No. 23-1616

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

FEDERAL TRADE COMMISSION,
Plaintiff-Appellee,

v.

AMERICAN SCREENING, LLC,
a Louisiana limited liability company;
RON KILGARLIN, JR.,
individually and as an officer of American Screening, LLC; and
SHAWN KILGARLIN,
individually and as an officer of American Screening, LLC,
Defendants-Appellants.

On Appeal from the United States District Court
for the Eastern District of Missouri – St. Louis
No. 4:20-cv-01021 (Hon. Ronnie L. White)

CORRECTED ANSWERING BRIEF FOR THE FEDERAL TRADE COMMISSION

SAMUEL LEVINE
Director

ANNE COLLESANO
Attorney

BUREAU OF CONSUMER PROTECTION

ANISHA S. DASGUPTA
General Counsel

MARIEL GOETZ
Acting Director of Litigation

MICHAEL D. BERGMAN
Attorney

FEDERAL TRADE COMMISSION
600 Pennsylvania Avenue, N.W.
Washington, DC 20580
(202) 326-3184
mbergman@ftc.gov

SUMMARY OF THE CASE

The Federal Trade Commission sued appellants for failing to honor their shipping promises or make required refunds for personal protective equipment in violation of FTC law and rules during the first year of the COVID-19 pandemic. The district court granted summary judgment for the FTC, found all appellants liable for the misconduct, ordered them to refund $14.6 million to consumers, and enjoined them from future violations. Appellants contest the amount of the refund and the ban on future sales. But consumers were entitled to full refunds based on appellants' violations of FTC rules and appellants provided no contrary evidence. Imposing fencing-in relief against future sales was reasonably based on appellants' "egregious" misconduct during the pandemic. Appellants also contend that the court erred by holding Shawn Kilgarlin individually liable and by refusing to consider their supplemental fact statement. But uncontested evidence showed Shawn's corporate control, and appellants' statement was noncompliant with local rules and irrelevant. This case presents no novel legal issues and the facts are straightforward. Should the Court deem oral argument appropriate, 10 minutes would be sufficient.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

OTHER AUTHORITIES

RULES

INTRODUCTION

When the COVID-19 pandemic hit the United States in March 2020, consumer demand skyrocketed for items like face masks, hand sanitizer, and other forms of personal protective equipment ("PPE"). Appellants Ron and Shawn Kilgarlin and their company American Screening sought to take advantage of that demand and advertised on their website that they had PPE products "in stock" and "available to ship," and that items would ship either "24-48 hours after processing" or within "7-10 business days." They also purported to offer overnight and expedited delivery. Predictably, American Screening was soon flooded with new PPE orders, for which it collected payment up front.

But appellants' representations that items were in stock and would ship quickly were false. Appellants lacked sufficient inventory to satisfy the orders they solicited, and had no reasonable expectation that they would be able to ship products within the advertised timeframes. They nonetheless continued taking orders and collecting payments. When consumers complained that their products had not arrived as promised, appellants rarely cancelled the orders or offered refunds,

citing bogus excuses. Appellants also at times performed "SKU swaps" where they sent products different than the ones ordered.

The FTC sued the Kilgarlins and American Screening for violations of the FTC Act's prohibition on deceptive acts or practices, 15 U.S.C. § 45, and the Mail, Internet, or Telephone Order Merchandise Rule ("MITOR"), 16 C.F.R. Pt. 435, which requires sellers to have a reasonable basis for their shipping claims and to offer refunds where they cannot ship products within the advertised time frames. The district court granted summary judgment for the FTC, finding appellants liable for both claims. To remedy the MITOR violations, the court entered a monetary judgment of $14.6 million, to be paid into a fund administered by the FTC and used to provide refunds to consumers, with any unclaimed funds to be returned to appellants. The district court also entered an injunction permanently barring appellants from further sales of protective goods and services and from further MITOR violations or misrepresentations about shipping times or refunds for any product.

On appeal, appellants argue that the district court abused its discretion in calculating the monetary relief and by permanently

barring appellants from selling protective goods or services. Appellants also argue that the district court erred by holding Shawn Kilgarlin individually liable and by rejecting a proposed "supplemental statement" submitted in opposition to summary judgment.

None of these arguments have merit. The district court has broad discretion under Section 19 of the FTC Act, 15 U.S.C. § 57b, to grant such relief as it found necessary to redress consumer injury, including the refund of money. The court could presume consumer reliance because appellants made widely disseminated material misstatements. Consumers were injured when their orders arrived late and without receiving their MITOR-required refund offers. Appellants claim the $14.6 million figure is too high, but that amount was based on their own business records, and they never provided alternative calculations or evidence showing deductions from that amount. The district court also had broad discretion to fashion injunctive relief to prevent future violations, including the ban on sales of protective goods and services, based on the court's findings that appellants' conduct was "egregious" and that they likely will violate the law again.

The district court properly held Shawn Kilgarlin individually liable, based on undisputed evidence that she had authority to control American Screening's conduct. And the court rightly rejected appellants' supplemental facts as violative of local rules and irrelevant.

This Court should affirm the judgment.

STATEMENT OF JURISDICTION

The district court had subject-matter jurisdiction pursuant to 28 U.S.C. §§ 1331, 1337(a), and 1345. The district court issued its summary judgment decision on July 14, 2022, and its Final Order and Judgment on January 31, 2023. Defendants timely filed a notice of appeal on March 30, 2023 and an amended notice of appeal on March 31, 2023. This Court has jurisdiction pursuant to 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES PRESENTED

1. Did the district court act within the scope of its discretion with respect to the amount of monetary relief for the MITOR violations?

- 15 U.S.C. § 57b
- 16 C.F.R. § 435.2
- *FTC v. Sec. Rare Coin & Bullion Corp.*, 931 F.2d 1312 (8th Cir. 1991)
- *FTC v. Figgie Int'l,* 994 F.2d 595 (9th Cir. 1993)

- *FTC v. Moses*, 913 F.3d 297 (2d Cir. 2019)
- *FTC v. Kuykendall*, 371 F.3d 745 (10th Cir. 2004)

2. Did the district court act within the scope of its discretion in permanently enjoining appellants from future marketing and sales of protective goods and services?

- 15 U.S.C. § 53(b)
- *FTC v. Colgate-Palmolive Co.*, 380 U.S. 374 (1965)
- *United States v. W.T. Grant Co.*, 345 U.S. 629 (1953)

3. Did the district court properly hold appellant Shawn Kilgarlin individually liable for American Screening's violations of MITOR and the FTC Act?

- *FTC v. Bay Area Bus. Council, Inc.*, 423 F.3d 627 (7th Cir. 2005)
- *FTC v. Gem Merch. Corp.*, 87 F.3d 466 (11th Cir. 1996)
- *FTC v. Moses*, 913 F.3d 297 (2d Cir. 2019)

4. Did the district court act within the scope of its discretion in not considering appellants' "Supplemental Statement of Facts"?

- E.D. Mo. L.R. 4.01(E)
- *N.W. Bank & Trust Co. v. First Ill. Nat'l Bank*, 354 F.3d 721 (8th Cir. 2003)
- *Jones v. UPS*, 461 F.3d 982 (8th Cir. 2006)

STATEMENT OF THE CASE

A. Appellants' Deceptive Practices

American Screening markets and sells medical supplies and equipment, mostly through the internet. Ron Kilgarlin is the company's founder, CEO, and president. He is responsible for "overseeing and managing the day-to-day affairs and operations of the company in all aspects," including department managers, website content, policy and procedures, expenditures, and at least some marketing efforts. App. 282, 297; R. Doc. 80, at 2, 17.[1] Shawn Kilgarlin (who is married to Ron) is the Quality and International Organizations of Standardization ("ISO") manager for American Screening. She also held herself out as American Screening's Chief Operating Officer, although when asked about that role at deposition she invoked her Fifth Amendment right against self-incrimination. App. 282, 296; R. Doc. 80, at 2, 16. Regardless of her title, she had significant operational responsibilities for the company, including authority over inventory, customer service,

[1] "App." refers to appellants' Appendix; "FTCApp." refers to the FTC's Appendix; "FTCApp2." refers to the FTC's Appendix Vol. 2; "R. Doc." refers to district court docket entries; "Br." refers to appellants' opening Brief. Page cites (other than to appellants' opening Brief) are to ECF-generated page numbers.

product orders, and web content; she supervised employees and helped her husband run the company. App. 296-297; R. Doc. 80, at 16-17.

This case concerns American Screening's sales of PPE, including items such as hand sanitizer, face masks, disinfecting wipes, gowns, face shields, goggles, shoe covers, and thermometers. Prior to 2020, American Screening sold small amounts of PPE, mainly as ancillary supplies to its other products. FTCApp. 226-227; R. Doc. 55-1, at 2-3 (¶¶ 9, 11-17). When the COVID pandemic hit in early 2020, however, American Screening began an aggressive online marketing campaign to sell PPE. In just March and April of that year, American Screening spent more than $1.5 million on advertising with Google AdWords to boost online PPE sales. FTCApp. 228-229; R. Doc. 55-1, at 4-5 (¶¶ 31, 35). The company also sent mass promotional emails hawking "PRODUCTS TO RESPOND TO COVID-19" and "Essentials for Combating COVID-19," and urging consumers to "BUY NOW." FTCApp. 228-229; R. Doc. 55-1, at 4-5, 15 (¶¶ 37, 38, 41-44, 49, 123).

The marketing campaign drove consumers to American Screening's website, which told consumers that the company had PPE products "in stock" and "available to ship." App. 283; R. Doc. 80, at 3. At

least at the start of the pandemic, the website stated that "[a]l shipping occurs 24-48 hours after processing, pending product availability." *Id.* The company's representatives reiterated this timeframe directly to some customers by email. FTCApp. 235; R. Doc. 55-1, at 11 (¶¶ 76-77).

At some point in or around March 2020 (the precise date is unclear), American Screening updated the website to state prominently at the top of the homepage that "Products may ship 7-10 business days after order has been placed." App. 283; R. Doc. 80, at 3; FTCApp. 236, 239; R. Doc. 55-1, at 12, 15 (¶¶ 87, 124, 126, 127).

But even then, for some period of time that appellants cannot determine, the 24-48 hour promise remained on the website despite the addition of the 7-10 business day claim. *See* FTCApp2. 281; R. Doc. 51, at 12 (webpage in *mid-June 2020* promising shipping "7-10 business days after order is placed" along with the company's online "shipping policy" of "24-48 hours after processing."). The company also offered overnight shipping, for an extra fee. App. 283; R. Doc. 80 at 3; FTCApp. 236-237; R. Doc. 55-1, at 12-13 (¶¶ 88-90). The company collected payments up front, charging customers as soon as they hit "submit" on

their orders, and before confirming that the item was in stock. FTCApp. 233; R. Doc. 55-1, at 9 (¶¶ 62-65).

At a time when consumers were desperate, store shelves were empty, and many retailers had run out of inventory, American Screening's "in stock" and fast-shipping claims were wildly successful in driving consumer purchases. Many customers complained that they had ordered PPE from American Screening primarily because of its shipping representations and purported product availability. FTCApp. 235-237; R. Doc. 55-1, at 11-13 (¶¶ 78-82, 87, 93). But the company's representations were false—it did not have nearly enough PPE "in stock" to satisfy customer demand. In fact, from March through November 2020, American Screening did not even know how much inventory it had in stock. App. 284, 288; R. Doc. 80, at 4, 8. Nonetheless, the company permitted customers to order PPE items advertised as "in stock" that were not available, and many did. FTCApp. 244; R. Doc. 55-1, at 20 (¶¶ 192-195, 202).

The lack of inventory resulted in backorders, with the result that many products did not ship within the 24-48 hours that American Screening originally promised or within 7-10 days as it promised on its

updated website, or even within 30 days. During at least the early part of the pandemic, most PPE products took about six weeks to ship. App. 289; R. Doc 80, at 9. In thousands of cases, American Screening also made "SKU swaps," where it filled orders with different products than what customers had ordered and paid for. FTCApp. 247; R. Doc. 55-1, at 23 (¶¶ 235. 236).

American Screening did not comply with MITOR requirements to inform affected customers that their products would be delayed or obtain their consent to longer shipping times or SKU swaps. Nor did it offer customers the opportunity to cancel their orders and obtain a refund. The company's policy was not to cancel orders without a prior demand from the customer. And in some cases, even when customers requested refunds, the company refused to process them, and instead simply shipped the product. App. 285; R. Doc 80, at 5 (citing testimony of Shawn Kilgarlin's assistant). Many customers pursued chargebacks through their credit card companies. *Id.*

Not surprisingly, thousands of customers complained to the company. App. 285; R. Doc. 80, at 5. American Screening's customer service manager testified that throughout 2020, the company was

receiving 500 complaints *per day* about shipping delays, incorrect shipments, and failure to give refunds. The company did not respond to all of these complaints. App. 285-286; R. Doc. 80, at 5-6.[2]

B. The FTC's Enforcement Suit and Orders on Review

The FTC sued American Screening and the Kilgarlins in August 2020, alleging that their sales conduct violated the FTC Act's prohibition of deceptive acts or practices, 15 U.S.C. § 45(a), and the requirements of MITOR, 16 C.F.R. § 435.2. The complaint sought relief under two provisions of the FTC Act: Section 13(b), which authorizes courts to issue a permanent injunction against violation of any provision of law enforced by the FTC, and Section 19, which authorizes courts to grant such relief as they find necessary to redress consumer injury resulting from the violation of an FTC rule, such as MITOR. 15

[2] As a result of its deceptive business practices, in 2020, the Better Business Bureau revoked American Screening's accreditation. FTCApp. 257; R. Doc. 55-1, at 33 (¶ 349). In addition, the Louisiana Attorney General sent the company a "Notice of Unfair Trade Practices" concerning its questionable inventory and shipping practices, and two months later sued American Screening for violating state consumer protection laws. FTCApp. 256; R. Doc. 55-1, at 32 (¶¶ 342-343).

U.S.C. §§ 53(b), 57b(a)(1), (b). Section 19(b) expressly permits the "refund of money" as a type of authorized relief. 15 U.S.C. § 57b(b).

MITOR prohibits sellers from soliciting online, phone, or mail order sales "unless, at the time of the solicitation, the seller has a reasonable basis to expect that it will be able to ship any ordered merchandise to the buyer … within the time clearly and conspicuously stated in any such solicitation," or "if no time is clearly and conspicuously stated, within thirty (30) days after receipt of a properly completed order from the buyer. 16 C.F.R. § 435.2(a)(1). A seller's "failure … to have records or other documentary proof establishing its use of systems and procedures" to assure shipping within these time frames creates "a rebuttable presumption that the seller lacked a reasonable basis for any expectation of shipment within said applicable time." *Id*. § 435.2(a)(4).

MITOR also establishes procedures that apply when a seller is unable to ship products within these time frames, regardless of whether it had a reasonable basis for the original shipping claims. Within a reasonable time, 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." *Id.* § 435.2(b)(1). If a seller fails to provide this option and has not shipped the merchandise within the promised timeframe, it must "deem [the] order canceled and … make a prompt refund to the buyer[.]" *Id.* § 435.2(c)(5). Again, the seller's "failure … to have records or other documentary proof establishing its use of systems and procedures which assure compliance" with these requirements creates "a rebuttable presumption that the seller failed to comply with said requirement[s]." *Id.* § 435.2(d).

The FTC's complaint alleged that appellants violated all three of MITOR's proscribed practices: (1) they solicited PPE orders without any reasonable expectation that the products would ship within the advertised time frames of 24-48 hours or 7-10 business days; (2) they failed to contact customers for consent to the delayed shipping or to provide an opportunity to cancel orders and receive a refund; and (3) having failed to contact customers, they did not deem the orders cancelled and provide a prompt refund. App. 11-12; R. Doc. 1, at 11-12. The complaint further alleged that appellants' shipping representations and their claims that PPE items were "in stock" and "available to ship"

were false, misleading or unsubstantiated, and thus constituted deceptive acts or practices under Section 5(a) the FTC Act, 15 U.S.C. § 45(a). App. 12-13; R. Doc. 1, at 12-13.

Following discovery, the FTC moved for summary judgment. As required by the district court's local rules, E.D. Mo. R. 4.01(E), the FTC submitted a Statement of Uncontroverted Material Facts, with 578 numbered paragraphs and citations to the record supporting each fact. FTCApp. 1-70; R. Doc. 50. Appellants submitted a "Response to Statement of Material Facts" (App. 220-258; R. Doc. 53), but that document responded to only a quarter of the numbered paragraphs in the FTC's statement. Because appellants did not "specifically controvert" the remaining paragraphs of the FTC's statement, those facts were "deemed admitted for purposes of summary judgment." *See* E.D. Mo. R. 4.01(E).[3]

Appellants also included in their response a "Supplemental Statement of Facts." App. 236-248, R. Doc. 53, at 27-39. The district court declined to consider the "Supplemental Statement" because the

[3] The FTC filed with its reply a statement of the facts that were deemed admitted by appellants' failure to address them. FTCApp. 225; R. Doc. 55-1.

local rule "does not contemplate a separate statement of facts by the opposing party." App. 282 n.2; R. Doc. 80, at 2 n.2. The court stated that even if the Supplemental Statement was intended as a "further response to the FTC's statement," it was "improper" because "(1) It does not note the paragraph number to which it responds, as required by Rule 4.01; and (2) It contains numerous irrelevant facts pertaining to the progression of the COVID-19 pandemic." *Id*.

Based on the undisputed facts, the district court granted summary judgment for the FTC against American Screening on the three MITOR claims and the FTC Act's deceptive acts or practices claim. App. 288-295; R. Doc. 80, at 8-15. It also held that both Kilgarlins were individually liable for American Screening's violations because they had the authority to control the company and knowledge of its wrongful acts. App. 295-297; R. Doc. 80, at 15-17.

Turning to relief, the district court determined that a permanent injunction under Section 13(b) was appropriate, including a permanent bar against advertising or selling "Protective Goods and Services" and

various compliance-monitoring measures.[4] App. 323, 331-335; R. Doc. 89, at 8, 16-20. The court noted the "egregious nature of Defendants' conduct … during a global pandemic" and concluded that even though appellants had altered some of their business practices since being sued by the FTC, there was still a "cognizable danger of recurrent violation." App. 298; R. Doc. 80, at 18. The court also enjoined appellants from further violations of MITOR or misrepresentations about shipping times and refunds with respect to any product ordered by mail, the internet, or by telephone. App. 323-327; R. Doc. 89, at 8-12.

The court also held that monetary relief under Section 19 was necessary to redress consumer injury resulting from the MITOR violations. Relying on this Court's decision in *FTC v. Security Rare Coin & Bullion Co.*, 931 F.2d 1312 (8th Cir. 1991), the court held that the FTC was "not required to prove individual injury and reliance." App. 301; R. Doc. 80, at 21. Because appellants made "materially misleading shipping promises" prior to the consumer's purchase, the court could

[4] "Protective Goods and Services" is defined as: "any good or service designed, intended, or represented to detect, treat, prevent, mitigate, or cure COVID-19 or any other infection or disease, including, but not limited to, Personal Protective Equipment, hand sanitizer, and thermometers." App. 321; R. Doc 89, at 6.

"presume that consumers actually relied upon [those] shipping statements." *Id.* Further, the pre-purchase misrepresentations that "induced the sale of PPE" meant that even customers who received their orders were entitled to refunds. *Id.* The court observed that although "the large number of consumers affected by [appellants'] deceptive trade practices creates a risk of uncertainty regarding the exact amount" of the refunds, appellants should "bear that risk." App. 301-302; R. Doc. 80, at 21-22 (cleaned up).

To determine the refunds due, the district court relied on calculations prepared by an FTC data analyst, which in turn were based on a spreadsheet showing all invoices for PPE or COVID products sold in 2020 and explanatory testimony by the company's controller. App. 128-129; R. Doc. 50-19, at 2-3 (¶¶ 8, 16, 17). For each invoice, the spreadsheet showed the amount paid and any refunds or chargebacks issued; most of the orders also contained shipping information. App. 129-132; R. Doc. 50-19, at 4-7 (¶¶ 24-28, 33-34, 44-48, 52). The FTC's data analyst calculated that the net revenue (total revenue less refunds) on PPE orders in 2020 that took longer than two days to ship (or for which there was no shipping information) was $14,651,185.42. App.

302; R. Doc. 80, at 22. The court agreed that this was the appropriate amount of monetary relief and ordered appellants to pay that sum to the FTC to be used for a consumer redress fund. App. 303; R. Doc. 80, at 23. Because the court recognized some customers may have been satisfied with their orders despite the delay, it did not order an automatic refund to every customer. Rather, the court required the FTC to "implement a plan that requires customers to make refund requests rather than receiving refunds outright." *Id.* Any "unclaimed funds" will be returned to the appellants, less FTC costs administering the redress program. *Id.*

Following further briefing, the district court rejected appellants' objections to specific provisions of the contemplated final order. *See* App. 305-315; R. Doc. 88. The court entered the Final Order and Judgment for Permanent Injunction and Monetary Relief on January 31, 2023. App. 316-335; R. Doc. 89. This appeal followed.

SUMMARY OF THE ARGUMENT

1. The district court's $14.6 million redress order was well within the court's discretion to craft appropriate relief. The court properly applied a long-established presumption, adopted by this Court in *FTC*

v. Security Rare Coin & Bullion Co., 931 F.2d 1312 (8th Cir. 1991), that consumers rely on and thus are harmed by widely disseminated, material misrepresentations. Appellants' advertisements of protective goods "in stock" that would ship within "24-48 hours" or "7-10 business days" were untrue; desperate consumers plainly relied on them in deciding to purchase from appellants; and the claims were widely disseminated through online sources. The district court properly presumed consumer reliance on appellants' false claims.

Appellants failed to rebut the presumption with proof that individual consumers did not rely on such claims. To the contrary, the undisputed evidence showed that many consumers bought from American Screening specifically because it promised quick shipping.

The district court also correctly held that under binding precedent, the FTC was not required to prove individualized injury. Where consumers relied on promises of fast shipping within a specified period, they were necessarily injured when the products did not arrive on time. Appellants' practices were especially harmful given the pandemic, when product availability and shipping time was critical—with many store shelves empty and online suppliers out of stock.

Appellants contend that the court should not have treated so many orders as late, but undisputed evidence supported the court's approach. And the court correctly held that appellants—who kept shoddy records—should bear the risk of any uncertainty on this point.

The court properly ordered appellants to pay an amount sufficient to offer consumers full refunds. Courts long have recognized that using a baseline of full refunds is appropriate in FTC cases, and appellants failed to offer admissible evidence to show any other amount was proper. Furthermore, MITOR specifically requires sellers to offer refunds when they do not ship products on time. On this record, and given the nature of the products at issue, the court was not required to order product returns or deduct an amount for the products' value. Moreover, the district court did not make refunds automatic; it required consumers to apply for refunds, ensuring that only those who are dissatisfied would get money back.

2. The district court acted within its discretion when it enjoined appellants' future sales of protective goods. District courts enjoy broad discretion to fashion effective equitable relief to prevent defendants from engaging in similar illegal practices in the future. Here, the court

found that appellants had engaged in "egregious" misconduct by misrepresenting availability and shipping time of important PPE, exploiting consumer fear during a deadly pandemic. Appellants persisted with the misconduct even after consumer complaints poured in and the FTC gave notice of this lawsuit. The court reasonably concluded that appellants' practices reflected an indifference to the law and required particularly strict fencing in.

Nor is the injunction unduly burdensome. It prohibits conduct that constituted only a fraction of appellants' pre-pandemic business, and does not bar them from selling other products. The court's order was reasonably tailored to prevent similar future misconduct.

3. The district court properly held Shawn Kilgarlin personally liable for American Screening's violations. Undisputed evidence showed that she controlled the company and knew of its violations, which satisfies the test for personal liability. That evidence was bolstered by proper adverse inferences arising from repeated invocations of her Fifth Amendment right against self-incrimination when asked about her role.

4. The district court did not abuse its discretion in refusing to consider appellants' "Supplemental Statement of Facts." The statement

clearly violated local rules and the court was permitted to disregard it. Even so, any error would be harmless because the statement's content was irrelevant to the summary judgment issues. The pandemic did not excuse appellants' responsibility to make truthful claims and notify customers of delays. Appellants knew full well when they made their "in stock" and fast shipping claims that they could not timely fulfill the orders that predictably resulted. Appellants were not innocent victims of unforeseen circumstances but purposefully exploited the pandemic for their own financial gain—at the expense of consumers.

ARGUMENT

I. THE MONETARY AND INJUNCTIVE RELIEF ORDERED BY THE DISTRICT COURT WAS PROPER.

Appellants do not challenge the district court's grant of summary judgment as to either the MITOR or the FTC Act violations committed by American Screening and Ron Kilgarlin. Instead, they challenge two aspects of the relief ordered by the district court: the $14.6 million in consumer refunds, and the portion of the injunction permanently barring them from sales and marketing of protective goods or services. The district court's choice of remedies is reviewed for abuse of discretion. *Triple Five of Minn. v. Simon*, 404 F.3d 1088, 1095 (8th Cir.

2005). The district court did not abuse its discretion either with respect to the award of monetary relief or the permanent ban on sales of protective goods and services.

A. The District Court's Monetary Relief Award Was Proper Under Section 19 of the FTC Act.

Section 19 of the FTC Act provides that where a defendant has violated an FTC consumer protection rule like MITOR, the district court may "grant such relief as the court finds necessary to redress injury to consumers … resulting from the rule violation[,]" including without limitation "the refund of money" but excluding any "exemplary or punitive damages." 15 U.S.C. §§ 57b(a)(1), (b). Appellants focus on the word "necessary" (Br. 10-14), but ignore the words that immediately precede it: "such relief as *the court finds* necessary." (Emphasis added.) This language gives the district court broad discretion to determine what kind of monetary or other relief is necessary to remedy consumer injury, depending on the facts and circumstances in a particular case. The district court did not abuse its discretion in concluding that up to $14.6 million in refunds was necessary to redress consumer injury from appellants' MITOR violations.

1. The District Court Properly Held That The FTC Was Not Required To Prove Individual Reliance Or Injury.

This Court's decision in *Security Rare Coin* squarely bars appellants' argument that the FTC should have been required to show that individual consumers relied on appellants' misrepresentations concerning shipping time. In that case, the defendants sold rare coins to consumers at inflated prices, fraudulently describing the coins as low-risk investments. The district court ordered monetary relief to redress consumer injury. Like appellants here, the *Security Rare Coin* defendants argued that the FTC was required to prove actual reliance on the false and misleading statements by each consumer to be reimbursed. 931 F.2d at 1315-16. The Court rejected this argument, holding that the FTC only had to show that "the misrepresentations or omissions were of a kind usually relied upon by reasonable and prudent persons, that they were widely disseminated, and that the injured consumers actually purchased the defendants' products." *Id.* at 1316. The Court explained that an FTC enforcement action "is not a private fraud action, but a government action brought to deter unfair and deceptive trade practices and obtain restitution on behalf of a large

class of defrauded [consumers]" and that requiring "proof of subjective reliance by each individual consumer" would be "inconsistent with the statutory purpose" and "thwart and frustrate the public purposes of FTC action." *Id.*

Many other courts have reached the same conclusion and have applied the presumption of reliance to a variety of FTC cases involving harm to a large number of consumers. For example, in *FTC v. Figgie Int'l,* 994 F.2d 595 (9th Cir. 1993), the Ninth Circuit relied on *Sec. Rare Coin* and held that the FTC was not required to prove individual consumer reliance in a misrepresentation case where the agency sought relief under Section 19. The court held that "[a] presumption of actual reliance arises once the Commission has proved that the defendant made material misrepresentations, that they were widely disseminated, and that consumers purchased," and that the burden then "shifts to the defendant to prove the absence of reliance." *Id.* at 605-06. Courts have similarly applied a presumption of reliance where defendants' misrepresentations violated a court order and the FTC sought consumer redress as a contempt sanction, as well as in other related contexts. *See FTC v. Blue Hippo Funding*, 762 F.3d 238, 243-46 (2nd Cir. 2014) ("To

require proof of each individual consumer's reliance on a defendant's misrepresentations would be an onerous task with the potential to frustrate the purpose of the FTC's statutory mandate."); *FTC v. Kuykendall*, 371 F.3d 745, 765-66 (10th Cir. 2004) (applying presumption of reliance in contempt case); *McGregor v. Chierico*, 206 F.3d 1378, 1388 (11th Cir. 2000) (same); *CFPB v. Gordon*, 819 F.3d 1179, 1196 (9th Cir. 2016) (applying presumption of reliance in misrepresentation case brought by the CFPB).

Applying these principles here, the district court properly found that the FTC was not required to prove consumer reliance by each individual consumer. Appellant's representations that products were "in stock" and would ship either within 24-48 hours or 7-10 business days are statements "of a kind usually relied upon by reasonable and prudent persons," particularly during a pandemic. *Sec. Rare Coin*, 931 F. 2d at 1316. And the undisputed evidence showed that many consumers did in fact rely on the promises and purchased products from American Screening specifically because it promised quick shipping. *See infra* at 9; FTCApp, 11-13, 21, 79-82, 87; R. Doc. 55-1, at 11-13, 21, 79-82, 87. Appellants do not dispute that the false statements were widely

disseminated through internet search engine ads, their website, direct mail, and mass email promotions. Nor is there any dispute that tens of thousands of consumers purchased the products. App. 128; R. Doc. 50-19, at 4.

Accordingly, the district court properly presumed consumer reliance on appellants' shipping promises. App. 301; R. Doc. 80, at 21. The burden then shifted to appellants to rebut that presumption by identifying individual consumers who did not rely on appellants' misrepresentations. Appellants failed to do that.

Appellants' argument that the FTC was required to prove individualized injury fails for the same reasons. Where consumers were promised prompt shipping within a specified time frame, and they relied on that promise, they were necessarily injured when the products did not arrive on time. This was especially true in the early days of the pandemic, when many Americans were desperately trying to find PPE, only to find that store shelves were empty and the websites they usually ordered from were out of stock. In other words, what consumers wanted and what they were promised (and paid for) was PPE *now*. When appellants shipped PPE *later*, consumers did not get the benefit of their

bargain, and that was an injury. To be sure, some consumers ultimately may have been satisfied with their purchases, notwithstanding the late shipment. The district court addressed that issue by requiring customers to make specific refund requests, rather than receiving refunds outright. App. 303; R. Doc. 80, at 23. In any event, given the presumption of reliance, the court did not err by holding that the FTC did not need to prove individualized injury.

Requiring the FTC to prove individual consumer reliance and injury also would be improper here given the nature of the MITOR violations at issue. The underlying premise of MITOR is that consumers are entitled to (and often do) rely on a seller's representations about shipping times, and that they are entitled to a refund if the seller does not timely ship the product.[5] Here, appellants did not violate MITOR

[5] MITOR is the successor to the FTC's Mail Order Merchandise Rule, 40 Fed. Reg. 51582 (Nov. 5, 1975), issued to "ensure that sellers either shipped mail-ordered merchandise on time or offered cancellations and refunds for merchandise." *See* 79 Fed. Reg. 55615-01, at *55615 (Sept. 14, 2014). In amending the rule in 1993 to cover telephone sales, the Commission found that "shipment time is important to consumers" and that "reasonable consumers expect that merchandise . . . will be shipped in the time expressly represented or, if no time is specified, within 30 days." *Id*. at *55616. MITOR was issued to address complaints about "shipment and refund failures for Internet orders of merchandise" and

simply by making misrepresentations about quick shipping times. They also separately violated MITOR when an order was delayed by failing to contact customers and giving them the option to either consent to the delayed shipping or cancel their orders and receive a refund, 16 C.F.R. § 435.2(b)(1), and they violated the rule again by failing to deem late orders canceled and provide a refund without request when the products did not ship on time, *id.* § 435.2(c)(5). Consumers were injured because they were not given the refunds to which they were entitled under MITOR.

2. The District Court Did Not Abuse Its Discretion By Treating Orders Shipped After Two Days As Late.

Appellants also fail to show that the district court abused its discretion by including in the refund calculation all orders that were shipped more than two days after the order was placed. Appellants' argument is that even though *many* customers were promised shipment within 24-48 hours, not *all* of them were, because the message on the website was updated sometime in March 2020 to promise shipping

---

evidence showing that "deceptive and unfair practices remain prevalent" for such orders. *Id.*

within "7-10 business days." *See* App. 283; R. Doc. 80, at 3. Appellants also contend that new shipping promises were made "specific to each product" showing that the item was either "available to ship" right away or was "expected to ship between" two future dates. Br. 16-18.

The problem with these arguments is that while the 24-48 hour shipping promise may not have been made with respect to all shipments, appellants have not established which of their multiple shipping representations applied to which order. Appellants' representations were often inconsistent and confusing. For example, appellants point to a webpage captured on June 18, 2020. Br. 17; App. 139, FTCApp2. 279-281; R. Doc. 51, at 9-12. The top of the webpage says "[P]roducts may ship 7-10 business days after order has been placed." FTCApp2. 279; R. Doc. 51, at 9. But the "Shipping Policy" says "All shipping occurs 24-48 hours after processing, pending availability," FTCApp2. 281; R. Doc. 51, at 12 —even though appellants contend they stopped making that claim three months earlier. For some products, there are "'expected to ship" dates, *e.g.*, a surgical gown listed as expected to ship between June 1 and July 1. App. 139; R. Doc. 51, at 10. But many other items are claimed to be ready to ship with no expected-

to-ship dates even though the undisputed evidence is that American Screening did not know how much inventory it had in stock at this time. FTCApp. 244; R. Doc. 55-1, at 20 (¶ 188). Furthermore, the 24-48 hour promise was not made only on the website. Company representatives also reiterated the same promise in emails with customers, who in turn referenced the 48 hour shipping guarantee when corresponding with the company. *See* FTCApp. 235-36; R. Doc. 55-1, at 11-12 (¶¶ 76-82).

Once the FTC showed that the 24-48 hour representation was widely disseminated, the district court was entitled to presume reliance on that representation, and the burden shifted to appellants to produce evidence that particular orders were *not* made in reliance on the 24-48 hour representation. *See, e.g.*, *Figgie*, 994 F.2d at 605-06. Appellants failed to rebut the presumption with affidavits or other evidence showing that the 24-48 hour shipping claim did not apply to particular shipments. Absent any objection to the inclusion of particular invoices, or alternative calculations of the proper refund amount, it was not an abuse of discretion for the district court to award the full $14.6 million.

Appellants misplace their reliance on arguments that they lacked data to determine what specific representations were made to specific

customers, which orders were shipped after the promised date, and even when they made their various shipping promises. Br. 18-20. MITOR specifically requires a seller to maintain "records or other documentary proof establishing its use of systems or procedures" to ensure compliance with the rule, and establishes a rebuttable presumption of non-compliance where the seller fails to maintain such records, 16 C.F.R. §§ 435.2(a)(4), (d), which appellants failed to do here.

Along similar lines, as the district court noted (App. 301; R. Doc. 80, at 21), courts have recognized that "[t]o the extent the large number of consumers affected by … defendants' deceptive trade practices creates a risk of uncertainty" about the amount of gross receipts defendants were paid, "the defendants must bear that risk." *Kuykendall*, 371 F.3d at 765. This rule is rooted in "the most elementary conceptions of justice and public policy" which "require that the wrongdoer shall bear the risk of the uncertainty which his own wrong has created." *Bigelow v. RKO Radio Pictures, Inc.*, 327 U.S. 251, 265 (1946). Appellants attempt to distinguish *Bigelow* by arguing that "uncertainty falls on Defendants only where Defendants' misconduct

renders more accurate data unavailable." Br. 19. But that is exactly the situation here.

The undisputed evidence shows that for much of 2020 appellants' recordkeeping was a shambles and they had lost track of company inventory and shipping orders. American Screening had no "direct records" showing "what a customer ordered and what was shipped." FTCApp. 247; R. Doc. 55-1, at 23 (¶ 241). From March to November 2020, the company "did not know how much inventory it had in stock," and "did not know whose orders were back ordered." FTCApp. 244; R. Doc. 55-1, at 20 (¶¶ 188-89). Thus, although appellants complain that the "necessary" amount of redress remains "uncertain," Br. 14, they must bear the risk of that uncertainty, which their own inadequate recordkeeping created.

3. The District Court Was Not Required to Deduct the Value of the Products Shipped from the Refund Amount or to Order the Return of the Shipped Product.

Also unavailing is appellants' argument that the district court abused its discretion by ordering a full refund of the amounts consumers paid for PPE (*i.e.,* total receipts less refunds). *See* Br. 21-23. Appellants first claim that the district court should have deducted the

value of the PPE that customers eventually received, but they presented no evidence that the products had any significant value and made no effort to quantify any such value. *See, e.g.*, FTCApp. 242; R. Doc. 52 at 19.

Yet even if appellants had produced evidence of the late-shipped product's value, a deduction would have been inappropriate given the nature of consumers' injuries resulting from the MITOR violations at issue. Under MITOR, once it became clear that American Screening could not ship products within the advertised time frames, it had an obligation to contact customers and give them the option to either cancel their orders and receive a refund or consent to a later shipping date. 16 C.F.R. § 435.2(b)(1). Having failed to do that, American Screening had an obligation to deem such orders canceled and provide a prompt refund without request when the products did not ship on time. *Id.* § 435.2(c)(5). But instead of cancelling the orders and providing a refund as it was legally required to do, American Screening went ahead and shipped the orders late. Because appellants injured consumers by depriving them of the refunds to which MITOR entitled them, their injury could only be redressed by providing consumers with the full

refunds MITOR provided for. Any deductions from that amount would effectively reward American Screening for its failure to comply with the cancel-and-refund provisions.[6]

Further, full refunds would be an appropriate remedy even if there were no MITOR violations here. When the FTC establishes a presumption of reliance, a court can "use the defendants' gross receipts as a baseline for calculating damages at the first step of the burden-shifting framework." *FTC v. Moses*, 913 F.3d 297, 310-11 (2d Cir. 2019); *see also Kuykendall*, 371 F.3d at 764-65 (same); *FTC v. Commerce Planet*, 815 F.3d 593, 603 (9th Cir. 2016) (using defendants' net revenues—payments less refunds and chargebacks—as the compensatory baseline); *FTC v. Febre*, 128 F.3d 530, 535-36 (7th Cir. 1997) ("consumers' net payments" was the compensatory baseline). The FTC showed—through its data analyst's declaration based on

[6] Awarding full refunds did not result in a "windfall" to consumers, as appellants suggest. Br. 21-22. American Screening chose to send out merchandise after it was legally required to cancel the orders. Under 39 U.S.C. § 3009, any such merchandise "may be treated as a gift by the recipient, who shall have the right to retain, use, or dispose of it in any manner he sees fit without any obligation whatsoever to the sender." *Id.* § 3009(b). Sending the merchandise after the order was deemed cancelled did not obviate American Screening's refund obligations under MITOR.

appellants' business records, App.132-33; R. Doc. 50-19, at 8-9 (¶¶ 53-57)—that appellants' net revenue derived from its 2020 PPE sales was the appropriate compensatory baseline.

The burden then shifted to the appellants to show that the net revenue figure was inaccurate. But they failed to proffer any admissible evidence to rebut or offset the net revenue amount they received from consumers including (as explained above) as to the value of PPE received. Instead, they submitted only unsupported "Revenue, Costs and Refunds" data, *see* App. 258; R. Doc. 53, at 39, which lacked any evidentiary basis, and as part of appellants' supplemental statement was rejected by the district court for violating the local rules. *See* App. 282 n.2; R. Doc.80 at 2 n.2. Absent any admissible, reliable rebuttal evidence, the district court certainly did not abuse its discretion in ordering a refund of the full amounts paid by consumers. *See Gordon*, 819 F.3d at 1194-1196; *Moses*, 913 F.3d at 310-311.[7]

[7] Appellants urge the Court to adopt the reasoning of *FTC v. Noland*, No. CV-20-00047, 2021 U.S. Dist. LEXIS 226238 (D. Ariz. Nov. 23, 2021), which required consideration of the value of late-shipped products where its MITOR violations occurred *after* the consumer made her purchase. *See* Br. 22. *Noland* does not help appellants because, as the scheme's operators, they were in the best position to provide such

Even if appellants had shown some value in the late-shipped PPE, other courts of appeals have rejected the argument that compensatory awards must be reduced by the value of the products obtained. The Tenth Circuit has held that in calculating contempt sanctions for magazine sales that violated an injunction, "the district court need not offset the value of any product the defrauded consumers received." *Kuykendall*, 371 F.3d at 766. The Eleventh Circuit likewise affirmed a compensatory contempt award for fraudulent print toner sales in the amount of gross revenue without deducting the value of the toner. *McGregor*, 206 F.3d at 1388-89. Whether any amounts should be deducted from the total sales figure depends on the circumstances of the case and defendants' factual showing, and district courts have broad discretion in ordering such relief. *See Sec. Rare Coin*, 931 F.2d at 1316.

Appellants unpersuasively attempt to distinguish other FTC cases where courts have awarded monetary relief equal to full refunds. Br.

---

product values, but failed to do so. Further, the *Noland* court later distinguished that case from one which – just like here – involved "pre-purchase misrepresentations about whether the products were in stock and would be shipped quickly" which induced sales and thus allowed full refunds as an appropriate remedy. *FTC v. Noland*, No. CV-20-00047, 2023 WL 3372517, at *54 (D. Ariz. May 11, 2023) (cleaned up).

26-28. In the pandemic context of appellants' PPE sales, shipping time was critical to purchasing consumers. FTCApp. 235-237, 245; R. Doc. 55-1, at 11-13, 21 (¶¶ 78-82, 87, 93, 217). Appellants' misrepresentations thus tainted the transaction just as much as a misrepresentation about the product's "qualities" (Br. 26-28); *i.e.*, the product's effectiveness or nature. *See Figgie*, 994 F.2d at 606; *Kuykendall*, 371 F.3d at 766; *McGregor*, 206 F.3d at 1388-89.

Finally, appellants' bare assertion that the district court should have ordered the return of PPE before a consumer could receive a refund, Br. 9, 21, 28, fails both because it was waived and it lacks merit. Appellants waived this contention by failing to raise and explain it in the district court. *See N. Bottling Co. v. Pepsico, Inc.*, 5 F.4th 917, 922 (8th Cir. 2021). The district court thus had no reason to opine on it. Appellants also waived the contention on appeal because it was conclusory, raised in passing, and lacked an explanation. *See*, *e.g.*, *CFPB v. Gordon*, 819 F.3d 1179, 1194 (9th Cir. 2016).

Even if the argument is considered, appellants provide no reason why returns are necessary before a consumer can obtain a refund. District courts have the discretion to order return of property as a

condition for obtaining a refund under Section 19. *See, e.g. Figgie*, 994 F.2d at 606. But *Figgie* does not hold that returns are required in all cases, and it involved very different facts from this case. The devices at issue in *Figgie* were relatively costly home heat detectors that sold for $170 apiece (about $457-$635 in 2023 dollars, depending on year of sale) and retained meaningful value notwithstanding the *Figgie* defendants' misrepresentations about effectiveness during the sales process. 994 F.2d at 601, 606. In contrast, most of the PPE products American Screening sold were low-priced consumable items such as disposable wipes, masks, or bottles of hand sanitizer that American Screening had promised to ship expeditiously. In these circumstances, the district court did not have to require product returns as a condition for receiving refunds.

B. The District Court Properly Enjoined Appellants From Future Sales of Protective Goods and Services.

Appellants fail to show that the district court overstepped its authority under Section 13(b) of the FTC Act by permanently barring them from sales and marketing of protective goods and services. *See* Br. 28-33. It is well-settled that "those caught violating the [FTC] Act …

must expect some fencing in." *FTC v. Colgate-Palmolive Co.*, 380 U.S. 374, 394-395 (1965) (citation omitted).

Injunctions must be framed "broadly enough" so they prohibit not just the conduct giving rise to the violations in the case but also that necessary "to prevent respondents from engaging in similarly illegal practices" in the future. *Id.* Even where the violation has ceased, an injunction is appropriate where "there exists some cognizable danger of recurrent violation." *United States v. W.T. Grant Co.*, 345 U.S. 629, 633 (1953). Moreover, district courts enjoy "substantial flexibility" in fashioning effective equitable relief. *Brown v. Plata*, 563 U.S. 493, 538 (2011) (cleaned up). "In shaping equity decrees, the trial court is vested with broad discretionary power" such that "appellate review is correspondingly narrow." *Americans United for Separation of Church & State v. Prison Fellowship Ministries, Inc.*, 509 F.3d 406, 426 (8th Cir. 2007) (citing *Lemon v. Kurtzman*, 411 U.S. 192, 200 (1973)).

Here, the district court determined that appellants engaged in "egregious" misconduct by making "misrepresentations regarding shipping and availability of PPE during a global pandemic." App. 298; R. Doc. 80, at 18. Appellants took advantage of consumers' panic during

the early days of the pandemic to vigorously advertise PPE products as "in stock" and "available to ship" when in fact the products were backordered for months. For months, appellants had no idea what was in their inventory and had no basis to make these claims, but they continued to collect payments upfront for orders that were not shipped for weeks or even months. Appellants then failed to satisfy their obligations to contact consumers about the shipping delays and offer refunds, and in many cases they further deceived customers through SKU swaps, sending consumers products different than what had been ordered. FTCApp. 247; R. Doc. 55-1, at 23 (¶¶ 235, 236). These violations were systemic and continued for months after notice of the FTC's lawsuit. FTCApp. 274; R. Doc. 55-1, at 50 (¶¶ 577-78).

Appellants miss the mark in arguing that their conduct is less egregious than other cases in which district courts have imposed permanent bans. Br. 30-31. The district court could reasonably conclude that preying on vulnerable consumers in the midst of a deadly pandemic demonstrated a general disregard for legal guardrails and called for especially rigorous fencing-in. That is especially so where, as the district court recognized, the PPE products being sold were needed

"to maintain [consumers'] own lives and livelihood," App. 293; R. Doc. 80, at 13, and where appellants persisted with their misconduct despite receiving over 500 consumer complaints *per day* in 2020. App. 285-286; R. Doc. 80, at 5-6.

For the same reasons, appellants are not aided by their argument that other provisions of the injunction, such as the prohibition on MITOR violations for the sales of any product, are sufficient to deter future violations. Br. 29-30. As noted, the district court found that appellants' practices—inducing upfront PPE sales with bald misleading claims of quick shipping, regardless of product availability—were sufficiently egregious to warrant banning future sales of protective goods and services. The court could reasonably conclude that simply prohibiting appellants from future MITOR violations – which were already unlawful – was insufficient to deter future violations. "A district court has a wide range of discretion in framing an injunction in terms it deems reasonable to prevent wrongful conduct." *Soltex Polymer Corp. v. Fortex Indus., Inc.*, 832 F.2d 1325, 1329 (2d Cir. 1987) (cleaned up). !

Finally, appellants fail to show that the sales ban is unduly burdensome for their business. The ban is limited to "Protective Goods

and Services," "including, but not limited to, [PPE], hand sanitizer, and thermometers." App. 321; R. Doc 89, at 6. Before the pandemic such sales were only a small part of American Screening's business. As appellants concede, the injunction does not prohibit them from selling their other products. Br. 32**.** The district court considered the level of burden but concluded that the injunction would not put appellants "out of business." App. 298; R. Doc. 80 at 18.[8] The district court's injunction was reasonably tailored to prevent future misconduct very closely related to the unlawful practices appellants engaged in, and this Court should not second guess that judgment.

II. THE DISTRICT COURT PROPERLY HELD SHAWN KILGARLIN PERSONALLY LIABLE.

Appellants do not dispute the district court's determination that Ron Kilgarlin was personally liable for American Screening's violations, but do challenge the finding of personal liability as to Shawn Kilgarlin. Br. 33-40. This issue is subject to *de novo* review because it goes to the

[8] American Screening notes that it has filed for bankruptcy, but does not assert the bankruptcy was caused by the injunction against selling protective goods or services. Br. 13 n.3. Also, the company's bankruptcy petition seeks its reorganization under Chapter 11 so presumably it intends to remain a viable business.

district court's liability determination on summary judgment. *See e.g. Kaliannan v. Hoong Liang*, 2 F.4th 727, 736 (8th Cir. 2021). A party opposing summary judgment "may not rely on allegations or denials," but rather "must substantiate [her] allegations with sufficient probative evidence that would permit a finding in [her] favor on more than mere speculation or conjecture." *Carter v. Pulaski Cnty. Special Sch. Dist.*, 956 F.3d 1055, 1059 (8th Cir. 2020) (cleaned up). The district court properly found no genuine dispute of fact that Ms. Kilgarlin had sufficient control over American Screening and knowledge of its violations to render her personally liable.

Individuals are liable for injunctive and monetary relief for corporate violations of the FTC Act if they (1) participated directly in the practices or acts or had authority to control them and (2) had some knowledge of the wrongful practices. *E.g.*, *FTC v. Bay Area Bus. Council, Inc.*, 423 F.3d 627, 636 (7th Cir. 2005); *FTC v. Gem Merch. Corp.*, 87 F.3d 466, 470 (11th Cir. 1996). As to knowledge, Ms. Kilgarlin does not challenge the district court's determination that "no reasonable jury could conclude [she] was unaware of the wrongful practices." App.

297; R. Doc. 80, at 17.[9] She challenges only the district court's determination that she had authority to control those practices.[10] The district court properly concluded that she did have such authority.

Authority to control can be evidenced by active involvement in business affairs and the making of corporate policy, including assuming the duties of a corporate officer. *E.g.*, *Moses*, 913 F.3d at 307. Here, the undisputed evidence showed that Ms. Kilgarlin had authority to control American Screening's wrongful practices, both by virtue of her job title and her actual duties. She served as Quality and ISO Manager, and also held herself out in 2020 as the company's Chief Operating Officer. App. 296; R. Doc. 80, at 16. Specifically, her email signature identified her as COO, her job description on American Screening's employee list

[9] Ms. Kilgarlin admitted that American Screening violated MITOR, and was well aware of American Screening's PPE inventory problems, thousands of backorders, chargebacks, and the "overwhelming" number of consumer complaints regarding delayed and missing shipments. FTCApp. 261-262, 266-267, 270-271; R. Doc. 55-1, at 37-38, 42-43, 46-47 (¶¶ 401, 407-14, 467-79, 496, 503).

[10] Undisputed evidence also establishes that Ms. Kilgarlin directly participated in the wrongful acts, but the district court's liability determination was based on authority to control rather than direct participation.

identified her as COO, and Ron Kilgarlin referred to her as COO. FTCApp. 262; R. Doc. 55-1, at 38 (¶¶ 424-26).

Ms. Kilgarlin's argument that she was never an owner of American Screening, Br. 35, is irrelevant because the applicable individual liability test turns not on ownership but on whether she had authority to control the wrongful practices. She also tries to cast doubt on whether she really served as COO, Br. 36, but the undisputed evidence shows that she held herself out as the COO. App. 296; R. Doc. 80, at 16. She is not now in a position to deny that she held that position, having chosen to remain silent when asked about the COO title at deposition. In any event, whether or not Ms. Kilgarlin formally held the title of COO, the undisputed evidence of her job functions clearly demonstrates her authority to control.

Undisputed evidence also showed that Ms. Kilgarlin had a significant operational role in American Screening, which included helping Ron Kilgarlin run the company, meeting with the company's controller to discuss "operational issues" like "inventory numbers" and "process review," and "ensuring that processes are being performed by people in their respective areas." FTCApp. 262-263; R. Doc. 55-1, at 38-

39 (¶¶ 430-432). Ms. Kilgarlin directed changes to the company's website, had authority to approve cancellations, refunds, and purchases for inventory, supervised the group of employees that was attempting to find new suppliers during the COVID-19 pandemic, and helped oversee "personnel in customer service and quality control" and "responses to consumer complaints and quality control." FTCApp. 263-264; R. Doc. 55-1, at 39-40 (¶¶ 433-443, 448). She was also directly involved in American Screening's MITOR violations, including by directing employees to take product orders, to stop cancelling orders, to refuse refund requests, and to respond to BBB complaints. FTCApp. 264-265; R. Doc. 55-1, at 40-41 (¶¶ 453, 455-463).

Thus, extensive undisputed record evidence clearly establishes that she was "actively involved with business matters and corporate policy," and had (at the very least) an important managerial role at American Screening, which demonstrates her authority to control the wrongful practices. *See* App. 296-297; R. Doc. 80, at 16-17. Her control and involvement in corporate operations equals or exceeds that found in other FTC cases which have imposed individual liability. *See, e.g.*, *FTC v. Elegant Solutions, Inc.*, No. 20-55766, 2022 WL 2072735, at *2 (9th

Cir. June 9, 2022) (affirming personal liability for corporate officer who held herself out as the director of operations, made decisions about payments to lenders, worked closely with the company owner, and was aware of customer complaints including passing one to the owner).

Further, as the district court properly held, the conclusion that Ms. Kilgarlin had the authority to control the company is bolstered by adverse inferences which may be drawn from her repeated Fifth Amendment invocations. *See* App. 296; R. Doc. 80, at 16. For example, Ms. Kilgarlin invoked her Fifth Amendment right against self-incrimination when asked about her COO title and when she held that position, FTCApp. 262, R. Doc. 55-1, at 38 (¶ 427). She did so again when asked about her specific tasks at the company. FTCApp. 263-264, 266-271; R. Doc. 55-1 at 39-40, 42-47 (¶¶ 442-444, 464, 467, 475-479, 481-494, 497, 499-502, 504).

It is well established that "the Fifth Amendment does not forbid adverse inferences against parties to civil actions when they refuse to testify in response to probative evidence offered against them." *Baxter v. Palmigiano*, 425 U.S. 308, 318 (1976). To be sure, "such adverse inference can only be drawn when independent evidence exists of the

fact to which the party refuses to answer." *Doe v. Glanzer*, 232 F.3d 1258, 1264 (9th Cir. 2000); *see also SEC v. Colello*, 139 F.3d 674, 678 (9th Cir.1998) (ruling was proper where it was based on evidence presented by SEC combined with adverse inference drawn from the defendant's silence). Here, as the district court held, the FTC presented such evidence, and an adverse inference could properly be drawn. *See* App. 296; R. Doc. 80, at 16.

Ms. Kilgarlin is wrong in claiming that adverse inferences are improper at the summary judgment stage. Br. 38. Courts recognize that "the claim of [Fifth Amendment] privilege will not prevent an adverse finding or *even summary judgment* if the litigant does not present sufficient evidence to satisfy the usual evidentiary burdens in the litigation." *Louis Vuitton Malletier S.A. v. LY USA, Inc.*, 676 F.3d 83, 98 (2d Cir. 2012) (emphasis added). *In re Caucus Distributors, Inc.*, 83 B.R. 921 (Bankr. E.D. Va. 1988), Br. 38, is not to the contrary. The court there observed that a court "may not draw [adverse] inferences to fill in the gaps of the movant's case." *Id.* at 926. Here, the district court noted that the FTC had presented undisputed evidence to show Ms. Kilgarlin's control. The adverse inferences merely corroborated what

the evidence already showed. But in any case, even if the use of an adverse inference was improper, the error was harmless because the undisputed facts clearly show control even without such inferences.

III. THE DISTRICT COURT PROPERLY DECLINED TO CONSIDER APPELLANTS' SUPPLEMENTAL STATEMENT OF FACTS IN ACCORDANCE WITH LOCAL RULES.

The district court's refusal to consider appellants' "Supplemental Statement of Facts" (App. 246-258; R. Doc. No. 53, at 27-39) was based on its application of its local rules and is reviewed for abuse of discretion. *See* App. 282 n.2; R. Doc. 80, at 2 n.2; *N.W. Bank & Trust Co. v. First Ill. Nat'l Bank*, 354 F.3d 721, 725 (8th Cir. 2003). The court did not abuse its discretion in declining to consider this material, but even if it had the error would be harmless because, as the court noted, the material was irrelevant.

The district court's Local Rule 4.01(E), which is similar to local rules in many other district courts, controls the way parties must establish or dispute the facts relevant to a summary judgment motion. The rule requires the moving party to submit a "Statement of Uncontroverted Material Facts" which must "set forth each relevant fact in a separately numbered paragraph stating how each fact is

established by the record, with appropriate supporting citation(s)." E.D. Mo. L.R. 4.01(E). The opposing party must then submit a "Response to Statement of Material Facts," which must "set forth each relevant fact as to which the party contends a genuine issue exists," with "specific citation(s) to the record, where available, upon which the opposing party relies." *Id.* The Response must also "note for all disputed facts the paragraph number from the moving party's Statement of Uncontroverted Material Facts." *Id.* The rule provides that "All matters set forth in the moving party's Statement of Uncontroverted Material Facts shall be deemed admitted for purposes of summary judgment unless specifically controverted by the opposing party." *Id.*

As this Court has explained, the obvious purpose of such rules is to "distill to a manageable volume the matters that must be reviewed by a court undertaking to decide whether a genuine issue of fact exists for trial." *Jones v. UPS*, 461 F.3d 982, 990 (8th Cir. 2006) (district court did not abuse its discretion by disregarding non-movant's factual statement which failed to comply with local rules). "With both the movant's list of uncontroverted facts and the non-movant's list of controverted facts and accompanying cross-references, including specific citations to the

record, the court can focus its review on materials that may demonstrate a disputed issue for trial." *Id.*; *see also N.W. Bank*, 354 F.3d at 725 (similar local rule for another court in this Circuit "exists to prevent a district court from engaging in the proverbial search for a needle in the haystack."); *Febre*, 128 F.3d at 535–36) (no abuse of discretion in awarding monetary relief under similar local Illinois court rules based on the FTC's record-supported statement of facts where defendants failed to properly dispute the facts).

In this case, appellants appended a "Supplemental Statement of Facts" to the responsive statement required by the rule. The district court declined to consider the "Supplemental Statement" because the local rule "does not contemplate a separate statement of facts by the opposing party." App. 282 n.2; R. Doc. 80, at 2 n.2. And even if the Supplemental Statement was intended as a "further response to the FTC's statement," the district court found it "improper" because "(1) It does not note the paragraph number to which it responds, as required by Rule 4.01; and (2) It contains numerous irrelevant facts pertaining to the progression of the COVID-19 pandemic." *Id.*

The district court did not abuse its discretion in making these determinations. It simply applied the terms of the local rule. The court's conclusion that the rule does not contemplate a separate statement of facts by the opposing party is correct and consistent with other decisions from within the same district. *See Thompson v. Normandy Sch. Collaborative,* No. 4:19-CV-03220-MTS, 2021 WL 3286810, at *1 (E.D. Mo. Aug. 2, 2021) (declining to consider supplemental statement submitted by party opposing summary judgment). That the supplemental statement did not note the paragraph numbers of the FTC statement to which it responded provides a further justification for the court's decision. "[I]t is the parties who know the case better than the judge," *N.W. Bank*, 354 F.3d at 725, and the court should not have to guess what part of the moving party's statement a particular fact is intended to respond to.

In any event, as the district court found, the "facts" set forth in the Supplemental Statement were irrelevant to the issues presented by the summary judgment motion. Appellants argue that these facts related to the "unprecedented and overwhelming challenges" they faced in operating their businesses during the early days of the pandemic. Br.

41. But appellants do not cite any legal authority as to why these circumstances would excuse their misrepresentations and failures to comply with MITOR. As the district court recognized, neither MITOR nor the FTC Act contains an exigent circumstances exception. *See* App. 292-293; R. Doc. 80, at 12-13 ("[T]he law provides no exceptions for sellers who do their 'best' during pandemics, particularly when customers paid upfront for PPE they need to maintain their own lives and livelihoods.").[11] The pandemic did not excuse appellants' responsibility to give their customers reasonable notice about shipping delays. American Screening exploited the pandemic for its own financial gain—at great cost to consumers. Appellants now must face the consequences of that decision.

[11] Other courts likewise have recognized that pandemic conditions did not excuse sellers' unreasonable shipping time claims made in violation of MITOR and the FTC Act. *See FTC v. QYK Brands, LLC*, No. SACV 20-1431 PSG (KESx), 2022 WL 1090257 (C.D. Cal. Apr. 6, 2022); *FTC v. Romero*, No. 5:21-CV-343-BJD-PRL, 2023 WL 2445339 (M.D. Fla. Feb. 27, 2023); *FTC v. Zaappaaz, LLC.,* No. 4:20-CV-2717, 2023 WL 5020618 (S.D. Tex. June 9, 2023), *report and recommendation adopted sub nom. FTC v. Zaappaaz, LLC*, No. 4:20-CV-02717, 2023 WL 5018433 (S.D. Tex. Aug. 3, 2023).

CONCLUSION

For the foregoing reasons, the district court's decision should be affirmed.

Respectfully submitted,

SAMUEL LEVINE
Director

ANNE COLLESANO
Attorney

BUREAU OF CONSUMER PROTECTION

ANISHA S. DASGUPTA
General Counsel

MARIEL GOETZ
Acting Director of Litigation

/s/ *Michael D. Bergman*
MICHAEL D. BERGMAN
Attorney
FEDERAL TRADE COMMISSION
600 Pennsylvania Avenue, N.W.
Washington, DC 20580
(202) 326-3184
mbergman@ftc.gov

September 6, 2023

CERTIFICATE OF COMPLIANCE

I certify that the foregoing "Corrected Answering Brief for the Federal Trade Commission" complies with the volume limitations of Fed. R. App. P. 32(a)(7)(B) because it contains 11,015 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii). I certify further that it complies with the typeface and type style requirements of Fed. R. App. P. 32(a)(5)-(6) because it was prepared using Microsoft Word 2010 in 14 point Century Schoolbook.

September 6, 2023

/s/ *Michael D. Bergman*

MICHAEL D. BERGMAN
Attorney
FEDERAL TRADE COMMISSION
600 PENNSYLVANIA AVENUE, N.W.
WASHINGTON, D.C. 20580

CERTIFICATES OF SERVICE AND ELECTRONIC VIRUS SCAN

I certify that the foregoing "Corrected Answering Brief for the Federal Trade Commission" has been filed using the Court's CM/ECF system, and that all parties have consented to electronic service via that system, and will thus be served via the Court's CM/ECF system.

In addition, pursuant to 8th Cir. Rule 28A(h)(2), the electronic version of this brief is in PDF format and has been scanned for computer viruses and found to be virus-free.

September 6, 2023

/s/ *Michael D. Bergman*

MICHAEL D. BERGMAN
Attorney
FEDERAL TRADE COMMISSION
600 PENNSYLVANIA AVENUE, N.W.
WASHINGTON, D.C. 20580