From: Goetz, Mariel
Sent: Thu, 29 Sep 2022 00:54:14 +0000
To: Dasgupta, Anisha
Subject: Fwd: QYK brief filed
Attachments: DE 25 FTC Answering Brief (QYK).pdf

QYK brief as filed earlier. Great to see you in person during the lit meeting today!

From: Goetz, Mariel <mgoetz@ftc.gov>
Sent: Wednesday, September 28, 2022 5:59 PM
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Subject: QYK brief filed

All, we just filed our answering brief (attached) and accompanying supplemental excerpts of record (saved here) in the QYK appeal. Thanks to each of you for the help along the way. Special thanks to Zach and Spencer for their expert paralegal assistance getting this across the finish line.
Their reply is due October 19, though they could get that automatically extended. I will keep the group posted.
Thanks again! Best,
Mariel

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).

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[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