnamese to English translator." 1-ER-11 (Op. 10) n.6. A "conclusory, self-serving affidavit, lacking detailed facts and any supporting evidence, is insufficient to create a genuine issue of material fact." *Publ'g Clearing House*, 104 F.3d at 1171; *Anderson*, 477 U.S. at 248; *Gordon*, 819 F.3d at 1193-94 (holding conclusory affidavit did not raise a triable issue because it lacked supporting evidence). Nguyen's say-so about the meaning of her words did not create a factual dispute that can defeat summary judgment.

Finally, appellants get no help from their claim that "the FTC's translator imputed the word 'Covid' into the passage when it was never used." Br. 40; *see* 5-

ER-676–77 (Nguyen Decl. ¶¶ 16-17). For one thing, the claim is not true. The FTC's certified translation of the contested passage did not use the word "Covid" at all. *See* 1-SER-130–31. The FTC's summary judgment brief, Dkt. 135 at p. 19, quoted the passage as "Is it guaranteed that we will stay safe [from COVID-19]?" when it discussed the exchange. But the district court was interpreting not the FTC's pleading, but the certified translation. *See* 1-ER-11 (Op. 10) (quoting Dkt. 144, the translation). As for the pleading, appellants identify no error in supplying the obvious context of an excerpted quotation in brackets. *See* Blue Book R. 5.2 (a).

Ultimately, this entire issue is largely pointless because appellants touted Basic Immune IGG as a COVID preventative multiple times in English-language videos. One video shows Nguyen responding to a question about "the best preventative measure to take now" by stating about the product, "in case you get infected with the virus, then your body will be able to fight back and destroy all the Coronavirus that is entering your body." 3-ER-212; 2-SER-415–18 (¶¶ 299-305). In another one, Nguyen claimed Basic Immune IGG was a "prevention" for COVID-19, and suggested that it had been clinically tested and had a "patent" from the FDA. 3-ER-218, 220; 2-SER-418–20 (¶¶ 306-07). In light of those uncontested statements, it is clear that even if the dispute over the Vietnamese

broadcast had merit, it is not genuine because it would not "preclude the entry of summary judgment." *Anderson*, 477 U.S. at 248-49.

IV. APPELLANTS' "FORCE MAJEURE" DEFENSE HAS NO MERIT.

Finally, in a last-ditch effort to evade responsibility for their misconduct, appellants argue that the district court erred in finding them liable despite the "unprecedented global pandemic that was unforeseen to anyone." Br. 51. By their account, appellants were innocent victims of events in a "tumultuous time" over which they "had no control." Br. 52-53. Rather than being held responsible for exploiting consumer fears by selling merchandise under false pretenses, appellants contend, they should be applauded for "their heroic effort" working long hours during the pandemic. Br. 53.

This account twists the facts beyond recognition and in any event provides no defense to appellants' violations. The law required appellants to have a reasonable basis for their shipping time claims at the time they made them. The district court found that appellants had no factual basis to claim, among other deceptive statements, that they had sanitizer "in stock" that would "ship[] today" (or within a few days). 1-ER-4–5, 8–10 (Op. 3-4, 7-9). They did not have sufficient inventory on hand when they disseminated ads making those claims to hundreds of thousands of consumers, inducing millions in sanitizer sales. 1-ER-5, 14 (Op. 4, 13). And they made the claims despite "known supply chain obstacles and a

dwindling or nonexistent inventory." 1-ER-5 (Op. 4). Indeed, the court found appellants "were well aware of the global supply chain disruptions that hindered [their] ability to restock their inventory" and yet "continued to solicit orders." 1-ER-15 (Op. 14). And when Google and Facebook cut off their accounts for violating the platforms' policies, appellants circumvented those suspensions by advertising on the same sites through different accounts. 1-ER-16 (Op. 15); 1-SER-4, 5–6, 200–03; 2-SER-351–52 (¶ 189-90), 488–90 (¶¶ 436-39). This was not a situation where a seller had every reason to believe it could ship products promptly but was caught unawares by an intervening disruption.

Moreover, appellants' MITOR violations extended beyond the unfounded shipping time claims. Appellants also violated MITOR's shipping delay notification and prompt refund requirements. Appellants' made-up "force majeure" defense has no bearing on those violations. Even if appellants *did* have reason to believe they could ship their products in the promised time frames, there is no excuse for failing to issue the required notifications to purchasers, or failing to issue prompt refunds when asked.

At base, appellants are profiteers, not victims. The district court properly declined to allow them to shift blame to circumstances they purposefully seized upon for their own financial gain – at great cost to consumers.

CONCLUSION

The judgment of the district court should be affirmed.

Respectfully submitted,

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FOR THE NINTH CIRCUIT

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STATUTORY ADDENDUM

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Federal Trade Commission Act

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Title 15 - COMMERCE AND TRADE

CHAPTER 2 - FEDERAL TRADE COMMISSION; PROMOTION OF EXPORT TRADE AND PREVENTION OF UNFAIR METHODS OF COMPETITION
SUBCHAPTER I - FEDERAL TRADE COMMISSION

§45. Unfair methods of competition unlawful; prevention by Commission

(a) Declaration of unlawfulness; power to prohibit unfair practices; inapplicability to foreign trade

(1) Unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are hereby declared unlawful.

(2) The Commission is hereby empowered and directed to prevent persons, partnerships, or corporations, except banks, savings and loan institutions described in section 57a(f)(3) of this title, Federal credit unions described in section 57a(f)(4) of this title, common carriers subject to the Acts to regulate commerce, air carriers and foreign air carriers subject to part A of subtitle VII of title 49, and persons, partnerships, or corporations insofar as they are subject to the Packers and Stockyards Act, 1921, as amended [7 U.S.C. 181 et seq.], except as provided in section 406(b) of said Act [7 U.S.C. 227(b)], from using unfair methods of competition in or affecting commerce and unfair or

deceptive acts or practices in or affecting commerce.

* * *

§ 52. Dissemination of false advertisements

(a) Unlawfulness. It shall be unlawful for any person, partnership, or corporation to disseminate, or cause to be disseminated, any false advertisement—

(1) By United States mails, or in or having an effect upon commerce, by any means, for the purpose of inducing, or which is likely to induce, directly or indirectly the purchase of foods, drugs, devices, services, or cosmetics; or

(2) By any means, for the purpose of inducing, or which is likely to induce, directly or indirectly, the purchase in or having an effect upon commerce of food, drugs, devices, services, or cosmetics.

(b) Unfair or deceptive act or practice. The dissemination or the causing to be disseminated of any false advertisement within the provisions of subsection (a) of this section shall be an unfair or deceptive act or practice in or affecting commerce within the meaning of section 5 [15 USCS § 45].

§57b. Civil actions for violations of rules and cease and desist orders respecting unfair or deceptive acts or practices

(a) Suits by Commission against persons, partnerships, or corporations; jurisdiction; relief for dishonest or fraudulent acts

(1) If any person, partnership, or corporation violates any rule under this subchapter respecting unfair or deceptive acts or practices (other than an interpretive rule, or a rule violation of which the Commission has provided is not an unfair or deceptive act or practice in violation of section 45(a) of this title), then the Commission may commence a civil action against such person, partnership, or corporation for relief under subsection (b) in a United States district court or in any court of competent jurisdiction of a State.

(2) If any person, partnership, or corporation engages in any unfair or deceptive act or practice (within the meaning of section 45(a)(1) of this title) with respect to which the Commission has issued a final cease and desist order which is applicable to such person, partnership, or corporation, then the Commission may commence a civil action against such person, partnership, or corporation in a United States district court or in any court of competent jurisdiction of a State. If the Commission satisfies the court that the act or practice to which the cease and desist order relates is one which a reasonable man would have known under the circumstances was dishonest or fraudulent, the court may grant relief under subsection (b).

(b) Nature of relief available

The court in an action under subsection (a) shall have jurisdiction to grant such relief as the court finds necessary to redress injury to consumers or other persons, partnerships, and corporations resulting from the rule violation or the unfair or deceptive act or practice, as the case may be. Such relief may include, but shall not be limited to, rescission or reformation of contracts, the refund of money or return of property, the payment of damages, and public notification respecting the rule violation or the unfair or deceptive act or practice, as the case may be; except that nothing in this subsection is intended to authorize the imposition of any exemplary or punitive damages.

* * *

39 USCS § 3009

United States Code, 2019 Edition

TITLE 39. POSTAL SERVICE (§§ 101 — 5605)
Part IV. Mail Matter (Chs. 30 — 37)
CHAPTER 30. Nonmailable Matter (§§ 3001 — 3018)

§ 3009. Mailing of unordered merchandise

(a) Except for (1) free samples clearly and conspicuously marked as such, and (2) merchandise mailed by a charitable organization soliciting contributions, the mailing of unordered merchandise or of communications prohibited by subsection (c) of this section constitutes an unfair method of competition and an unfair trade practice in violation of section 45(a)(1) of title 15.

(b) Any merchandise mailed in violation of subsection (a) of this section, or within the exceptions contained therein, may be treated as a gift by the recipient, who shall have the right to retain, use, discard, or dispose of it in any manner he sees fit without any obligation whatsoever to the sender. All such merchandise shall have attached to it a clear and conspicuous statement informing the recipient that he may treat the merchandise as a gift to him and has the right to retain, use, discard, or dispose of it in any manner he sees fit without any obligation whatsoever to the sender.

(c) No mailer of any merchandise mailed in violation of subsection (a) of this section, or within the exceptions contained therein, shall mail to any recipient of such merchandise a bill for such merchandise or any dunning communications.

(d) For the purposes of this section, “unordered merchandise” means merchandise mailed without the prior expressed request or consent of the recipient.

Code of Federal Regulations (2020)
16 CFR 435.1
Title 16 – Commercial Practices
Part 435 — Mail, Internet, or Telephone Order Merchandise

§ 435.1 Definitions.

For purposes of this part:

(a) Mail, Internet, or telephone order sales shall mean sales in which the buyer has ordered merchandise from the seller by mail, via the Internet, or by telephone, regardless of the method of payment or the method used to solicit the order.

* * *

(e) Shipment shall mean the act by which the merchandise is physically placed in the possession of the carrier.

* * *

§ 435.2 Mail, Internet, or telephone order sales.

In connection with mail, Internet, or telephone order sales in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, it constitutes an unfair method of competition, and an unfair or deceptive act or practice for a seller:

(a)

(1) To solicit any order for the sale of merchandise to be ordered by the buyer through the mail, via the Internet, or by telephone 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:

(i) Within that time clearly and conspicuously stated in any such solicitation; or

(ii) If no time is clearly and conspicuously stated, within thirty (30) days after receipt of a properly completed order from the buyer. Provided, however, where, at the time the merchandise is ordered the buyer applies to the seller for credit to pay for the merchandise in whole or in part, the seller shall have fifty (50) days, rather than thirty (30) days, to perform the actions required in this paragraph (a)(1)(ii).

(2) To provide any buyer with any revised shipping date, as provided in paragraph (b) of this section, unless, at the time any such revised shipping date is provided, the seller has a reasonable basis for making such representation regarding a definite revised shipping date.

(3) To inform any buyer that it is unable to make any representation regarding the length of any delay unless:

(i) The seller has a reasonable basis for so informing the buyer; and

(ii) The seller informs the buyer of the reason or reasons for the delay.

(4) In any action brought by the Federal Trade Commission, alleging a violation of this part, the failure of a respondent-seller to have records or other documentary proof establishing its use of systems and procedures which assure the shipment of merchandise in the ordinary course of business within any applicable time set forth in this part will create a rebuttable presumption that the seller lacked a reasonable basis for any expectation of shipment within said applicable time.

(b)

(1) Where a seller is unable to ship merchandise within the applicable time set forth in paragraph (a)(1) of this section, to fail to offer to the buyer, clearly and conspicuously and without prior demand, an option either to consent to a delay in shipping or to cancel the buyer s order and receive a prompt refund. Said offer shall be made within a reasonable time after the seller first becomes aware of its inability to ship within the applicable time set forth in paragraph (a)(1) of this section, but in no event later than said applicable time.

(i) Any offer to the buyer of such an option shall fully inform the buyer regarding the buyer's right to cancel the order and to obtain a prompt refund and shall provide a definite revised shipping date, but where the seller lacks a reasonable basis for providing a definite revised shipping date the notice shall inform the buyer that the seller is unable to make any representation regarding the length of the delay.

(ii) Where the seller has provided a definite revised shipping date which is thirty (30) days or less later than the applicable time set forth in paragraph (a)(1) of this section, the offer of said option shall expressly inform the buyer that, unless the seller receives, prior to shipment and prior to the expiration of the definite revised shipping date, a response from the buyer rejecting the delay and cancelling the

order, the buyer will be deemed to have consented to a delayed shipment on or before the definite revised shipping date.

(iii) Where the seller has provided a definite revised shipping date which is more than thirty (30) days later than the applicable time set forth in paragraph (a)(1) of this section or where the seller is unable to provide a definite revised shipping date and therefore informs the buyer that it is unable to make any representation regarding the length of the delay, the offer of said option shall also expressly inform the buyer that the buyer's order will automatically be deemed to have been cancelled unless:

(A) The seller has shipped the merchandise within thirty (30) days of the applicable time set forth in paragraph (a)(1) of this section, and has received no cancellation prior to shipment; or

(B) The seller has received from the buyer within thirty (30) days of said applicable time, a response specifically consenting to said shipping delay. Where the seller informs the buyer that it is unable to make any representation regarding the length of the delay, the buyer shall be expressly informed that, should the buyer consent to an indefinite delay, the buyer will have a continuing right to cancel the buyer's order at any time after the applicable time set forth in paragraph (a)(1) of this section by so notifying the seller prior to actual shipment.

(iv) Nothing in this paragraph shall prohibit a seller who furnishes a definite revised shipping date pursuant to paragraph (b)(1)(i) of this section, from requesting, simultaneously with or at any time subsequent to the offer of an option pursuant to paragraph (b)(1) of this section, the buyer's express consent to a further unanticipated delay beyond the definite revised shipping date in the form of a response from the buyer specifically consenting to said further delay. Provided, however, that where the seller solicits consent to an unanticipated indefinite delay the solicitation shall expressly inform the buyer that, should the buyer so consent to an indefinite delay, the buyer shall have a continuing right to cancel the buyer's order at any time after the definite revised shipping date by so notifying the seller prior to actual shipment.

(2) Where a seller is unable to ship merchandise on or before the definite revised shipping date provided under paragraph (b)(1)(i) of this section and consented to by the buyer pursuant to paragraph (b)(1)(ii) or (iii) of this section, to fail to offer to the buyer, clearly and conspicuously and without prior demand, a renewed option either to consent to a further delay or to cancel the order and to receive a

prompt refund. Said offer shall be made within a reasonable time after the seller first becomes aware of its inability to ship before the said definite revised date, but in no event later than the expiration of the definite revised shipping date. Provided, however, that where the seller previously has obtained the buyer's express consent to an unanticipated delay until a specific date beyond the definite revised shipping date, pursuant to paragraph (b)(1)(iv) of this section or to a further delay until a specific date beyond the definite revised shipping date pursuant to paragraph (b)(2) of this section, that date to which the buyer has expressly consented shall supersede the definite revised shipping date for purposes of paragraph (b)(2) of this section.

(i) Any offer to the buyer of said renewed option shall provide the buyer with a new definite revised shipping date, but where the seller lacks a reasonable basis for providing a new definite revised shipping date, the notice shall inform the buyer that the seller is unable to make any representation regarding the length of the further delay.

(ii) The offer of a renewed option shall expressly inform the buyer that, unless the seller receives, prior to the expiration of the old definite revised shipping date or any date superseding the old definite revised shipping date, notification from the buyer specifically consenting to the further delay, the buyer will be deemed to have rejected any further delay, and to have cancelled the order if the seller is in fact unable to ship prior to the expiration of the old definite revised shipping date or any date superseding the old definite revised shipping date. Provided, however, that where the seller offers the buyer the option to consent to an indefinite delay the offer shall expressly inform the buyer that, should the buyer so consent to an indefinite delay, the buyer shall have a continuing right to cancel the buyer's order at any time after the old definite revised shipping date or any date superseding the old definite revised shipping date.

(iii) Paragraph (b)(2) of this section shall not apply to any situation where a seller, pursuant to the provisions of paragraph (b)(1)(iv) of this section, has previously obtained consent from the buyer to an indefinite extension beyond the first revised shipping date.

(3) Wherever a buyer has the right to exercise any option under this part or to cancel an order by so notifying the seller prior to shipment, to fail to furnish the buyer with adequate means, at the seller's expense, to exercise such option or to notify the seller regarding cancellation.

(4) Nothing in paragraph (b) of this section shall prevent a seller, where it is unable to make shipment within the time set forth in paragraph (a)(1) of this section or within a delay period consented to by the buyer, from deciding to consider the order cancelled and providing the buyer with notice of said decision within a reasonable time after it becomes aware of said inability to ship, together with a prompt refund.

(c)

To fail to deem an order cancelled and to make a prompt refund to the buyer whenever:

(1) The seller receives, prior to the time of shipment, notification from the buyer cancelling the order pursuant to any option, renewed option or continuing option under this part;

(2) The seller has, pursuant to paragraph (b)(1)(iii) of this section, provided the buyer with a definite revised shipping date which is more than thirty (30) days later than the applicable time set forth in paragraph (a)(1) of this section or has notified the buyer that it is unable to make any representation regarding the length of the delay and the seller:

(i) Has not shipped the merchandise within thirty (30) days of the applicable time set forth in paragraph (a)(1) of this section, and

(ii) Has not received the buyer's express consent to said shipping delay within said thirty (30) days;

(3) The seller is unable to ship within the applicable time set forth in paragraph (b)(2) of this section, and has not received, within the said applicable time, the buyer's consent to any further delay;

(4) The seller has notified the buyer of its inability to make shipment and has indicated its decision not to ship the merchandise;

(5) The seller fails to offer the option prescribed in paragraph (b)(1) of this section and has not shipped the merchandise within the applicable time set forth in paragraph (a)(1) of this section.

(d)

In any action brought by the Federal Trade Commission, alleging a violation of this part, the failure of a respondent-seller to have records or other documentary proof establishing its use of systems and procedures which assure compliance, in the ordinary course of business, with any requirement of paragraph (b) or (c) of this section will create a rebuttable presumption that the seller failed to comply with said requirement.