No. ____

IN THE
SUPREME COURT OF THE UNITED STATES

QYK BRANDS LLC, DBA GLOWYY; ET AL.,
Petitioner,
v.
FEDERAL TRADE COMMISSION,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

MICHAEL BAZYLER (CA SBN 84398),
Counsel of Record
SCOTT WELLMAN (CA SBN 82897), *Of Counsel*
WELLMAN & WARREN, LLP
24411 Ridge Route, Suite 200
Laguna Hills, CA 92653
(949) 580-3737
bazyler@aol.com
Counsel for Petitioner

QUESTION PRESENTED

In *Loper Bright Enterprises v. Raimondo*, 144 S. Ct. 2244 (2024), this Court overturned one of the foundational tenets of administrative law: a common law judicial doctrine that guided judges for forty years and affected the outcome of over 18,000 federal judicial opinions, the *Chevron* doctrine.[1] This petition presents for review a summary judgment decision that hinged on the now-abandoned *Chevron* precedent. Petitioners respectfully request this Court to issue a GVR order (grant, reverse, and remand order) directing the district court that issued the summary judgment and the Ninth Circuit that affirmed to reconsider their decisions based on *Loper Bright*.

Without the *Chevron* doctrine's judicially mandated deference, actions and interpretations of federal agencies must now be scrutinized in a new light, along with any judicial opinion which plainly defers to agency judgment without attempting to use its own. The question presented is: *Whether in the post-Chevron era, the district court can issue a permanent lifetime ban through summary judgment on a company for alleged violations of the Federal Trade Commission (FTC) Act and the Federal Trade Commission's Mail, Internet, or Telephone Order Merchandise Rule (MITOR) by simply deferring to the*

---

[1] The *Chevron* doctrine, a foundational principle of U.S. administrative law, was established in the 1984 U.S. Supreme Court case *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.,* 467 U.S. 837 (1984). In *Chevron*, the Court set forth a two-step test for determining when courts should defer to an administrative agency's interpretation of a statute it administers.

FTC's own interpretation of MITOR and its application?

PARTIES TO THE PROCEEDINGS BELOW

Petitioner QYK Brands LLC, doing business as Glowyy; an individual running the company, Rakesh Tammabattula; and related companies, EASII, Inc. and Theo Pharmaceuticals, Inc. – collectively "QYK" – were defendants-appellants in the United States Court of Appeals for the Ninth Circuit in this action brought by the FTC. Another individual running the company, Jacqueline Nguyen, was also a defendant-appellant in the United States Court of Appeals for the Ninth Circuit but is not participating in the proceedings in this Court. Defendant Rakesh Tammabattula, whose lifetime ban was overturned by the Ninth Circuit and is now being reviewed by the district court on remand, is also not a party to this petition. Appearing before this Court as petitioner is solely the company QYK.

Respondent Federal Trade Commission was plaintiff-appellee in the United States Court of Appeals for the Ninth Circuit.

CORPORATE DISCLOSURE STATEMENT

Petitioner QYK Brands LLC has no parent corporation, and no publicly held company owns 10% or more of its stock.

RELATED PROCEEDINGS

Federal Trade Comm'n v. QYK Brands, LLC, DBA Glowyy; et al., No. 22-55446, U.S. Court of Appeals for the Ninth Circuit, judgment entered April 9, 2024; rehearing denied June 20, 2024.

Federal Trade Comm'n v. QYK Brands, LLC, DBA Glowyy; et al., No. 8:20-cv-01431-PSG-KES, U.S. District Court for the Central District of California,

judgment, based on the order granting the FTC's motion for summary judgment and denying defendants' motion for partial summary judgment, entered April 8, 2022.

TABLE OF CONTENTS

TABLE OF APPENDICES

TABLE OF AUTHORITIES

CASES

STATUTORY PROVISIONS

REGULATIONS

OTHER AUTHORITIES

PETITION FOR A WRIT OF CERTIORARI

Petitioner respectfully asks this Court for a writ of certiorari to review the summary judgment of the United States District Court and the affirmance of the summary judgment by the United States Court of Appeals for the Ninth Circuit against the company QYK.

OPINIONS BELOW

The panel decision of the Ninth Circuit (App. 1a–13a) and opinions concerning the denial of rehearing en banc (App. 74a–75a) are not published. The district court's orders granting the FTC's motion for summary judgment and denying Defendants' motion for partial summary judgment (App. 14a–39a) and granting a permanent injunction and monetary judgment against Defendants (App. 40a–73a) are not published.

JURISDICTION

On April 9, 2024, the Ninth Circuit affirmed in part and vacated in part the judgment of the District Court, but upholding the injunction as it pertains to QYK (App. 1a–13a). On June 20, 2024, the Ninth Circuit denied petitioner's timely motion for rehearing en banc (App. 74a–75a). On August 21, 2024, this Court ordered that the time within which to petition for a writ of certiorari is 150 days from an order issued June 20, 2024, denying a timely petition for rehearing, making the deadline November 17, 2024 (Application No. 24A191). This Court has jurisdiction under 28 U.S.C. § 1254(1).

INTRODUCTION

This case raises an important and novel question regarding the level of judicial deference which should be given to federal agency interpretation of agency rules in the post-*Chevron* era. In the decision below, the Ninth Circuit adhered to a status quo which no longer exists when it deferred to the FTC's own interpretation of the Mail, Internet, or Telephone Order Rule (hereinafter "MITOR") and neglected to review the agency's application of the Rule beyond mere reasonableness. This decision thus compounds the problem which led to *Chevron*'s overruling in the first place: allowing agency interpretation to avoid judicial review. The Court should grant certiorari.

This petition warrants review for three reasons. *First*, the abolition of *Chevron* resulted in an immediate upheaval of the framework which guided judges for decades in deciding cases that implicated administrative law – an upheaval which the defendants missed by mere days. *Loper Bright Enterprises* was decided on June 28, 2024; the Ninth Circuit denied a rehearing on this matter on June 20, 2024. In a matter of eight days, the precedent of federal agency deference disappeared along with any reason to blanketly allow the FTC's interpretation of a rule it created without subjecting that interpretation to further scrutiny.

Second, the Ninth Circuit's decision is wrong and should be overturned with respect to QYK. The Ninth Circuit panel held that the lifetime injunction implemented by the district court against Defendant Tammabattula had to be overturned because his conduct was a first-time violation of MITOR; yet it failed to extend that same reasoning to his company

QYK. In doing so, the Court effectively upheld the ban against Defendant Tammabattula since Mr. Tammabattula's livelihood is inextricably tied to his company QYK.

Third, the facts of this case arose from the most unprecedented and unanticipated event in modern history – the COVID-19 pandemic – which caused the world to come to a standstill. A company cannot be penalized for delayed shipments in times of worldwide shutdown to the same extreme as when supply chains are functioning properly. But this is what the FTC asked for and this is what the district court granted on summary judgment.

STATEMENT OF THE CASE

This case arises from the unprecedented delays in shipping and delivery of hand sanitizer during the height of the COVID-19 pandemic when worldwide commerce came to a standstill. When QYK – a small company operating out of Southern California – faced those same delays and unable to promptly deliver orders of hand sanitizer, the FTC sought and obtained on summary judgment a lifetime, permanent injunction against the company for alleged violations of MITOR. Without a trial and denying the defendant even the opportunity of oral argument, on FTC's motion for summary judgment the district court judge granted the lifetime ban, not just for hand sanitizer, but for all protective goods and services, a ban that prohibits the company from even selling simple band-aids.

On appeal, QYK argued that the shipping delays were due to external factors out of its control – namely, the worldwide pandemic – and that it had gone to extraordinary measures to fulfill each

outstanding order despite the overwhelming supply issues. In the end, QYK was only a few days late on deliveries, and all customers received the hand sanitizer. After two years of argument, during which time the company continued to struggle to stay alive, the Ninth Circuit finally reversed the lifetime injunction, but only as to Defendant Tammabattula, leaving his company QYK in the same precarious situation.

A. The Unforeseen COVID-19 Pandemic

At the start of 2020, QYK was a company of only four to five employees, focused on selling beauty products and health care items, such as hand sanitizer, to a small, local customer base. One month before the pandemic shut down the world, in February 2020, the company had 2,000 bottles of hand sanitizer in stock, which it predicted would be more than enough to fulfill potential orders based on past demand. Furthermore, it was expecting an order of 10,000 more bottles from India to be delivered by FedEx on March 4, 2020 – the same date an ad was placed on Google AdWords stating it had hand sanitizer "In Stock & Ships Today" among 100 other ads placed on various websites and social media platforms.

At the time the ad was placed, such representations were reasonable based upon both the company's current inventory and the anticipated delivery of more product. Then the unpredictable happened: supply chains came to a standstill and shipments were canceled or delayed as thousands of pending orders for hand sanitizer had to be filled. Specifically, between March 4th and March 18th, nearly 150,000 bottles were sold. Facing an uncertain

reality and an unknown number of future orders, QYK did its best to rectify the situation for its customers, working 18-hour days and scouring the globe to secure more shipments of hand sanitizer.

QYK concedes the FTC's assertion that there were delays in shipping products to its customers. However, every customer who ordered hand sanitizer did receive their order, and after mid-May 2020, every order was shipped on time.

B. Summary Judgment and the Lifetime Ban

Despite the company's herculean efforts to fulfill each order in as timely a manner as possible, the FTC entirely disregarded the impact of the pandemic and instead asked for a permanent injunction enjoining the company from ever "advertising, promoting, or offering for sale . . . Protective Goods and Services . . . designed intended, or represented to detect, treat, prevent, mitigate, or cure COVID-19 or any other infection or disease." Plaintiff's Notice of Motion and Motion for Summary Judgment; Memorandum of Points and Authorities, *Fed. Trade Comm'n v. QYK Brands LLC*, No. 8:20-cv-014310-PSG-KES, at 3–4 (C.D. Cal. Feb. 14, 2022) [hereinafter *FTC's Motion for Summary Judgment*].

The FTC's argument rested in large part upon QYK's alleged violation of MITOR through the Google AdWords campaign promising same-day shipping, arguing that out of the 43,633 orders received by QYK, an overwhelming 39,724 were shipped late in violation of that promise. *Id*. at 12. However, as pointed out by the district court, that number "assumes all sales made between March 4 to 18 and April 1 to May 18 promised one-day shipping . . .

[which] is not entirely supported by the record, as the FTC's only evidence of one-day shipping promises comes from Defendants' Google AdWords advertisements" that only accounted for ten to eleven percent of all hand sanitizer sales. App. 18a.

With minimal discussion, the district court judge found QYK had violated each aspect of MITOR as well as three sections of the FTC Act and granted the FTC's motion for summary judgment. Not stopping there, the court continued to defer to the FTC's requests and granted the preliminary injunction against the Defendants because they "retain the ability to commit future violations *even though* they recently changed their business model to sell directly to wholesale retailers instead of individual consumers." App. 37a (emphasis added).

As admitted by the district court, an injunction "can only be granted where wrongdoing is ongoing or likely to recur." App. 35a–36a (citing *Fed. Trade Comm'n v. Cardiff*, No. EDCV 18-2104 DMG (PLAx), 2021 WL 3616071, at *7 (C.D. Cal. June 29, 2021)). Yet, the FTC's requested injunction was granted based upon an intangible *possibility* of such violations occurring at some indeterminable point in the future.

Beyond the injunction, the district court further imposed monetary penalties against QYK, ordering the company to pay a full refund to its customers who were affected by the supply chain issues and delays in shipping.

C. The Case on Appeal

On appeal, QYK did not fare any better, and the permanent injunction was upheld against the company. In terms of damages, the district court

remedy ordered a full refund, and the consumer keeps the product; the panel Decision of the Ninth Circuit upholds this refund plus the punitive damages remedy even though section 19(b) of the FTC Act specifically prohibits it.

Arguments concerning the over-broadness of a *lifetime* ban and the severe impact of the pandemic on shipping and delivery again fell on deaf ears. QYK also attempted to argue the futility of ordering a full refund to consumers who received hand sanitizer on time or only a few days late, but the Ninth Circuit rejected this and upheld nearly each aspect of the relief requested by the FTC except for the injunction against Defendant Tammabattula. App. 11a–13a.

Though the Defendants requested a rehearing en banc, this was also denied, leaving QYK struggling to survive and with no recourse beyond an appeal to this Court. *See* App. 74a–75a.

REASONS FOR GRANTING THE WRIT

This petition satisfies the traditional criteria for certiorari. *See* Sup. Ct. R. 10(a). The decision of the U.S. Court of Appeals for the Ninth Circuit conflicts with the recent U.S. Supreme Court decision in *Loper Bright Enterprises* in that the Ninth Circuit deferred to the FTC's interpretation of MITOR and upheld the granting of nearly all the FTC's requested relief without fully taking into consideration whether such relief was reasonable under the circumstances.

The question presented is of particular importance as it falls within the novel category of cases concerning federal agency action in the wake of the *Chevron* doctrine's disappearance. Only this Court can vacate the lower court's decision and remand the

case for a chance to re-argue the case under the current law. The petition should be granted.

I. Without the *Chevron* Doctrine, the Case Would Have Been Decided Differently

Section 706 of the Administrative Procedure Act (APA) states: "To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action." 5 U.S.C § 706. Within the scope of the statute, "agency action" is defined as any person, rule, order, license, sanction, or relief. 5 U.S.C § 701(b)(2).

As such, the lower courts had a statutory duty to review the relief requested by the FTC rather than deferring wholly to the FTC's judgment. This was an important factor in overturning *Chevron* – the determination that requiring a court to decide all relevant questions of law was inconsistent with the *Chevron* doctrine's precedent of yielding to agency interpretation.

As recently as August 2024, a federal judge set aside an FTC rule which would have banned non-compete agreements between employers and employees, citing the *Loper Bright Enterprises* decision four times in her final order. *Ryan, LLC v. Fed. Trade Comm'n*, No. 3:24-CV-00986-E, 2024 WL 3879954, at *7, *14 (N.D. Tex. Aug. 20, 2024) ("Congress in 1946 enacted the APA 'as a check upon administrators whose zeal might otherwise have carried them to excesses not contemplated in legislation creating their offices.'") (quoting *Loper Bright Enters. v. Raimondo*, 144 S. Ct. 2244, 2261 (2024) (quoting *United States v. Morton Salt Co.*, 338

U.S. 632, 644 (1950))). The district court explained that the Non-Compete Rule extended beyond the FTC's statutory authority, and yet it was only able to perform such a detailed analysis of the agency's action as a result of the *Chevron* doctrine being overturned a few months prior. *See id.* at *7–*8 (citing *Loper Bright* in explaining that "the APA delineates the basic contours of judicial review of [agency] action" and that "[t]he deference that *Chevron* requires of courts reviewing agency action cannot be squared with the APA) (citations omitted).

Though neither the district court nor the Ninth Circuit reference the doctrine by name, the influence of the *Chevron* framework permeates the entire record of the case. As explained by the Supreme Court, despite the various limitations placed on *Chevron* throughout the years since its creation, "litigants must continue to wrestle with it, and lower courts – bound by even [the Court's] crumbling precedents – understandably continue to apply it." *Loper Bright Enters.*, 144 S. Ct. at 2269 (citation omitted). The litigants here had to wrestle with lower courts that continued to defer to the FTC's every argument and demand; had the case been even ten days later, after the holding in *Loper Bright Enterprises* was issued, they might not have faced this hurdle. Because this certiorari petition was filed timely, the Court through a GVR order, or through a full review, can correct the errors committed by the lower court in slavishly deferring to the FTC.

There are instances scattered throughout the record in which the lower courts here accepted the FTC's arguments and interpretations without the

same scrutiny that was given to the defendants' assertions.

The Ninth Circuit states: "The FTC suggests that the 11% figure 'includes only those consumers who clicked on the [Google] ad's link to make their purchase,' but there is no basis in the record to conclude that such click-throughs are the *only* purchases that were made in reliance on such advertising." App. 7a (alteration in original) (emphasis in original). Not only does the court accept the FTC's suggestion that more than 11 percent of sales made were via advertisements with claims of false shipping times, it takes the FTC's argument a step further all on its own by stating that perhaps even *more* sales were made in reliance on those delivery estimates. This is not only a baseless suggestion, but also contrary to the defendants' express and repeated representations that only 11 percent of the advertisements contained the shipping language with which the FTC found issue.

In the FTC's motion for summary judgment, the agency asserts that "because Defendants have no records demonstrating which customers received the Notice [that shipments would be delayed], they are presumed to not have complied with" MITOR. *FTC's Motion for Summary Judgment* at 34. This is an incredibly broad standard that is not addressed by the district court despite its ultimate determination that QYK violated MITOR. Though the lack of notice to customers was not the only basis on which the FTC hinged its argument, the fact the lower courts failed to even acknowledge the potential over-broadness of a standard which presumes a violation without any accompanying facts or required scienter is telling. In

essence, the district court deferred to the FTC's interpretation of MITOR rather than applying its own.

Regarding the reasonableness of the injunction, the Ninth Circuit acknowledged QYK's assertion that any violations occurred only over a few months, and the company is no longer in the business of retail sales, which were the subject of the violations at issue. App. 10a. But acknowledging this argument is as far as the Ninth Circuit panel decision goes. After admitting that those factors "arguably weigh in favor of declining to impose an injunction," the panel deferred to the district court's decision that "other considerations . . . reflected a potential willingness and continued opportunity to engage in violations of the FTC Act." *Id.*

These "other considerations" being the FTC's concerns that QYK will continue violating MITOR and shipping materials late despite the fact the only past instances of violations occurred during the pandemic due to *force majeure* factors. The FTC's motion for summary judgment stated unequivocally that "a permanent injunction is necessary to protect consumers because Defendants clearly violated MITOR as well as the FTC Act and there is 'some cognizable danger of recurrent violation.'" *FTC's Motion for Summary Judgment* at 43 (citing *U.S. v. W.T. Grant Co.*, 345 U.S. 629, 633 (1953)). Rather than scrutinizing this statement, the district court simply deferred to the FTC's blanket assertion that a lifetime ban was "necessary" on all protective goods and services, even an item as small as a band-aid, and the Ninth Circuit affirmed for lack of abuse of discretion.

Neither MITOR nor the FTC Act states that a permanent injunction is necessary under these circumstances; such language was the FTC's interpretation of its own rule and its determination that a lifetime ban was best suited to cure the harm of a few late shipments. The problem with *Chevron* was that it required "a court to *ignore*, not follow 'the reading [of an agency rule or statute] the court would have reached' had it exercised its independent judgment." *Loper Bright Enters.*, 144 S. Ct. at 2265. This is exactly what the district court and the Ninth Circuit have done here. The Court's GVR order, or a remand after a full review, can cure this error committed by the district court.

II. The Ninth Circuit Should Not Have Deferred to the FTC's Requests for a Lifetime Ban and Monetary Relief

Not only did the Ninth Circuit allow the FTC to dictate the relief without an in-depth examination as to that relief's reasonableness in relation to the alleged harm, it failed to adequately shield Defendant Tammabattula as intended. Though the permanent injunction was reversed as to Defendant Tammabattula, it was not reversed as to his company QYK, effectively leaving Tammabattula in the same position as before since it is his company which has an established reputation in the industry.

A. Permanent Injunction

The injunction imposed against QYK is so overbroad as to be considered punitive in nature, and it is difficult to see how a court could construe its breadth as being tailored to the circumstances of the

case, nor only that which is necessary to prevent future harm.

When outlining the reasons for granting the permanent injunction against QYK, the district court explains that the "FTC is authorized to seek a permanent injunction for violation of 'any provision of law enforced by the' FTC." App. 35a (citing 15 U.S.C. § 53(b)). The court acknowledges that injunctive relief cannot be used as a remedy for past behaviors and that "[t]o determine whether wrongdoing is likely to recur, courts consider several factors, including '[1] the degree of scienter, [2] frequency of violative acts, [3] the defendant's ability to commit future violations, [4] the degree of harm consumers suffered, and [5] the defendant's recognition of his own culpability.'" App. 36a (citing *United States v. Zaken Corp.*, 57 F. Supp. 3d 1233, 1242 (C.D. Cal. 2014)). Furthermore, an injunction's scope must have "a reasonable relationship to the violation," which is determined by the unique needs of each case. *Fed. Trade Comm'n v. John Beck Amazing Profits LLC*, 888 F. Supp. 2d 1006, 1012 (C.D. Cal. 2012).

The violative acts in question occurred solely during a three-month period at the height of the COVID-19 pandemic – March 2020 through May 2020, when world commerce stopped. *See* App. 17a–18a. Moreover, QYK's ability to commit similar violations in the future is nonexistent since QYK no longer engages in direct-to-consumer sales. App. 9a. Furthermore, every consumer who ordered hand sanitizer eventually received their shipment, and each consumer who requested a refund was given that refund once the company was able to process the return of the product.

Under an objective view of the factors, injunctive relief was not appropriate given the facts of the case, let alone a lifetime ban. Yet the district court granted this injunction, and the Ninth Circuit affirmed it as to QYK – an injunction so broad and wide-sweeping that it precludes the company from even selling a simple band-aid.

Judges have questioned this type of broad-sweeping injunction before, most recently in an Eighth Circuit opinion with facts analogous to Defendant Tammabattula's situation here. In that case, a Louisiana company sold personal protective equipment (PPE) online during the height of the COVID-19 pandemic, and when deliveries were delayed due to supply chain issues, the FTC alleged it violated both the FTC Act and MITOR. *Fed. Trade Comm'n v. Am. Screening LLC*, 105 F.4th 1098, 1100–01 (2024). On summary judgment, the FTC sought and obtained a permanent injunction enjoining the company from ever advertising or selling PPE. *Id*. at 1100–01, 1105. In a 2-1 decision, the Eighth Circuit panel affirmed the broad injunction based on no abuse of discretion, but one judge disagreed, publishing a strong dissent contending that granting summary judgment without further findings of fact by the district court was clear error. *See id.* at 1105, 1107.

Starting with the proposition that injunctions can only be granted in "proper cases" where "a violation is ongoing or 'about to' happen," the dissenting judge emphasized that "past misconduct alone is not enough" and that the district court "never explained why there was *still* a 'cognizable danger of recurrent violation.'" *Id.* (Stras, J., concurring in part and dissenting in part) at 1109 (citing 15 U.S.C. §

53(b)(1); then quoting *Fed. Trade Comm'n v. Shire ViroPharma, Inc.*, 917 F.3d 147, 160 (3d Cir. 2019)).

> By the time the Federal Trade Commission requested a permanent injunction, there was *no* evidence that American Screening was still violating the statute or on the verge of doing so again. Nor was there evidence that the extraordinary circumstances surrounding the early days of the pandemic . . .would recur. Plus, as the district court itself pointed out, American Screening had already 'altered some of . . . [its] practices' [to avoid the same problems in the future].

Id. (citation omitted).

Many of the problems Judge Stras identified in *American Screening* are also present here in nearly identical fashion. The district court failed to articulate why there is such a strong potential for recurrent violations that an injunction against QYK is needed, especially given the company's transition to the wholesale market, which necessarily prevents the same conduct from recurring. The district court also provided no evidence that the extraordinary circumstances of the pandemic are likely to recur – circumstances that were the only reason QYK was unable to deliver on time for those few months.

Notably, the Ninth Circuit did reverse the lifetime ban as to Defendant Tammabattula. It explained that "[t]o determine if an injunction is overbroad, we consider '(1) the seriousness and deliberateness of the violation; (2) [the] ease with which the violative claim may be transferred to other

products; and (3) whether the [defendant] has a history of prior violations.'" App. 10a (second and third alterations in original) (citing *Fed. Trade Comm'n v. Grant Connect, LLC*, 763 F.3d 1094, 1105 (9th Cir. 2014) (citation omitted)). The court found that Mr. Tammabattula's wrongdoing was limited to false shipping claims regarding the hand sanitizer, he had no involvement with prior Defendant Nguyen's misconduct, and it was a first-time violation. App. 11a–12a. This means that four separate appellate judges – three in this Ninth Circuit opinion and one in the *American Screening* dissent – have agreed that blindly acquiescing to the FTC's often ovebroad demands and *effectively affirming the death penalty verdict for a corporation* is error. Post *Loper Bright*, it is even more clearly erroneous.

Yet, the Ninth Circuit panel failed to extend its reasoning to QYK – a company inextricably connected with Defendant Tammabattula and that also had no prior violations. No explicit reason is given for this decision, and the Ninth Circuit seemingly groups together QYK with prior Defendant Nguyen, determining "the district court acted well within its discretion in concluding that she and the Defendant corporations should be enjoined from further participation in the selling of goods or services for the detection, treatment, prevention, mitigation, or cure of illness" on the basis of her personal misrepresentations. App. 11a.

The reasoning behind the injunction against Defendant Nguyen is distinct from that which led to an injunction against Defendant Tammabattula and his company. The court's explanation – or lack thereof – leaves much to be desired in terms of a reasonable

justification for affirming the injunction against QYK, especially when the court itself acknowledges the injunction's over-breadth: "Tammabattula's first-time violation did not reasonably support including him, personally, in the sweeping *permanent* industry ban imposed by the district court." App. 12a (emphasis in original).

If Defendant Tammabattula's first-time violation could not possibly support a lifetime ban, and neither can QYK's first-time violation of MITOR.

B. Monetary Relief

Section 19(b) of the FTC Act, in relevant part, provides that the court may

> grant such relief as the court finds necessary to redress injury to consumers . . . resulting from . . . the unfair or deceptive act or practice. . . . Such relief may include, but shall not be limited to . . . the refund of money *or* return of property . . . except that *nothing in this subsection is intended to authorize the imposition of any exemplary or punitive damages.*

15 U.S.C. § 57b(b) (emphasis added).

In this case, the district court remedy orders a full refund to the customer, *and* the consumer is allowed to keep the product. *See* App. 6a–8a. The Ninth Circuit then upheld this refund plus the remedy of punitive damages despite the fact Section 19 specifically prohibits such damages. As explained by one court: "Section 19(b) confers no authority to award monetary relief that exceeds redress to consumers." *Fed. Trade Comm'n v. Wash. Data Res.*, 856 F. Supp. 2d 1247, 1280 (M.D. Fla. 2012). Allowing consumers

to keep the product while also providing them a full refund and instituting punitive damages against the company far exceeds the necessary redress to consumers whose orders were slightly delayed as a result of supply chain issues.

The refund and monetary remedy ordered by the district court violated section 19(b). If the district court decided that the consumer could keep the hand sanitizer, then it was incumbent on the court to determine the value of the sanitizer and reduce any refund by said amount. Otherwise, the consumer realizes a windfall, which is not proper redress of the injury as required by section 19(b). *See Fed. Trade Comm'n v. Noland*, No. CV-20-00047-PHX-DWL, 2021 WL 5493443, at *4 (D. Ariz. Nov. 23, 2021) ("[G]ranting a full refund to a satisfied consumer who received a one-day-late shipment would result in a windfall and thus go beyond § 57b(b)'s narrow focus on redressing injury.").

In the same vein, requiring QYK to pay back the money and allowing the consumer to keep the product is punitive, expressly prohibited by section 19(b). A section 19(b) remedy that "accomplishes more than redress acts as prohibitive punitive damages." *Fed. Trade Comm'n v. Silueta Distribs., Inc.*, No. C 93-4141 SBA, 1995 WL 215313, at *6 (N.D. Cal. Feb. 24, 1995). The dissenting judge in *American Screening* had similar concerns with the monetary judgment imposed against the company, explaining, "[i]n contractual terms, the district court did more than just make customers 'whole' . . . [because] customers received the best of both worlds: they could keep the personal protective equipment they received *and* get a full refund." *Am. Screening LLC*, 105 F.4th at 1107–

08 (citations omitted). The same unsound result has occurred here.

A recent FTC lawsuit analyzed the degree of monetary damages the FTC is entitled to recover after it has prevailed on claims of consumer-oriented unfair or deceptive practices under MITOR. *See Fed. Trade Comm'n v. Noland*, 672 F. Supp. 3d 721, 789–90 (D. Ariz. 2023). In *Noland*, the FTC sought $561,798.80 in monetary remedies based on the defendants' failure to timely fulfill customer orders in violation of the MITOR rule. *Id.* at 792.

Judge Dominic W. Lanza disagreed with the FTC's calculations, finding its request to be "flawed" and ultimately awarding only $6,829 in damages based upon unfulfilled refund requests made prior to the late shipments. *Id.* at 792, 796. Judge Lanza ruled the FTC could not recover the full purchase price when consumers had already received something of value from their purchase. *See id.* at 792. He found that the FTC's "all-or-nothing methodology" failed to take into consideration the "inherent value of the product" the consumers received, even if that product was shipped late. *Id.*

> It is difficult to see how [the FTC's desired] outcome could be viewed as 'necessary to redress injury to the affected consumer' . . . [because it] assumes that a late-shipped product automatically ceases to have any value, such that there is no need to provide an offset for the value of the product received. . . . [S]uch an approach [cannot] be reconciled with the text of section 19 of the FTC Act . . . or with *Figgie*.

Id. at 792–93 (citation omitted).

The Ninth Circuit, faced with this same issue, has already ruled that when the refund remedy is used, the consumer can "make the informed choice to keep [the product] instead of returning them for refunds." *Fed. Trade Comm'n v. Figgie Int'l, Inc.*, 994 F.2d 595, 606 (9th Cir. 1993). That is, the consumer can either keep the product, or return it and receive a refund, but not both.

During oral argument in this matter, Judge Collins appeared to agree, asking the FTC whether a consumer who received a washing machine a day late could keep the machine and still get a full refund. Yet the panel's decision appears to countenance this strange result in direct violation of Section 19.

III. The Ninth Circuit Failed to Consider the Severe Impact of the COVID-19 Pandemic

The COVID-19 pandemic was the most unpredictable period of time in recent memory; a time when the ability to purchase and sell goods changed on a daily basis due to continuing supply chain issues and worldwide shutdown. This difficulty in obtaining goods was no easier on the suppliers than it was on the consumers, especially regarding personal protective equipment and health products like hand sanitizer. Products that were once common household items, even toilet paper, became precious commodities, and QYK was not immune to the difficulties in obtaining materials and resources to keep hand sanitizer in supply.

Curiously, when justifying the imposition of monetary relief plus refunds for QYK's customers, the

Ninth Circuit made a point of emphasizing the "unique circumstances" of the case:

> On the *specific facts of this case*, we find *no abuse of discretion*. . . . [B]y the time that the FTC would be able to set up the contemplated refund program and provide notification to consumers, the relevant product would have expired by the end of the 120-day period for requesting refunds. *Under these unique circumstances*, imposing a requirement to return expired or about-to-expire products could reasonably be viewed as pointless and of no value. On that basis, we conclude that the district court did not abuse its discretion in failing to require return of the products as a condition for receiving a full refund.

App. 8a (emphasis added).

Yet, the court does not extend this same consideration to the Defendants who faced the most dire "unique circumstances" imaginable: delivering a product on time in the face of the raging COVID-19 pandemic during which almost every seller in the world could not ship or deliver on time.

CONCLUSION

The Court should grant the petition for a writ of certiorari, vacate the judgment of the court of appeals, and remand the case to the court of appeals for further consideration of the merits in light of *Loper Bright Enterprises v. Raimondo*, 144 S. Ct. 2244 (2024). In the alternative to a GVR order, the Court should grant certiorari to provide important guidance to the lower courts for how to proceed in a post-*Loper Bright* world.

Respectfully submitted,

MICHAEL BAZYLER
Counsel of Record
SCOTT WELLMAN
Of Counsel
WELLMAN & WARREN, LLP
24411 Ridge Route, Suite 200
Laguna Hills, CA 92653
(949) 580-3737
bazyler@aol.com

Counsel for Petitioner

November 17, 2024

APPENDIX

TABLE OF CONTENTS

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FEDERAL TRADE COMMISSION,
Plaintiff-Appellee,

v.

QYK BRANDS LLC, DBA Glowyy; DRJSNATURAL LLC; RAKESH TAMMABATTULA, individually and as an officer of QYK Brands LLC, DRJSNATURAL LLC, EASII, Inc., and Theo Pharmaceuticals, Inc; JACQUELINE THAO NGUYEN, individually and as officer of QYK Brands LLC, DRJSNATURAL LLC and Theo Pharmaceuticals, Inc; EASII, INC.; THEO PHARMACEUTICALS, INC.,
Defendants-Appellants.

No. 22-55446
Filed: April 9, 2024
D.C. No. 8:20-cv-01431-PSG-KES

MEMORANDUM*

Before: W. FLETCHER, RAWLINSON, and COLLINS, Circuit Judges. Concurrence by Judge Rawlinson.

---

*This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

Defendants QYK Brands LLC; DRJSNATURAL LLC; EASII, Inc.; Theo Pharmaceuticals, Inc.; Jacqueline Nguyen; and Rakesh Tammabattula appeal from the district court's grant of summary judgment to the Federal Trade Commission ("FTC") and from the district court's ensuing final judgment awarding injunctive and monetary relief. We have jurisdiction under 28 U.S.C. § 1291, and we affirm in part and vacate and remand in part.

1. The FTC's operative complaint asserted four causes of action:

(1) a claim brought under § 19(a)(1) of the FTC Act, 15 U.S.C. § 57b(a)(1), alleging that Defendants had violated the FTC's "Mail, Internet, or Telephone Order Merchandise" Rule ("MITOR"), 16 C.F.R. § 435.2; *see also* 15 U.S.C. § 57a(a)(1)(B) (authorizing the FTC to issue rules specifically defining particular acts as unfair acts within the meaning of § 5(a)); *id.* § 57b(a)(1) (authorizing the FTC to bring a civil action against any person who violates such a rule);

(2) a claim brought under § 13(b) of the FTC Act, 15 U.S.C. § 53(b), alleging that Defendants had made deceptive shipping claims in violation of § 5(a) of the FTC Act, 15 U.S.C. § 45(a);

(3) a further § 13(b) claim alleging that Defendants had violated § 5(a), as well as § 12 of the FTC Act, 15 U.S.C. § 52, by making deceptive claims that one of their products ("Basic Immune IGG") could "effectively treat, prevent transmission of, or reduce the risk of contracting COVID-19"; and

(4) an additional § 13(b) claim alleging that Defendants had violated § 5(a) and § 12 by making

false claims that Basic Immune IGG had been "clinically proven and FDA-approved to treat, prevent transmission of, or reduce the risk of contracting COVID-19." The district court granted summary judgment to the FTC on each of these claims, concluding that the undisputed facts established as a matter of law that Defendants committed the alleged violations. Reviewing de novo, *see Donell v. Kowell*, 533 F.3d 762, 769 (9th Cir. 2008), we affirm that ruling.

a. With respect to the alleged MITOR violation, Defendants contend that the district court erroneously "applied MITOR as a strict liability rule" and thereby failed to take account of the Covid pandemic's disruptive effect on Defendants' ability to fulfill their offered shipping times. We reject this contention.

Nothing in MITOR required Defendants to commit to delivery within the short time frames that they represented, which included 3–5 days, 5–7 days, and 7–10 days. MITOR states that it is unlawful to solicit an order "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 . . . [w]ithin that *time clearly and conspicuously stated in any such solicitation*" or, "[i]f no time is clearly and conspicuously stated, within thirty (30) days after receipt of a properly completed order from the buyer." *See* 16 C.F.R. § 435.2(a)(1) (emphasis added). Undisputed evidence shows that Defendants lacked a reasonable basis to expect that they would be able to satisfy their advertised shipping-time claims. At the time that they were continuing to post hand-sanitizer

advertisements that said, "In Stock & Ships Today," Defendants had limited inventory and were aware of shipping issues, and yet they processed orders for nearly 150,000 bottles in two weeks. Defendants admit that Tammabattula "became aware of the 'full gravity of the situation'" regarding shipping delays by March 12 or 13, 2020, and that Tammabattula thereafter knew that they "could not keep up with demand." Defendants plainly had no reasonable basis to expect that they could meet the shipping times they continued to advertise, and they thereby violated MITOR. And, for the same reason, they also made deceptive shipping claims in violation of § 5 of the FTC Act.

Moreover, if (as Defendants contend) post-order events make it impossible to fulfill an order within the time stated, MITOR provides that the seller must "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." 16 C.F.R. § 435.2(b)(1); *see also id*. (stating that any such "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"). MITOR thus has built into its structure an accommodation for unforeseen disruptions. What MITOR does not allow is for sellers to do what Defendants did here, which is to provide shipping estimates that, at the time those estimates were made, Defendants had no reasonable basis to believe would be met. *Id*. § 435.2(a)(1). In addition, Defendants undisputedly failed, in many cases, to offer customers an actual opportunity to cancel the

order and receive a refund. *Id.* § 435.2(b)(1). For example, Defendants informed some customers that orders could not be canceled after the creation of a shipping label and that, if they desired a refund, they would have to await their late shipment and then send it back to Defendants.

b. With respect to the alleged false representations concerning Basic Immune IGG, Defendants contend that there was a disputed issue of fact as to what representations Nguyen made in an interview on a Vietnamese-language television channel. Specifically, Defendants point to Nguyen's declaration providing her own English-language translation of the key statements she made in Vietnamese during that interview, and Defendants argue that the district court improperly resolved a resulting factual dispute as to the actual meaning of what she had said. This contention fails. A declaration proffered in response to a summary judgment motion "must . . . set out facts that would be admissible in evidence[] and show that the . . . declarant is competent to testify on the matters stated." FED. R. CIV. P. 56(c)(4). But as the district court noted, Nguyen's declaration failed to provide any foundation for concluding that she is "competen[t] to testify as a Vietnamese to English translator." This evidentiary ruling was not an abuse of discretion. *See Sandoval v. County of San Diego*, 985 F.3d 657, 665 (9th Cir. 2021) ("Evidentiary rulings made in the context of summary judgment motions are reviewed for abuse of discretion." (citation omitted)). With that contrary evidence properly excluded, there was no genuine issue of material fact as to the English translation of the statements made.

2. The district court ordered monetary relief in the form of consumer refunds, invoking the authority conferred under § 19(b) of the FTC Act. Specifically, the court ordered Defendants to pay over to the FTC $3,086,239.99, which represented Defendants' net revenue from hand sanitizer sales from March to August 2020. Those funds were then to be used to provide full-price refunds to consumers, but *only* if the consumer affirmatively submitted a "request for a refund" within a 120-day period following notification of the refund program. At the conclusion of the 120-day period, the FTC would then be required to "determine the amount of unclaimed funds" left and then to "return to Defendants" that amount, "less costs of administering the Redress Fund." Defendants challenge the scope of the monetary relief order, but we discern no abuse of discretion. *See FTC v. Figgie Int'l, Inc.*, 994 F.2d 595, 607 (9th Cir. 1993).

a. The undisputed facts concerning the unrealistic shipping representations made by Defendants in their internet advertising over an extended period of time are unquestionably sufficient to give rise to a presumption that consumer orders placed during that time period were made in reliance on such material representations and that consumers were injured by the shipping delays. *Figgie*, 994 F.2d at 605–06 (holding that, once the FTC "has proved that the defendant made material misrepresentations, that they were widely disseminated, and that consumers purchased the defendant's product," a "presumption of actual reliance arises" and, if unrebutted, "injury to consumers has been established").

Defendants have failed to put forward sufficient evidence to rebut this presumption. Defendants posit that only 11% of their sales were attributable to the "In Stock & Ships Today" Google advertising campaign, and they therefore contend that the district court erred in applying the *Figgie* presumption to all purchasers. But this argument overlooks the fact that this Google advertising campaign was not the only time that Defendants made unrealistic claims about delivery timeframes: although the precise time estimates varied, such claims were also made on Defendants' websites and a variety of other social media platforms. Moreover, Defendants' 11% figure is based on an unexplained estimate in a declaration from Tammabattula that lacks adequate foundation. The FTC suggests that the 11% figure "includes only those consumers who clicked on the [Google] ad's link to make their purchase," but there is no basis in the record to conclude that such click-throughs are the *only* purchases that were made in reliance on such advertising.

Defendants also contend that some customers were satisfied with their hand sanitizer, because "there were hundreds of repeat customers," some percentage of customers did receive products within the requisite timeframes, and some customers even sent compliments. We conclude that any such issues were adequately addressed by the district court's requirement that monetary refunds could *only* be provided under the court's remedial order to those consumers who affirmatively asked for one.

b. Defendants also argue that, even if the district court's remedial order could be said to adequately target its monetary relief to injured

consumers, the court should not have afforded a full-price refund to all such consumers, especially without any requirement to return the product. On the specific facts of this case, we find no abuse of discretion.

The listed expiration period for the hand sanitizer products was two years, and at the time of the district court's remedial ruling on April 22, 2022, much of the product at issue would already have expired. Moreover, by the time that the FTC would be able to set up the contemplated refund program and provide notification to consumers, the relevant product would have expired by the end of the 120-day period for requesting refunds. Under these unique circumstances, imposing a requirement to return expired or about-to-expire products could reasonably be viewed as pointless and of no value. On that basis, we conclude that the district court did not abuse its discretion in failing to require return of the products as a condition for receiving a full refund.

Defendants also assert that providing full refunds to consumers whose product was only one or two days late overcompensates them for any asserted injury from the delay. We conclude that, in light of the requirement that no refunds would be given unless a particular consumer affirmatively made such a request, the district court did not abuse its discretion. That limitation could reasonably be deemed sufficient to screen out any consumers who experienced only a de minimis delay. And for those who experienced a material delay, a uniform monetary award is a reasonable approximation of individual consumer injury, particularly given the relatively modest price of the sanitizer and the urgency with which

consumers sought such products at the beginning of the pandemic.

3. Defendants also raise a number of challenges to the district court's award of injunctive relief. We conclude that, with one exception, the district court did not abuse its discretion.

a. The district court did not abuse its discretion in concluding that there was a sufficient likelihood of future violations to warrant the imposition of an injunction. *See FTC v. Evans Prods. Co.*, 775 F.2d 1084, 1087 (9th Cir. 1985) (holding that, as a general rule, injunctive relief under § 13(b) is available "only if the wrongs are ongoing or likely to recur"); *see also CFPB v. Gordon*, 819 F.3d 1179, 1197 (9th Cir. 2016) (stating that a grant of permanent injunctive relief is reviewed for abuse of discretion).

Defendants argue that, in finding that they acted with a "high degree of scienter" in connection with the hand sanitizer sales, the district court misconstrued, as attributable to QYK, general comments that Tammabattula made in a podcast about the difficulties of obtaining sufficient supplies to keep up with demand. This contention is refuted by the podcast itself. In it, Tammabattula prefaces his remarks as reflecting his company's "firsthand" experience in being "one of the few companies here in the U.S. that's trying to produce [personal protective equipment ('PPE')] domestically," an experience that allowed them to "see all the challenges here." Moreover, the district court also relied on ample additional undisputed facts concerning Defendants' awareness of the scope of the problems concerning supply chains and shipping delays.

Defendants also emphasize that the violations occurred only over a period of several months rather than several years and that they recently changed their business model to avoid the sort of direct retail sales that were involved in the violations at issue here. While these are factors that arguably weigh in favor of declining to impose an injunction, the district court reached a contrary conclusion after considering these factors in light of other considerations that, in its view, reflected a potential willingness and continued opportunity to engage in violations of the FTC Act. On the undisputed underlying facts in this record, we cannot say that the decision to impose an injunction was an abuse of discretion.

b. Finally, Defendants challenge the scope of the injunction. Specifically, Defendants argue that the injunction is overbroad to the extent that it permanently bars all Defendants from "advertising, marketing, promoting, or offering for sale, . . . any Protective Goods and Services," which the injunction defines as "any good or service designed, intended, or represented to detect, treat, prevent, mitigate, or cure COVID-19 or any other infection or disease."

"To determine if an injunction is overbroad, we consider '(1) the seriousness and deliberateness of the violation; (2) [the] ease with which the violative claim may be transferred to other products; and (3) whether the [defendant] has a history of prior violations.'" *FTC v. Grant Connect, LLC*, 763 F.3d 1094, 1105 (9th Cir. 2014) (citation omitted). Our review is for abuse of discretion, *id.* at 1101, and we will uphold the injunction "so long as it bears a 'reasonable relation to the unlawful practices found to exist,'" *id.* at 1105 (quoting *FTC v. Colgate-Palmolive Co.*, 380 U.S. 374,

394–95 (1965)). Under these standards, we conclude that the injunction is overbroad only with respect to Defendant Tammabattula.

The district court's decision to permanently bar Nguyen and the corporate Defendants[1] from the "Protective Goods and Services" industry was not an abuse of discretion. As the district court correctly noted, Nguyen was "a licensed pharmacist who had her pharmacy license suspended" for serious misconduct, including acts of dishonesty, all of which was documented in the record. Given her willingness to then make false health claims to sell products during the pandemic (*i.e.*, Basic Immune IGG), the district court acted well within its discretion in concluding that she and the Defendant corporations should be enjoined from further participation in the selling of goods or services for the detection, treatment, prevention, mitigation, or cure of illness. *FTC v. Gill*, 265 F.3d 944, 957 (9th Cir. 2001).

We reach a different conclusion as to Defendant Tammabattula.[2] Tammabattula's wrongful conduct in

---

[1] In the district court, the parties agreed that the various corporate Defendants all "operated as a common enterprise" and that each corporate Defendant "is liable for the acts and practices alleged" in the operative complaint. Because Nguyen acted through one or more of these corporate Defendants, who are in turn each concededly fully responsible for each other, any injunctive relief that is appropriate as to Nguyen would properly also extend to all of the corporate Defendants.

[2] The FTC contends that Defendants failed to object to the district court's inclusion of Tammabattula in the injunction below. But even assuming *arguendo* that our review is only for plain error, *Draper v. Rosario*, 836 F.3d 1072, 1084–85 (9th Cir. 2016), we conclude that the plain-error standard is met here. For the reasons we explain, the district court's decision to subject Tammabattula to the same injunction as Nguyen and the

this case was limited to the false shipping claims respecting the hand sanitizer. The record does not reflect that he had any personal involvement in Nguyen's prior misconduct as a pharmacist or in her misrepresentations regarding Basic Immune IGG. Moreover, in contrast to the corporate Defendants, there was no agreement below that Nguyen and Tammabattula were fully liable for each other's conduct, such that any injunction against Nguyen could automatically be extended, in every respect, to Tammabattula. Tammabattula's first-time violation did not reasonably support including him, personally, in the sweeping *permanent* industry ban imposed by the district court.[3] *Cf. Grant Connect*, 763 F.3d at 1097–98, 1105 (upholding permanent injunction entered against defendant whose "business practices ha[d] drawn FTC scrutiny for over a decade[] and ha[d] resulted in three distinct enforcement actions against him"). We leave it to the district court, on remand, to exercise its discretion in determining whether, and to what extent, a more suitably tailored injunction should be imposed with respect to Tammabattula.

For the foregoing reasons, we vacate the injunction as to Tammabattula personally and remand for further proceedings consistent with this

---

corporate Defendants was an obvious error that should be corrected in order to prevent a miscarriage of justice. *Id.*

[3] We do not disturb the injunction to the extent that it prohibits any person (including Tammabattula) from acting "in active concert or participation" with Nguyen or the corporate Defendants in violation of the injunction as to them. We vacate the injunction only insofar as it applies fully to Tammabattula with respect to his future conduct independent of Nguyen or the corporate Defendants.

decision. The judgment of the district court is otherwise affirmed in all respects.

AFFIRMED IN PART, VACATED IN PART, AND REMANDED.

***FTC v. QYK Brands, LLC*, Case No. 22-55446**
Rawlinson, Circuit Judge, concurring in the result:

I concur in the result.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES – GENERAL

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

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

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

Before the Court are two motions for summary judgment. Plaintiff, the Federal Trade Commission ("FTC"), filed a motion for summary judgment. *See generally* Dkt. # 168 ("*Mot. I*"). Defendants QYK Brands LLC d/b/a Glowyy ("QYK"); DRJSNATURAL LLC ("Dr. J's Natural"); Rakesh Tammabattula ("Tammabattula"); Jacqueline Thao Nguyen a/k/a Dr. J ("Dr. J"); EASII, Inc. ("EASII"); and Theo Pharmaceuticals, Inc. ("Theo") (collectively, "Defendants") opposed.[21] *See generally*

---

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

Dkt. # 198 ("*Opp. I*"). The FTC replied.[32] *See generally* Dkt. # 205 ("*Reply I*"). Defendants also filed a motion for partial summary judgment. *See generally* Dkt. # 196 ("*Mot. II*"). The FTC opposed. *See generally* Dkt. # 196 ("*Opp. II*"). Defendants replied. *See generally* Dkt. # 203 ("*Reply II*").

The Court finds these matters appropriate for decision without oral argument. *See* Fed. R. Civ. P. 78; L.R. 7-15. Having considered the moving, opposing, and reply papers, the Court **GRANTS** the

---

Court **GRANTS** both motions and accepts as filed both the FTC's motion and Defendants' opposition.

[2] The FTC also filed a 25-page reply. It subsequently realized that the Court's Standing Order requires reply briefs not to exceed 12 pages and so applied ex parte to exceed the page limit after the fact. *See generally* Dkt. # 207. Defendants opposed, arguing that the FTC does not meet the ex parte standard, does not establish good cause for the extra page limit, prejudices Defendants by raising new arguments for the first time in the reply, and should be sanctioned. *See generally* Dkt. # 208. True, the FTC does not meet the traditional *Mission Power* test for ex parte relief, but the test also permits relief where, as here, the movant is guilty of only excusable neglect. *See Mission Power Eng'g Co. v. Continental Cas. Co.*, 883 F. Supp. 488, 493 (C.D. Cal. 1995). Because the Court has already permitted the parties to exceed the page limit in their other briefs, there is no reason to disregard a majority of the FTC's reply at this point. And the Court fails to see how Defendants would be prejudiced by the extra pages simply because they allegedly raise new arguments for the first time. As the Court previously explained to Defendants when they tried to raise a new argument in a reply brief, such arguments generally will not be considered even if made within the page limit. *See* Dkt. # 127 at 1 n.1 (citing *FT Travel-N.Y., LLC v. Your Travel Ctr., Inc.*, 112 F. Supp. 3d 1063, 1079 (C.D. Cal. 2015)). Accordingly, the Court **GRANTS** the FTC's ex parte application, accepts the reply brief as filed, and **DENIES** Defendants' request for sanctions.

FTC's motion for summary judgment and **DENIES** Defendants' motion for partial summary judgment.

I. Background

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

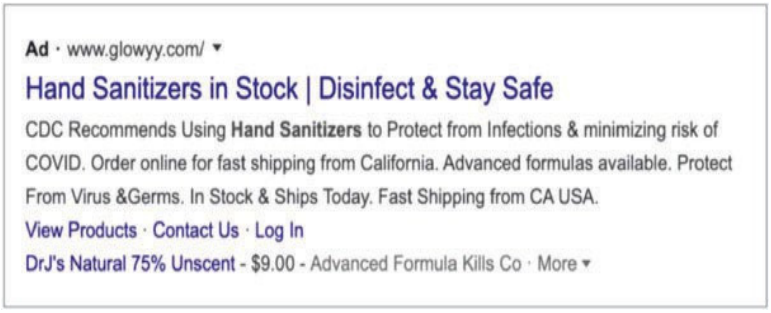
A. Hand Sanitizer Sales

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

In March 2020, to meet a pandemic-driven swell in demand for disinfectants, Defendants began

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

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



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

offered shipping times between three to ten days. *Id.* ¶¶ 171–77.

Defendants did not always follow through on their shipping promises. Of the 43,633 orders Defendants received between March and August 2020, the FTC claims that 39,724 were shipped late. *Id.* ¶ 390. This figure assumes that all sales made between March 4 to 18 and April 1 to May 18 promised one-day shipping, while orders placed between March 19 to 31 and May 19 to December 29 promised ten-day shipping. *Id.* But this assumption is not entirely supported by the record, as the FTC's only evidence of one-day shipping promises comes from Defendants' Google AdWords advertisements, which accounted for only 10 to 11% of Defendants' total hand sanitizer sales. *See* Dkt. # 199-3, Ex. C. In any event, it is undisputed that over 30,000 orders took more than 10 days to ship for orders placed between March and May 2020, *id.* ¶ 179, and over 10,000 orders took more than 30 days to ship, *id.* ¶ 394.[54]

The FTC avers that shipping was delayed in part because Defendants' inventory was woefully insufficient to meet demand. Throughout March and April 2020, Tammabattula publicly announced that

---

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

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

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

Some customers voiced their dissatisfaction with the shipping delays and demanded refunds. *See PSUF* ¶¶ 258, 381. Defendants' return policy generally

permitted customers to request a refund while the product was still in the "preshipment" stage—i.e., before it had been placed in the mail carrier's possession. *Id.* ¶ 245. But at times, Defendants refused to issue refunds once a shipping label had been generated and instead required customers to wait to receive the package and then reject it before receiving a refund. *See* Dkt. # 162, Ex. 16, Att. X, at 1 ("We can[']t cancel because it is already labelled. Your order will be scheduled for shipping within the week or early next week.").

B. Protein Powder as a COVID-19 Preventative

Defendants also sold a product called "Basic Immune IGG" that they offered through the Dr. J's Natural website. *PSUF* ¶¶ 280–81. Basic Immune IGG is a protein powder that is supposed to promote healthy digestion and immune function. *Id.* ¶¶ 286–87. It is not FDA- approved to treat or prevent COVID-19. *Id.* ¶ 309. During a Vietnamese language broadcast, Dr. J encouraged people to wash their hands regularly and use Basic Immune IGG. As a result, she "guaranteed" that people would "stay safe," citing the product's "FDA[] verification and approval." Dkt. # 144, Ex. 8, Att. A, at 14–15. She went on to explain that the protein powder could increase the user's total antibody count, giving them a better chance to "cling to and bite that coronavirus, push it out and kill it." *Id.* at 15. The broadcast host then said that, since Dr. J had taken the protein powder already, people "d[id not] have to be afraid of [her] anymore" and that people "c[ould] get close to [her]."

Id. Dr. J confirmed: "Yes, you're right." *Id.* Dr. J also posted two English language videos on YouTube that made similar claims but with more muted language. *See PSUF* ¶¶ 299–308; Dkt. # 137-1, Ex. 1, Att. H, at 11 (explaining that Basic Immune IGG could help users "fight back and destroy all of the coronavirus that is entering into your body").

C. Procedural History

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

> Count One – Failure to Timely Ship Goods and Issue Refunds: Violation of the Mail, Internet, or Telephone Order Merchandise Rule ("MITOR"), 16 C.F.R. § 435.2(a)–(c). *First Amended Complaint*, Dkt. # 73 ("*FAC*"), ¶¶ 72–73.
>
> Count Two – Deceptive Shipping Claims: Violation of § 5 of the FTC Act, 15 U.S.C. §§ 45(a), 52. *FAC* ¶¶ 77–79.
>
> Count Three – Deceptive COVID-19 Prevention Claims: Violation of § 5 of the FTC Act, 15 U.S.C. §§ 45(a), 52. *FAC* ¶¶ 80–82.

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

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

II. Legal Standard

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

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

In judging evidence at the summary judgment

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

III. Evidentiary Objections

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

IV. Discussion

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

A. First Cause of Action: MITOR Violation

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

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

Defendants' hand sanitizer sales between March and August 2020 violated all three of the MITOR's proscribed practices. First, Defendants solicited orders for hand sanitizer that they did not have in stock and had no "reasonable basis" to believe would be available to ship on Defendants' advertised timelines. *See id.* § 435.2(a). Throughout March and

April 2020, Tammabattula publicly acknowledged that Defendants lacked ingredients and packaging to keep up with demand. *PSUF* ¶¶ 331–33, 341–51. And Defendants knew that the COVID-19 pandemic had disrupted the global supply chain, resulting in delayed—sometimes indefinitely—shipments that they needed to meet an ever-growing demand for hand sanitizer. *Id.* ¶¶ 113–14, 126–30. This strongly suggests that Defendants had no "reasonable basis" to continue offering one to ten-day shipping or indicating that hand sanitizer was still in stock on their website. *See* 16 C.F.R. § 435.2(a). Additionally, over 10,000 orders took longer than 30 days to ship. *PSUF* ¶ 394. At bottom, these orders ran afoul of the MITOR because they exceeded both the "clearly and conspicuously stated" shipping timelines in some of Defendants' advertising as well as the MITOR's maximum 30-day shipping timeline when no specific shipping speed is stated. *See* 16 C.F.R. § 435.2(a)(i)–(ii).

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

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

Accordingly, the FTC's undisputed evidence reveals that Defendants violated multiple provisions of the MITOR between March and August 2020.[65] As such, the Court **GRANTS** the FTC's motion for summary judgment as to its first cause of action.

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

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

The FTC Act prohibits, among other things, "unfair or deceptive acts or practices in or affecting commerce." 15 U.S.C. § 45(a)(1). A statement can be "unfair or deceptive" if it is likely to mislead reasonable consumers under the circumstances in a way that is "material." *FTC v. Gill*, 265 F.3d 944, 950 (9th Cir. 2001). Whether a statement is misleading may be based on the "net impression" it creates or the "failure to disclose material information." *FTC v.*

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

Cyberspace.com LLC, 453 F.3d 1196, 1200 (9th Cir. 2006); *Sterling Drug, Inc. v. FTC*, 741 F.2d 1146, 1154 (9th Cir. 1984). A misleading statement is material if it "involves information that is important to consumers and, hence, likely to affect their choice of, or conduct regarding, a product." *Cyberspace.com LLC*, 453 F.3d at 1201 (quoting *Cliffdale Assocs., Inc.*, 103 F.T.C. 110, 165 (1984)). Materiality is presumed when statements "significantly involve health, safety, or other issues that would concern reasonable consumers." *FTC v. Wellness Support Network, Inc.*, No. 10-CV-04879-JCS, 2014 WL 644749, at *17 (N.D. Cal. Feb. 19, 2014).

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

("So I think it really shocked everybody else in the U.S. that we even had them, so [customers] just wanted to confirm first that we had them in stock. And when we did confirm that, they would place their order.").

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

But Dr. J went much further than that. In a Vietnamese language broadcast, Dr. J represented that, by taking Basic Immune IGG, people did not have to be afraid to stand close to her anymore. Dkt. # 144, Ex. 8, Att. A, at 14–15. And she "guaranteed" that users would "stay safe" if they washed their hands and used Basic Immune IGG, citing the product's "FDA[] verification and approval."[6] *Id.* To

[6] Defendants challenge the accuracy of the FTC's certified translation of these statements. *See* Dkt. # 200, ¶¶ 16–18. But

be sure, Dr. J did not say that users would "stay safe" from COVID-19 specifically or that Basic Immune IGG was FDA approved to protect against COVID-19. But even when read in the light most favorable to Defendants and in context with the entire broadcast, the clear "net impression" was that Dr. J misleadingly implied that Basic Immune IGG users would stay safe from COVID-19 and that it was FDA approved for that purpose. *See Cyberspace.com LLC*, 453 F.3d at 1200; *Sterling Drug, Inc.*, 741 F.2d at 1154. These misleading statements were also material because they "significantly involve[d] health, safety, or other issues that would concern reasonable consumers." *Wellness Support Network, Inc.*, 2014 WL 644749, at *17.

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

C. Remedies

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

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

i. Monetary Relief for Consumers

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

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

id. at 606 ("The same reasoning is applicable to Section 19."). Unless the defendant can rebut that presumption, injury to consumers is decisively established. *Id.* at 606.

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

Noland's concerns with consumer injury do not readily translate here. Critically, the FTC has established a MITOR violation for conduct that occurred *before* any contract was consummated. *See* 16 C.F.R. § 635.2(a) (solicitation of merchandise orders is prohibited "unless, *at the time of the solicitation*, the seller has a reasonable basis to expect that it will be able to ship any ordered merchandise to the buyer" within the timeframe "clearly and conspicuously" stated (emphasis added)). Accordingly, because the FTC's theory of MITOR liability here

turns on Defendants' pre-purchase, materially misleading shipping promises, the presumption of actual reliance standard can apply here. *See Figgie Int'l, Inc.*, 994 F.2d at 605. And given Defendants' widely disseminated materially misleading claims that they had hand sanitizer in stock and ready to ship, the Court finds that the FTC is entitled to a presumption of actual reliance in this case. *See id.* Because Defendants have "presented no evidence to rebut the presumption of reliance, injury to consumers has been established." *Id.* at 606.

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

by having customers make individual refund claims. *See id.*

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

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

Finally, Defendants argue that to be entitled to a

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

In short, the Court agrees with the FTC that consumers are entitled to redress in the form of full refunds not to exceed Defendants' total hand sanitizer revenue from March to August 2020—i.e., $3,086,238.99. However, given that some customers may have been satisfied with their hand sanitizer orders—even if delayed—the Court prefers to

implement a redress plan requiring customers to make refund requests rather than receiving the funds outright. *See Mot. II* 11:17–13:2; *Opp. II* 13:13 n.21. The FTC is to hold this sum in an escrow account, and Defendants' customers may seek refunds directly from the FTC. Funds must be returned to Defendants, less the FTC's costs to administer the refund process, if they remain unclaimed 120 days after consumers are notified. *See Figgie Int'l, Inc.*, 994 F.2d at 607–08 (modifying the district court's plan to ensure that unclaimed funds be returned to the defendant, less the FTC's administration costs).

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

ii. Permanent Injunctive Relief

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

The FTC is authorized to seek a permanent injunction for violation of "any provision of law enforced by the" FTC. 15 U.S.C. § 53(b). Injunctive relief under this section "cannot be used to remedy

past behavior and can only be granted where wrongdoing is ongoing or likely to recur." *FTC v. Cardiff*, No. EDCV 18-2104 DMG (PLAx), 2021 WL 3616071, at *7 (C.D. Cal. June 29, 2021). To determine whether wrongdoing is likely to recur, courts consider several factors, including "[1] the degree of scienter, [2] frequency of violative acts, [3] the defendant's ability to commit future violations, [4] the degree of harm consumers suffered, and [5] the defendant's recognition of his own culpability." *United States v. Zaken Corp.*, 57 F. Supp. 3d 1233, 1242 (C.D. Cal. 2014). The scope of an injunction depends on the circumstances of each case but must bear "a reasonable relationship to the violation." *FTC v. John Beck Amazing Profits LLC*, 888 F. Supp. 2d 1006, 1012 (C.D. Cal. 2012).

Based on the factors outlined above, the FTC is entitled to the permanent injunction it seeks. First, Defendants had a high degree of scienter. Regarding hand sanitizer sales, Tammabattula publicly acknowledged that Defendants lacked supplies to keep up with demand. *PSUF* ¶¶ 331–33, 341–51. Yet Defendants continued to solicit orders from customers when they had insufficient sanitizer inventory on hand and were well aware of the global supply chain disruptions that hindered Defendants' ability to restock their inventory. *See id.* ¶¶ 113–14, 121, 126–27. Additionally, Defendants had at least some notice that their advertisements were problematic because their Google advertising account was suspended for "potentially profit[ing] from or exploit[ing]a sensitive event with significant social, cultural or political impact." *Id.* ¶¶ 189–94. Defendants' Facebook account suffered a similar fate, but Defendants sought out a

freelancer to advertise for them to circumvent the suspension. *Id.* ¶¶ 436–38. Turning to Basic Immune IGG sales, Dr. J is a licensed pharmacist who had her pharmacy license suspended for "Unprofessional Conduct Involving Acts of Dishonesty, Fraud, or Deceit," among other things. *Id.* ¶¶ 20–23. Undeterred by this punishment, Dr. J nevertheless continued her apparent streak of dishonesty and deceit by misrepresenting on a Vietnamese language broadcast that Basic Immune IGG could prevent—or at least minimize the risk of—COVID-19 infection and was FDA approved for that purpose. *See* Dkt. # 144, Ex. 8, Att. A, at 14–15. Based on the foregoing, Defendants have exhibited a high degree of scienter, and this factor weighs in favor of finding that wrongdoing is likely to recur. *See Zaken Corp.*, 57 F. Supp. 3d at 1242.

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

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

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

In sum, the foregoing factors support the conclusion that Defendants' wrongdoing is likely to recur. *See Cardiff*, 2021 WL 3616071, at *7. Accordingly, the Court **GRANTS** the FTC's requested permanent injunction and its associated compliance-monitoring measures.[87]

iii. Liability for Individual Defendants

The FTC claims that the individual defendants—Tammabattula and Dr. J—should also be held personally liable for both the monetary and injunctive relief it seeks. *Mot. I* 47:1–50:5. Defendants do not

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

dispute this in their opposition, so the Court deems the issue conceded. *See Tapia*, 2015 WL 4650066, at *2.

V. Conclusion

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

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

IT IS SO ORDERED.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

FEDERAL TRADE COMMISSION,
Plaintiff,

v.

QYK BRANDS LLC d/b/a Glowyy, et al.
Defendants.

Case No. 8:20-cv-01431-PSG-KES

Filed April 22, 2022

FINAL ORDER FOR PERMANENT INJUNCTION AND MONETARY JUDGMENT

On August 4, 2020, Plaintiff, the Federal Trade Commission ("FTC"), filed its Complaint for Permanent Injunction and Other Equitable Relief pursuant to Sections 13(b) and 19 of the Federal Trade Commission Act ("FTC Act"), 15 U.S.C. §§ 53(b) and 57b, and the FTC's Trade Regulation Rule Concerning the Sale of Mail, Internet, or Telephone Order Merchandise ("MITOR" or the "Rule"), 16 C.F.R. Part 435. Plaintiff filed its First Amended Complaint on May 19, 2021 (ECF No. 73, "FAC"). On February 14, 2022, Plaintiff filed its Motion for Summary Judgment ("Motion"), as well as its Statement of Undisputed Facts, as supported by declarations, stipulation, admissions, interrogatory answers, or

other materials submitted in support of the Motion. Having considered the Motion and supporting materials in the record and any oppositions thereto, the Court finds there is no genuine dispute of material fact, and the FTC is entitled to judgment against all Defendants as a matter of law. The Court's reasoning and specific findings are detailed in the Minute Order dated April 6, 2022 (ECF No. 212).

THEREFORE, IT IS ORDERED as follows:

FINDINGS

A. This Court has jurisdiction over the subject matter of this case, and there is good cause to believe that it will have jurisdiction over all parties hereto and that venue in this district is proper.

B. The Complaint alleges that Defendants participated in deceptive and unfair acts or practices in violation of Sections 5 and 12 of the FTC Act, 15 U.S.C. § 45 and § 52, and of the Commission's Trade Regulation Rule Concerning the Sale of Mail, Internet or Telephone Order Merchandise, 16 C.F.R. Part 435 ("MITOR"), by representing they would ship goods, including Personal Protective Equipment ("PPE") and hand sanitizer, within certain timeframes but having no reasonable basis to expect to ship the goods within the advertised timeframes; failing to ship goods within the timeframe required by MITOR; failing to offer consumers the opportunity to consent to a delay in shipping or to cancel their order and receive a prompt refund upon becoming aware of their inability to ship goods within the time advertised; and, after

receiving cancellation and refund requests, failing to provide consumers with a prompt refund. The Complaint also charges that Defendants participated in deceptive acts or practices in violation of Section 5 of the FTC Act, 15 U.S.C. § 45, by misrepresenting that they: (1) would ship orders "Today"; or would ship within 7 days; (2) had certain PPE and hand sanitizer in stock and ready to ship; and (3) would ship the goods consumers ordered; and that they further violated Sections 5 and 12 of the FTC Act by participating in deceptive acts and practices by misrepresenting that their product, Basic Immune IGG, could treat, prevent, or reduce risk of contracting COVID-19, and that it was clinically shown and approved by the FDA to do so.

C. Defendants' activities are in or affecting commerce, as defined in Section 4 of the FTC Act, 15 U.S.C. § 44.

D. Corporate Defendants violated Section 5 of the FTC Act, 15 U.S.C. § 45, and MITOR, 16 C.F.R. Part 435, by representing they would ship goods, including hand sanitizer and PPE, within certain timeframes but having no reasonable basis to expect to ship the goods within the advertised timeframes; failing to ship goods within the timeframe required by MITOR; failing to offer consumers the opportunity to consent to a delay in shipping or to cancel their order and receive a prompt refund upon becoming aware of their inability to ship goods within the time advertised; and, after receiving cancellation and refund requests, failing to provide consumers with a prompt refund. Corporate Defendants further

violated Section 5 of the FTC Act, 15 U.S.C. § 45, by misrepresenting that they: (1) would ship orders "Today"; or would ship within 7 days; (2) had certain PPE and hand sanitizer in stock and ready to ship; and (3) would ship the goods consumers ordered; and that they further violated Sections 5 and 12 of the FTC Act by participating in deceptive acts and practices by misrepresenting that their product, Basic Immune IGG, could treat, prevent, or reduce risk of contracting COVID-19, and that it was clinically shown and approved by the FDA to do so.

E. Individual Defendants Rakesh Tammabattula and Jacqueline Thao Nguyen participated in and had authority to control the Corporate Defendants' deceptive marketing and sale of hand sanitizer, PPE products, and Basic Immune IGG.

F. In light of Defendants' conduct, there is a cognizable danger that they will continue to engage in activities that violate the FTC Act unless enjoined from such acts and practices.

DEFINITIONS

For the purposes of this Order, the following definitions apply:

A. "**Applicable Time Period**" means the time stated in Defendants' solicitation or within 30 days of Receipt of a Properly Completed Order if no time is stated in the solicitation.

B. "**Clearly and Conspicuously**" means that a required disclosure is difficult to miss (*i.e.*, easily noticeable) and easily understandable by ordinary consumers, including in all of the following ways:

1. In any communication that is solely visual or solely audible, the disclosure must be made through the same means through which the communication is presented. In any communication made through both visual and audible means, such as a television advertisement, the disclosure must be presented simultaneously in both the visual and audible portions of the communication even if the representation requiring the disclosure is made in only one means.

2. A visual disclosure, by its size, contrast, location, the length of time it appears, and other characteristics, must stand out from any accompanying text or other visual elements so that it is easily noticed, read, and understood.

3. An audible disclosure, including by telephone or streaming video, must be delivered in a volume, speed, and cadence sufficient for ordinary consumers to easily hear and understand it.

4. In any communication using an interactive electronic medium, such as the Internet or software, the disclosure must be unavoidable.

5. The disclosure must use diction and syntax understandable to ordinary consumers and

must appear in each language in which the representation that requires the disclosure appears.

6. The disclosure must comply with these requirements in each medium through which it is received, including all electronic devices and face-to-face communications.

7. The disclosure must not be contradicted or mitigated by, or inconsistent with, anything else in the communication.

8. When the representation or sales practice targets a specific audience, such as children, the elderly, or the terminally ill, "ordinary consumers" includes reasonable members of that group.

C. "**Corporate Defendant(s)**" means QYK Brands LLC d/b/a Glowyy, DrJsNatural LLC, Theo Pharmaceuticals, Inc., and EASII, Inc., and each of their subsidiaries, affiliates, successors, and assigns.

D. "**Covered Dietary Supplement**" means any Dietary Supplement, Food, or Drug, including Basic Immune IGG.

E. "**Defendants**" means all of the Individual Defendants and the Corporate Defendants, individually, collectively, or in any combination.

F. "**Dietary Supplement**" means: (1) any product labeled as a dietary supplement or otherwise represented as a dietary supplement; or (2) any pill, tablet, capsule, powder, softgel, gelcap, liquid, or other

similar form containing one or more ingredients that are a vitamin, mineral, herb or other botanical, amino acid, probiotic, or other dietary substance for use by humans to supplement the diet by increasing the total dietary intake, or a concentrate, metabolite, constituent, extract, or combination of any ingredient described above, that is intended to be ingested, and is not represented to be used as a conventional food or as a sole item of a meal or the diet.

G. "**Document**" is synonymous in meaning and equal in scope to the usage of "document" and "electronically stored information" in Federal Rule of Civil Procedure 34(a), Fed. R. Civ. P. 34(a), and includes writings, drawings, graphs, charts, photographs, sound and video recordings, images, Internet sites, web pages, websites, electronic correspondence, including e-mail and instant messages, contracts, accounting data, advertisements, FTP Logs, Server Access Logs, books, written or printed records, handwritten notes, telephone logs, telephone scripts, receipt books, ledgers, personal and business canceled checks and check registers, bank statements, appointment books, computer records, customer or sales databases and any other electronically stored information, including Documents located on remote servers or cloud computing systems, and other data or data compilations from which information can be obtained directly or, if necessary, after translation into a reasonably usable form. A draft or non- identical copy is a separate Document within the meaning of the term.

H. "**Drug**" means: (1) articles recognized in the official United States Pharmacopoeia, official Homoeopathic Pharmacopoeia of the United States, or official National Formulary, or any supplement to any of them; (2) articles intended for use in the diagnosis, cure, mitigation, treatment, or prevention of disease in humans or other animals; (3) articles (other than food) intended to affect the structure or any function of the body of humans or other animals; and (4) articles intended for use as a component of any article specified in (1), (2), or (3); but does not include devices or their components, parts, or accessories.

I. "**Essentially Equivalent Product**" means a product that contains the identical ingredients, except for inactive ingredients (e.g., binders, colors, fillers, excipients) in the same form and dosage, and with the same route of administration (e.g., orally, sublingually), as the Covered Dietary Supplement; provided that the Covered Dietary Supplement may contain additional ingredients if reliable scientific evidence generally accepted by experts in the field indicates that the amount and combination of additional ingredients is unlikely to impede or inhibit the effectiveness of the ingredients in the Essentially Equivalent Product.

J. "**Food**" means: (1) any article used for food or drink for humans or other animals; (2) chewing gum; and (3) any article used for components of any such article.

K. "**Individual Defendants**" means Rakesh Tammabattula and Jacqueline Thao Nguyen.

L. "**Option**" means an offer made Clearly and Conspicuously and without prior demand.

M. "**Personal Protective Equipment**" means protective clothing, helmets, gloves, face shields, goggles, facemasks, respirators, or other equipment designed, intended or represented to protect the wearer from the spread of infection or illness.

N. "**Prompt**," in the context of a Refund, means a Refund sent by any means at least as fast and reliable as first-class mail within 7 days of the date on which the buyer's right to Refund vests under the provisions of this Court Order. Provided, however, that where a Defendant cannot provide a Refund by the same method payment was tendered, Prompt Refund means a Refund sent in the form of cash, check, or money order, by any means at least as fast and reliable as first class mail, within 7 days of the date on which the Defendant discovers it cannot provide a Refund by the same method as payment was tendered.

O. "**Protective Goods and Services**" means any good or service designed, intended, or represented to detect, treat, prevent, mitigate, or cure COVID-19 or any other infection or disease, including, but not limited to, Personal Protective Equipment, hand sanitizer, and thermometers.

P. "**Refund**" means:

1. Where the buyer tendered full payment for the unshipped merchandise in the form of cash, check, or money order, a return of the amount tendered in the form of cash, check, or money order sent to the buyer;

2. Where there is a credit sale:

(i) And Defendant is a creditor, a copy of a credit memorandum or the like or an account statement sent to the buyer reflecting the removal or absence of any remaining charge incurred as a result of the sale from the buyer's account;

(ii) And a third party is the creditor, an appropriate credit memorandum or the like sent to the third party creditor which will remove the charge from the buyer's account and a copy of the credit memorandum or the like sent to the buyer that includes the date that Defendant sent the credit memorandum or the like to the third party creditor and the amount of the charge to be removed, or a statement from Defendant acknowledging the cancellation of the order and representing that it has not taken any action regarding the order which will result in a charge to the

buyer's account with the third party;

(iii) And the buyer tendered partial payment for the unshipped merchandise in the form of cash, check, or money order, a return of the amount tendered in the form of cash, check, or money order sent to the buyer.

3. Where the buyer tendered payment for the unshipped merchandise by any means other than those enumerated in (1) or (2) of this definition:

(i) Instructions sent to the entity that transferred payment to Defendant instructing that entity to return to the buyer the amount tendered in the form tendered and a statement sent to the buyer setting forth the instructions sent to the entity including the date of the instructions and the amount to be returned to the buyer;

(ii) A return of the amount tendered in the form of cash, check or money order sent to the buyer; or

(iii) A statement from Defendant sent to the buyer acknowledging the cancellation of the order and representing that Defendant has not taken any action regarding the order which will access any of the buyer's funds.

Q. "**Receipt of a Properly Completed Order**" means, where the buyer tenders full or partial payment in the proper amount in the form of cash, check or money order; authorization from the buyer to charge an existing charge account; or other payment methods, the time at which Defendant receives both said payment and an order from the buyer containing all of the information needed by Defendant to process and Ship the order.

R. "**Ship**," or any variation thereof, including Shipment or Shipping, means the act by which the merchandise is physically placed in the possession of the carrier.

ORDER
CONDUCT RELIEF

I.

IT IS ORDERED that Defendants are permanently restrained and enjoined from the advertising, marketing, promoting, or offering for sale, or assisting others in the advertising, marketing, promoting, or offering for sale, of any Protective Goods and Services.

II.

IT IS FURTHER ORDERED that Defendants, Defendants' officers, agents, employees, and attorneys, and all other persons in active concert or participation with any of them, who receive actual

notice of this Order, whether acting directly or indirectly, in connection with the sale of any good ordered by mail, via the internet, or by telephone are permanently restrained and enjoined from:

A. Representing, without a reasonable basis, that Defendants will: (1) Ship ordered goods within the time stated in their solicitation; or (2) Ship ordered goods by any revised Shipping date provided to buyers.

B. Where the order solicitation does not Clearly and Conspicuously state a Shipping time, soliciting any order for the sale of merchandise without having a reasonable basis that the goods will Ship 30 days after Receipt of a Properly Completed Order.

C. Informing buyers that Defendants are unable to make any representation regarding the length of any Shipping delay unless Defendants have a reasonable basis for so informing buyers.

D. Failing to provide buyers with the Option either to consent to the delay in Shipping or to cancel the order and receive a Prompt Refund where Defendants cannot Ship the ordered goods within the Applicable Time Period. Said Option must be provided within a reasonable time after the Defendants have become aware of their inability to Ship within the Applicable Time Period, but in no event later than the Applicable Time Period.

1. Provided however, that any such Option must either:

a. provide a definite revised Shipping date; or

b. where Defendants lack a reasonable basis for providing a definite revised Shipping date, inform the buyer that:

(i) the seller is unable to make any representation regarding the length of the delay; and
(ii) the reason(s) for the delay.

2. Where Defendants have provided a definite revised Shipping date, pursuant to II.D.1.a, that is more than 30 days later than the Applicable Time Period, Defendants must also Clearly and Conspicuously inform the buyer that the buyer's order will automatically be deemed to have been cancelled unless:

a. Defendants have Shipped the merchandise within the Applicable Time Period, and Defendants have received no cancellation request prior to Shipment; or

b. the buyer has specifically consented to said Shipping delay within the Applicable Time Period.

3. Where Defendants have informed the buyer that they cannot make any representation regarding the length of the delay pursuant to Section II.D.1.b, Defendants must also Clearly and Conspicuously inform the buyer that the buyer's order

will automatically be deemed to have been cancelled unless:

> a. Defendants have Shipped the merchandise within 30 days of the Applicable Time Period, and the Defendants have received no cancellation request prior to Shipment; or
>
> b. the buyer has specifically consented to said Shipping delay within 30 days of the Applicable Time Period. Provided however, Defendants must also expressly inform the buyer that the buyer will have a continuing right to cancel the order at any time after the Applicable Time Period.

E. Where the buyer has consented to a definite revised Shipping date pursuant to Section II.D, and Defendants become aware they are unable to Ship ordered goods by that date, failing to provide a renewed Option either to consent to a further delay or to cancel the order and receive a Prompt Refund. Said Option must be made within a reasonable time after the Defendants first become aware of their inability to Ship before the said definite revised Shipping date, but in no event later than the expiration of the definite revised Shipping date. Provided however, that any such Option must provide a new definite revised Shipping date, unless Defendants lack a reasonable basis for doing so. In such event, Defendants must also provide the notices required by Section II.D.1.b and Section II.D.3 of this Order.

F. Failing to cancel any order and provide the buyer with a Prompt Refund:

1. When Defendants have received a cancellation and Refund request from the buyer pursuant to Section II of this Order;

2. Under the circumstances prescribed in Section II.D.2 and II.D.3;

3. When Defendants fail to provide the Option required by Section II.D. and have not shipped the merchandise within the Applicable Time Period; or

4. When Defendants notify the buyer that they have decided not to Ship the merchandise.

III.

In any action brought by the Commission alleging a violation of Section II of this Order, the failure to create and maintain records establishing compliance with Section II creates a rebuttable presumption that Defendants violated the provisions of that Section.

IV.

IT IS FURTHER ORDERED that Defendants, Defendants' officers, agents, employees, and attorneys, and all other persons in active concert or participation with any of them, who receive actual notice of this Order, whether acting directly or

indirectly, in connection with the sale of any good or service ordered by mail, via the internet, or by telephone are permanently restrained and enjoined from, or assisting others in, expressly or by implication, misrepresenting:

A. The time within which the good will ship;

B. The time within which the buyer will receive the ordered good;

C. That any costs will be refunded if the order does not arrive on time, or any material aspect of a Refund policy; or

D. Any other fact material to consumers concerning any good or service, such as: the total costs; any material restrictions, limitations, or conditions; or any material aspect of its performance, efficacy, nature, or central characteristics.

V.

IT IS FURTHER ORDERED that Defendants, Defendants' officers, agents, employees, and attorneys, and all other persons in active concert or participation with any of them, who receive actual notice of this Order, whether acting directly or indirectly, in connection with the labeling, advertising, promotion, offering for sale, sale, or distribution of any Covered Dietary Supplement, are permanently restrained and enjoined from making, or assisting others in making, expressly or by implication, including through the use of a product or

program name, endorsement, depiction, or illustration, any representation that such product:

A. is FDA-approved to effectively treat, prevent transmission of, or reduce the risk of contracting COVID-19 unless the representation is true and non-misleading;

B. can effectively treat, prevent transmission of, or reduce risk of contracting COVID-19; or

C. cures, mitigates, or treats any disease, unless the representation in B or C is true and non-misleading, and, at the time such representation is made, Defendants possess and rely upon competent and reliable scientific evidence that is sufficient in quality and quantity based on standards generally accepted in the relevant scientific fields, when considered in light of the entire body of relevant and reliable scientific evidence, to substantiate that the representation is true.

For purposes of this Section, competent and reliable scientific evidence must consist of human clinical testing of the Covered Dietary Supplement, or of an Essentially Equivalent Product, that is sufficient in quality and quantity based on standards generally accepted by experts in the relevant disease, condition, or function to which the representation relates, when considered in light of the entire body of relevant and reliable scientific evidence, to substantiate that the representation is true. Such testing must be: (1) randomized, double-blind, and placebo-controlled; and (2) conducted by researchers qualified by training

and experience to conduct such testing. In addition, all underlying or supporting data and Documents generally accepted by experts in the field as relevant to an assessment of such testing as described in the Section entitled Preservation of Records Relating to Competent and Reliable Human Clinical Tests or Studies must be available for inspection and production to the Commission. Persons covered by this Section have the burden of proving that a product satisfies the definition of Essentially Equivalent Product.

VI.

IT IS FURTHER ORDERED that Defendants, Defendants' officers, agents, employees, and attorneys, and all other persons in active concert or participation with any of them, who receive actual notice of this Order, whether acting directly or indirectly, in connection with the manufacturing, labeling, advertising, promotion, offering for sale, sale, or distribution of any Covered Dietary Supplement, are permanently restrained and enjoined from making, or assisting others in making, expressly or by implication, including through the use of a product or program name, endorsement, depiction, or illustration, any representation, other than representations covered under the Section IV of this Order, about the health benefits, performance, efficacy, safety, or side effects of any Covered Dietary Supplement, unless the representation is non-misleading, and, at the time of making such representation, they possess and rely upon competent and reliable scientific evidence that is sufficient in

quality and quantity based on standards generally accepted by experts in the relevant disease, condition, or function to which the representation relates, when considered in light of the entire body of relevant and reliable scientific evidence, to substantiate that the representation is true.

For purposes of this Section, competent and reliable scientific evidence means tests, analyses, research, or studies (1) that have been conducted and evaluated in an objective manner by experts in the relevant disease, condition, or function to which the representation relates; (2) that are generally accepted by such experts to yield accurate and reliable results; and (3) that are randomized, double- blind, and placebo-controlled human clinical testing of the Covered Product, or of an Essentially Equivalent Product, when such experts would generally require such human clinical testing to substantiate that the representation is true. In addition, when such tests or studies are human clinical tests or studies, all underlying or supporting data and documents generally accepted by experts in the field as relevant to an assessment of such testing as set forth in the Section entitled Preservation of Records Relating to Competent and Reliable Human Clinical Tests or Studies must be available for inspection and production to the Commission. Persons covered by this Section have the burden of proving that a product satisfies the definition of Essentially Equivalent Product.

VII.

IT IS FURTHER ORDERED that Defendants, Defendants' officers, agents, employees, and attorneys, and all other persons in active concert or participation with any of them, who receive actual notice of this Order, whether acting directly or indirectly, in connection with the manufacturing, labeling, advertising, promotion, offering for sale, sale, or distribution of any Covered Dietary Supplement are permanently restrained and enjoined from misrepresenting, in any manner, expressly or by implication, including through the use of any product name, endorsement, depiction, or illustration:

A. That any Covered Dietary Supplement is clinically proven to treat, prevent the transmission of, or reduce the risk of contracting COVID-19;

B. That the performance or benefits of any product are scientifically or clinically proven or otherwise established; or

C. The existence, contents, validity, results, conclusion, or interpretations of any test, study, or other research.

VIII.

IT IS FURTHER ORDERED that nothing in this Order prohibits Defendants, Defendants' officers, agents, employees, and attorneys, or all other persons in active concert or participation with any of them from:

A. For any Drug product, making a representation that is approved for inclusion in labeling for such Drug product under a new drug application or biologics license application approved by the Food and Drug Administration, or, for any nonprescription Drug product authorized by Section 505G of the Food, Drug, and Cosmetics Act, 21 U.S.C. § 355h, ("FDCA") to be marketed without an approved new drug application, making a representation that is permitted or required to appear in its labeling in accordance with Section 505G(a)(1)-(3) of the FDCA, 21 U.S.C. § 355h(a)(1)-(3), or a final administrative order under Section 505G(b) of the FDCA, 21 U.S.C. § 355h(b); and

B. For any product, making a representation that is specifically authorized for use in labeling for such product by regulations promulgated by the Food and Drug Administration pursuant to the Nutrition Labeling and Education Act of 1990 or permitted under Sections 303-304 of the Food and Drug Administration Modernization Act of 1997.

IX.

IT IS FURTHER ORDERED that, with regard to any human clinical test or study ("test") upon which Defendants rely to substantiate any claim covered by this Order, Defendants must secure and preserve all underlying or supporting data and Documents generally accepted by experts in the field as relevant to an assessment of the test, including:

A. All protocols and protocol amendments, reports, articles, write-ups, or other accounts of the results of the test, and drafts of such documents reviewed by the test sponsor or any other person not employed by the research entity;

B. All documents referring or relating to recruitment; randomization; instructions, including oral instructions, to participants; and participant compliance;

C. Documents sufficient to identify all test participants, including any participants who did not complete the test, and all communications with any participants relating to the test; all raw data collected from participants enrolled in the test, including any participants who did not complete the test; source documents for such data; any data dictionaries; and any case report forms;

D. All documents referring or relating to any statistical analysis of any test data, including any pretest analysis, intent-to-treat analysis, or between-group analysis performed on any test data; and

E. All documents referring or relating to the sponsorship of the test, including all communications and contracts between any sponsor and the test's researchers.

Provided, however, the preceding preservation requirement does not apply to a reliably reported test, unless the test was conducted, controlled, or sponsored, in whole or in part by: (1) any Defendant;

(2) any Defendant's officers, agents, representatives, or employees; (3) any other person or entity in active concert or participation with any Defendant; (4) any person or entity affiliated with or acting on behalf of any Defendant; (5) any supplier of any ingredient contained in the product at issue to any of the foregoing or to the product's manufacturer; or (6) the supplier or manufacturer of such product.

For purposes of this Section, "reliably reported test" means a report of the test has been published in a peer-reviewed journal, and such published report provides sufficient information about the test for experts in the relevant field to assess the reliability of the results.

For any test conducted, controlled, or sponsored, in whole or in part, by Defendants, Defendants must establish and maintain reasonable procedures to protect the confidentiality, security, and integrity of any personal information collected from or about participants. These procedures must be documented in writing and must contain administrative, technical, and physical safeguards appropriate to Corporate Defendants' size and complexity, the nature and scope of Defendants' activities, and the sensitivity of the personal information collected from or about the participants.

X.

IT IS FURTHER ORDERED that:

A. Judgment in the amount of Three Million, Eighty-Six Thousand, Two Hundred Thirty-Nine Dollars and Ninety-Nine Cents ($3,086,239.99) is

entered in favor of the Commission against Defendants jointly and severally, as monetary relief pursuant to Section 19 of the FTC Act.

B. Defendants are ordered to turn over the sum of Three Million, Eighty- Six Thousand, Two Hundred Thirty-Nine Dollars and Ninety-Nine Cents ($3,086,239.99) to the Commission within seven (7) days of entry of this Order.

1. The money transfer identified above shall be made by wire transfer in accordance with wire transfer instructions provided by a representative of the Commission to Defendants.

2. After receipt of such funds by wire transfer, all money paid to the Plaintiff or Commission pursuant to this Order as equitable monetary relief shall be held in a non-interest bearing escrow account administered by the Commission or its designee to be used for equitable relief, including consumer redress and any attendant expenses for the administration of any redress fund ("Redress Fund"). Defendants have no right to challenge any actions the Commission or its representatives may take with regard to the conduct or administration of redress pursuant to this Section.

C. The FTC shall use the Redress Fund to redress consumers who purchased from Defendants from March through August 2020, and for the administration of that redress. The FTC shall have sole discretion on how to administer the redress program, provided however,

1. Such redress plan shall require consumers to request a refund to be reimbursed.

2. If Defendants have paid the Judgment in full on or before the date the FTC gives notice to consumers of their right to a refund:

a. All consumers notified shall have 120 days from the date of notification to request a refund after receiving notice ("120 Day Notice Period").

b. Any consumer that fails to submit a request for a refund within the 120 Day Notice Period shall have no right to a refund for redress from the FTC.

c. After the conclusion of the 120 Day Notice Period, the FTC shall have a reasonable time to determine the amount of unclaimed funds and costs of administering the Redress Fund ("Post-Notice Administration Period").

d. The FTC shall return to Defendants any amount of money in the Redress Fund (less costs of administering the Redress Fund) that remains at the conclusion of Post-Notice Administration Period.

3. The money transfer identified above shall be made by wire transfer in accordance with wire transfer instructions provided by a representative of the Commission to Defendants.

a. The FTC, at any time, may give notice to consumers of their right to a refund, and may make partial distributions if the FTC determines in its sole discretion that doing so is practical. Any notice given under this provision shall not trigger the 120 Day Notice Period.

b. The Commission may continue to collect the remainder of the Judgment plus interest and distribute those funds until the Judgment is paid in full.

c. After payment in full, the FTC shall make a last distribution, and return any remaining funds (less costs of administering the Redress Fund) within a reasonable period thereafter.

XI. ADDITIONAL MONETARY PROVISIONS

IT IS FURTHER ORDERED that:

A. Defendants relinquish dominion and all legal and equitable right, title, and interest in all assets transferred pursuant to this Order and may not seek the return of any assets.

B. Defendants acknowledge that their Taxpayer Identification Numbers (Social Security Numbers or Employer Identification Numbers), which Defendants must submit to the Commission, may be used for collecting and reporting on any delinquent amount arising out of this Order, in accordance with 31 U.S.C. § 7701.

XII. CUSTOMER INFORMATION

IT IS FURTHER ORDERED that Defendants, Defendants' officers, agents, employees, attorneys and all other persons in active concert or participation with any of them who receive actual notice of this Order, whether acting directly or indirectly, are permanently restrained and enjoined from directly or indirectly:

A. If a representative of the Commission requests in writing any information related to redress, Defendants must provide it, in the form prescribed by the Commission, within 14 days;

B. Disclosing, using, or benefitting from customer information, including the name, address, telephone number, email address, social security number, other identifying information, or any data that enables access to a customer's account (including a credit card, bank account, or other financial account), that any Defendant obtained prior to entry of this Order in connection with the sale of Protective Goods and Services; and

C. Failing to destroy such customer information in all forms in their possession, custody, or control within 30 days after receipt of written direction to do so from a representative of the Commission.

Provided, however, that customer information need not be disposed of, and may be disclosed, to the extent requested by a government agency or required by law, regulation, or court order.

XIII. ORDER ACKNOWLEDGMENTS

IT IS FURTHER ORDERED that Defendants obtain acknowledgments of receipt of this Order:

A. Each Defendant, within 7 days of entry of this Order, must submit to the Commission an acknowledgment of receipt of this Order sworn under penalty of perjury.

B. For 20 years after entry of this Order, each Individual Defendant for any business that such Defendant, individually or collectively with any other Defendants, is the majority owner or controls directly or indirectly, and each Corporate Defendant must deliver a copy of this Order to: (1) all principals, officers, directors, and LLC managers and members; (2) all employees having managerial responsibilities for conduct related to the subject matter of this Order and all agents and representatives who participate in conduct related to the subject matter of this Order; and (3) any business entity resulting from any change in structure as set forth in the Section titled Compliance Reporting. Delivery must occur within 7 days of entry of this Order for personnel currently working for Defendants. For all others, delivery must occur before they assume their responsibilities.

C. From each individual or entity to which a Defendant delivered a copy of this Order, Defendant must obtain, within 30 days, a signed and dated acknowledgment of receipt of this Order.

XIV. COMPLIANCE REPORTING

IT IS FURTHER ORDERED that Defendants make timely submissions to the Commission:

A. One year after entry of this Order, each Defendant must submit a compliance report, sworn under penalty of perjury.

1. Each Defendant must: (a) identify the primary physical, postal, and email address and telephone number, as designated points of contact, which representatives of the Commission may use to communicate with Defendant; (b) identify all of that Defendant's businesses by all of their names, telephone numbers, and physical, postal, email, and Internet addresses; (c) describe the activities of each business, including the goods and services offered, the means of advertising, marketing, and sales, and whether these businesses involve mail, internet or telephone order sales, and the involvement of any other Defendant (which Individual Defendants must describe if they know or should know due to their own involvement); (d) describe in detail whether and how that Defendant is in compliance with each Section of this Order; and (e) provide a copy of each Order Acknowledgment obtained pursuant to this Order, unless previously submitted to the Commission.

2. Additionally, each Individual Defendant must report any change in: (a) name, including aliases or fictitious names or residence address; or (b) title or

role in any business activity, including any business for which such Defendant performs services whether as an employee or otherwise and any entity in which such Defendant has any ownership interest, and identify the name, physical address, and any Internet address of the business or entity.

C. Each Defendant must submit to the Commission notice of the filing of any bankruptcy petition, insolvency proceeding, or similar proceeding by or against such Defendant within 14 days of its filing.

D. Any submission to the Commission required by this Order to be sworn under penalty of perjury must be true and accurate and comply with 28 U.S.C. § 1746, such as by concluding: "I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on: _____" and supplying the date, signatory's full name, title (if applicable), and signature.

E. Unless otherwise directed by a Commission representative in writing, all submissions to the Commission pursuant to this Order must be emailed to DEbrief@ftc.gov or sent by overnight courier (not the U.S. Postal Service) to: Associate Director for Enforcement, Bureau of Consumer Protection, Federal Trade Commission, 600 Pennsylvania Avenue NW, Washington, DC 20580. The subject line must begin: *FTC v. QYK Brands, LLC, et al.*, Matter No. 2023147.

XV. RECORDKEEPING

IT IS FURTHER ORDERED that Defendants must create certain records for 20 years after entry of this Order, and retain each such record for 5 years. Specifically, Corporate Defendant and each Individual Defendant, for any business that such Defendant, individually or collectively with any other Defendants, is a majority owner or controls directly or indirectly, he must create and retain the following records:

A. Accounting records showing the revenues from all goods or services sold;

B. Personnel records showing, for each person providing services, whether as an employee or otherwise, that person's: name; addresses; telephone numbers; job title or position; dates of service; and (if applicable) the reason for termination;

C. Records of all consumer complaints and refund requests whether received directly or indirectly, such as through a third party, and any response;

D. All records necessary to demonstrate full compliance with each provision of this Order, including all submissions to the Commission; and

E. A copy of each unique advertisement or other marketing material making any representation concerning the shipping, refunds, or returns of any

good ordered by mail, via the internet, or by telephone.

XVI. COMPLIANCE MONITORING

IT IS FURTHER ORDERED that, for the purpose of monitoring Defendants' compliance with this Order any failure to transfer any assets as required by this Order:

A. Within 14 days of receipt of a written request from a representative of the Commission, each Defendant must: submit additional compliance reports or other requested information, which must be sworn under penalty of perjury; appear for depositions; and produce documents for inspection and copying. The Commission is also authorized to obtain discovery, without further leave of court, using any of the procedures prescribed by Federal Rules of Civil Procedure 29, 30 (including telephonic depositions), 31, 33, 34, 36, 45, and 69.

B. For matters concerning this Order, the Commission is authorized to communicate directly with each Defendant. Defendant must permit representatives of the Commission to interview any employee or other person affiliated with Defendant who has agreed to such an interview. The person interviewed may have counsel present.

C. The Commission may use all other lawful means, including posing, through its representatives as consumers, suppliers, or other individuals or entities, to Defendants or any individual or entity

affiliated with Defendants, without the necessity of identification or prior notice. Nothing in this Order limits the Commission's lawful use of compulsory process, pursuant to Sections 9 and 20 of the FTC Act, 15 U.S.C. §§ 49, 57b-1.

D. Upon written request from a representative of the Commission, any consumer reporting agency must furnish consumer reports concerning Individual Defendants pursuant to Section 604(1) of the Fair Credit Reporting Act, 15 U.S.C. § 1681b(a)(1).

XVII. RETENTION OF JURISDICTION

IT IS FURTHER ORDERED that this Court retains jurisdiction of this matter for purposes of construction, modification, and enforcement of this Order.

SO ORDERED, this 22 day of April, 2022.

/s/
HON. PHILIP S. GUTIERREZ
UNITED STATES DISTRICT JUDGE

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FEDERAL TRADE COMMISSION,
Plaintiff-Appellee,

v.

QYK BRANDS LLC, DBA Glowyy; DRJSNATURAL LLC; RAKESH TAMMABATTULA, individually and as an officer of QYK Brands LLC, DRJSNATURAL LLC, EASII, Inc., and Theo Pharmaceuticals, Inc; JACQUELINE THAO NGUYEN, individually and as officer of QYK Brands LLC, DRJSNATURAL LLC and Theo Pharmaceuticals, Inc; EASII, INC.; THEO PHARMACEUTICALS, INC.,
Defendants-Appellants.

No. 22-55446

D.C. No. 8:20-cv-01431-PSG-KES
Central District of California
ORDER

Before: W. FLETCHER, RAWLINSON, and COLLINS, Circuit Judges.

The panel has unanimously voted to deny the petition for panel rehearing. Judge Rawlinson and Judge Collins have voted to deny the petition for rehearing en banc, and Judge Fletcher so

recommends. The full court has been advised of the petition for rehearing en banc and no judge has requested a vote on whether to rehear the matter en banc. *See* FED. R. APP. P. 35. Accordingly, Appellants' petition for panel rehearing and rehearing en banc (Dkt. Entry 55) is **DENIED.**