No. 24-20234

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

FEDERAL TRADE COMMISSION,
Plaintiff-Appellee,

v.

ZAAPPAAZ, L.L.C., agent of WBpromotion.com, agent of WB Promotions, Inc., doing business as Wrist-Band.com, doing business as Customlanyard.net; Azim Makanojiya,
Defendants-Appellants.

On Appeal from the United States District Court
for the Southern District of Texas
No. 4:20-cv-02717 (Hon. Keith P. Ellison)

BRIEF OF THE FEDERAL TRADE COMMISSION

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STATEMENT REGARDING ORAL ARGUMENT

The Federal Trade Commission believes oral argument would assist the Court in resolving the issues raised by this appeal.

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INTRODUCTION

The FTC's Merchandise Rule (also known as "MITOR") generally requires merchants who solicit orders over the Internet to ship merchandise within the time frame they advertise. Sellers that cannot timely ship merchandise must contact the buyer and offer the option to either (1) consent to delayed shipping or (2) cancel the order and receive a prompt refund. Sellers that do not make this offer and fail to timely ship must deem the order canceled and provide a prompt refund.

Appellants Zaappaaz, L.L.C., and Azim Makanojiya (collectively, "Zaappaaz") flagrantly violated these requirements, cheating consumers out of as much as $37.5 million during a national emergency. In the early days of the COVID-19 pandemic, many Americans were desperate to obtain personal protective equipment ("PPE") like face masks, gloves, and hand sanitizer. Zaappaaz sought to capitalize on that demand by selling PPE on its websites with claims like "GUARANTEED TO SHIP TODAY" and "IN STOCK—SHIPS SAME DAY." Consumers bought PPE in reliance on these representations, often paying extra for rush shipping. But Zaappaaz knew that it could not meet its shipping promises due to logistical and supply chain problems. Almost 60% of

PPE orders were shipped late. Many orders arrived weeks after the promised delivery date, by which time some buyers had already purchased PPE elsewhere. Others were never delivered at all. Zaappaaz never offered customers the refund-or-consent option required by the Merchandise Rule. Nor did Zaappaaz cancel orders and provide refunds when orders did not ship on time—in fact it routinely refused customer requests for cancellation and refunds.

The FTC sued Zaappaaz for violations of the Merchandise Rule and the FTC Act's prohibition against deceptive acts or practices. The district court found Zaappaaz liable on both counts, entered an injunction, and ordered Zaappaaz to pay approximately $37.5 million to redress consumer injury under Section 19 of the FTC Act. Approximately $12.2 million of that sum will be refunded to the consumers whose orders were never delivered. The rest will be paid to consumers who received late-shipped products and who affirmatively request refunds. Any unclaimed funds will be returned to Zaappaaz.

On appeal, Zaappaaz challenges only the award of monetary relief. Zaappaaz's main argument is based on the incorrect premise that Section 19 requires the FTC to show that consumers relied on

Zaappaaz's shipping promises. In fact, Section 19 requires the FTC to establish "injury to consumers … resulting from *the rule violation*." 15 U.S.C. § 57b(b) (emphasis added). Here, the Merchandise Rule required Zaappaaz to offer refunds to customers and Zaappaaz's failure to do so caused customers injury regardless of whether they relied on Zaappaaz's misrepresentations. In any event, undisputed evidence shows that customers *did* rely on Zaappaaz's false promises about shipping times, and the district court properly held that proof that a statement was widely disseminated and materially misleading establishes a rebuttable presumption of reliance. Seven other circuits have adopted this presumption, and this Court should as well.

Zaappaaz's other arguments also lack merit. The district court had discretion to order full refunds, which are expressly authorized by Section 19, to customers who request them. This remedy restores the parties as nearly as possible to the positions they would have occupied if Zaappaaz had complied with the Merchandise Rule. And because Zaappaaz did not dispute on summary judgment that it received $12.2 million for undelivered PPE orders, the court properly deemed that fact established for trial. The judgment should be affirmed.

JURISDICTIONAL STATEMENT

The district court had jurisdiction over the FTC's claims under 28 U.S.C. §§ 1331, 1337(a), and 1345. The district court entered final judgment on March 29, 2024. Zaappaaz timely appealed on May 24, 2024. This Court has jurisdiction under 28 U.S.C. § 1291.

ISSUES PRESENTED

1. Did the district court correctly conclude that Zaappaaz's Merchandise Rule violations caused injury to consumers?

2. Did the district court properly exercise its discretion in determining that consumers who received late-shipped products should have the option to obtain a full refund?

3. Did the district court properly exercise its discretion to deem it established for trial that Zaappaaz's net revenue from undelivered merchandise was $12,241,035.69, where the FTC submitted evidence on summary judgment supporting that figure and Zaappaaz did not challenge it?

STATEMENT OF THE CASE

A. The FTC Act and the Merchandise Rule

The FTC Act prohibits "unfair or deceptive acts or practices in or affecting commerce." 15 U.S.C. § 45(a)(1). It also authorizes the Commission to prescribe rules specifically defining unfair or deceptive acts or practices. *Id.* § 57a(a)(1)(B). The Commission originally issued the Merchandise Rule in 1975 to cover mail-order solicitations, amended it in 1993 to cover telephone solicitations, and revised it in 2014 to cover solicitations made over the Internet. *See* Mail, Internet, or Telephone Order Merchandise Rule ("MITOR"), 16 C.F.R. Pt. 435.

Three of the Rule's prohibitions are at issue here. First, the Rule bars sellers from soliciting orders for the sale of merchandise through the mail, via the Internet, or by telephone unless "at the time of the solicitation, the seller has a reasonable basis to expect that it will be able to ship any ordered merchandise to the buyer … [w]ithin that time clearly and conspicuously stated in any such solicitation." 16 C.F.R. § 435.2(a)(1)(i). In other words, merchants must have a reasonable basis for the claims they make about when a product will ship.

Second, the Rule provides that where a seller is unable to timely ship merchandise, it 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). The offer must be made within a reasonable time after the seller becomes aware of its inability to ship on time and in no event later than the advertised shipping date. *Id.*

Third, the Rule provides that if a seller fails to offer the refund-or-consent option and the merchandise is not timely shipped, the seller must "deem [the] order cancelled and … make a prompt refund to the buyer." *Id.* § 435.2(c)(5).

Additionally, the Rule requires a seller to maintain "records or other documentary proof establishing its use of systems and procedures which assure" compliance with these requirements. *Id.* § 435.2(a)(4). Failure to do so creates a rebuttable presumption of noncompliance in any FTC enforcement action. *Id.*

B. Zaappaaz's Merchandise Rule and FTC Act Violations

Prior to March 2020, Zaappaaz sold customized merchandise such as wristbands, lanyards, and keychains through various websites. ROA.6715. It utilized a drop-shipping model, whereby Zaappaaz did not actually maintain products in inventory. Instead, Zaappaaz took orders

and collected payment from customers, but orders were filled and shipped by a third party, most commonly a China-based vendor. ROA.6715-16.

After the COVID-19 pandemic hit the United States in March 2020, Zaappaaz transitioned to selling PPE, initially utilizing the same drop-shipping model. ROA.6716. Zaappaaz advertised its PPE as in-stock and provided rush and same-day shipment options. ROA.6718. For example, Zaappaaz's website contained the following claims: "GUARANTEED TO SHIP TODAY," "IN STOCK – SHIPS SAME DAY," and "ALL PRODUCTS IN STOCK READY TO SHIP." *Id.* Zaappaaz also sent mass promotional emails claiming that "ALL OF THESE PRODUCTS ARE FULLY IN STOCK, READY TO SHIP SAME DAY AND DELIVER IN 24 HOURS." *Id.* And it represented that consumers who were dissatisfied could receive a refund. *Id.*

By April 2020, Zaappaaz did not have a reasonable basis to expect that it could ship products within the time frames it was promising. ROA.6239, 6252-55, 6716. As a result of new legal restrictions in China and new FedEx shipping policies, the company changed its drop-shipping model and began shipping inventory to a warehouse in Texas,

but it still struggled to fill PPE orders in a timely manner. ROA.6716-17. From March to December 2020, over 50,000 PPE orders—59.5% of the total—were shipped late. ROA.6718. Sometimes Zaappaaz shipped different products than what customers had ordered. ROA.6719. And many orders were never delivered at all; Zaappaaz's records show no delivery or shipment information for 4.6% of its PPE orders. ROA.6721. Zaappaaz did not contact customers to offer the refund-or-consent option required by the Merchandise Rule. ROA.6718 When dissatisfied customers contacted the company seeking to cancel their orders and get a refund, Zaappaaz typically denied those requests. *Id.*

Many consumers were harmed by Zaappaaz's failure to meet its shipping promises and refusal to cancel orders and provide refunds. For example, Amy Russell, who works at St. Louis University, was tasked with buying face shields and gowns for university police officers. ROA.2446. Because it was "crucial that we get PPE quickly to protect our officers," and there were "no local sources with available PPE," Ms. Russell searched the Internet and came across a Zaappaaz website advertising that products were in stock and would ship within 24 hours. *Id.* She confirmed these details via chat with a company representative.

Id. "Based on these representations and the fact that PPE would be shipped within 24 hours," Ms. Russell purchased 500 face shields and 250 gowns for $6103.13, including $360.63 for one-day shipping, with delivery guaranteed by April 3, 2020. *Id.* When the product did not arrive on time, she repeatedly complained and asked Zaappaaz to cancel the order and issue a refund. ROA.2447-48. After Ms. Russell complained to the Missouri Attorney General, Zaappaaz promised to refund the expedited shipping charges but never did. ROA.2448.

Carol and Larry Faber sought to order PPE for their daughter, an immunocompromised nurse, and her hospital co-workers. ROA.2567, 2572. They ordered from Zaappaaz "because it had PPE in stock, offered same day shipping, and guaranteed delivery dates." ROA.2567. Other companies "either did not have PPE in stock or could not deliver them quickly." *Id.* They called Zaappaaz and spoke to a company representative who assured them that the products were in stock and could be delivered as promised. *Id.*; ROA.2572. The Fabers ordered 500 KN95 masks, 10 pairs of goggles, and 10 face shields for $4,776.73, including $431.93 in rush shipping fees; Zaappaaz guaranteed delivery by April 3, 2020. ROA.2568, 2572. When the products did not arrive, the

Fabers repeatedly contacted Zaappaaz, asking to cancel the order and requesting a refund. ROA.2573. Zaappaaz refused to provide a refund, though the Fabers ultimately received a refund from PayPal. ROA.2573-74.

Susan Alimonti worked for a moving company that needed face masks to protect workers from COVID-19. ROA.2307. She ordered 10 face shields from Zaappaaz "because their website stated that it had face shields in stock, that the masks would ship the same day, and that they guaranteed delivery dates." *Id.* She paid $52.91 for expedited shipping and asked for delivery by April 7, 2020. *Id.* When the product failed to arrive, she repeatedly tried to cancel her order, but was told that she could not cancel or receive a refund. ROA.2308. The products arrived three weeks late, by which point Ms. Alimonti had already purchased face shields from another vendor. ROA.2309. Zaappaaz promised to refund the rush shipping fees, but never did. *Id.*

Mechelle Braswell works for a peanut shelling plant, which needed disposable gloves and no-touch thermometers "as soon as possible to check employee temperatures as they entered the plant." ROA.2417. She ordered from Zaappaaz because its website "stated that

it had the products in stock and offered expedited shipping, including shipping within 24 hours." *Id.* She bought three thermometers and two boxes of disposable gloves for $334.94, including $28.99 for expedited one-day shipping for one thermometer. *Id.* When the products did not arrive as scheduled, Ms. Braswell repeatedly complained and asked for a refund, which Zaappaaz refused to provide. ROA.2418-19. The shipment arrived nearly five weeks late, by which time Ms. Braswell had ordered thermometers from another company. ROA.2419. The shipment was also incomplete, containing only one of the three thermometers she had ordered. *Id.* Ms. Braswell never received a refund for the undelivered products. *Id.*

Other consumers had similar experiences.[1] Many complained to Zaappaaz. Customer complaints to the company increased from zero in January 2020 to 820 in April 2020. *See* ROA.6716. Other consumers complained to law enforcement agencies and the Better Business Bureau of Greater Houston and South Texas. The FTC's review of these complaints showed a spike beginning in April 2020: only 2 complaints

[1] *See* ROA.2370-72 (Rhiannon Guevin); ROA.2395-97 (Andrew Li); ROA.2504-07 (Gary Hendricks); ROA.2555-2556 (Jason Pierson).

in March, but 38 in April, 23 in May, and 15 in June, with the largest numbers relating to failure to ship or deliver PPE as promised and failure to cancel orders and provide refunds. ROA.2166-67.

C. Proceedings Below

1. The Complaint and Preliminary Injunction

The FTC sued Zaappaaz in August 2020, alleging violations of the FTC Act and the Merchandise Rule and seeking relief under Sections 13(b) and 19 of the FTC Act. ROA.24, 40-41. Section 13(b) authorizes district courts to issue permanent injunctions against violations of any laws within the FTC's purview, 15 U.S.C. § 53(b),while Section 19 authorizes courts to award monetary relief, including "the refund of money," to redress consumer injury resulting from violation of FTC consumer protection rules, *id.* § 57b(a)(1), (b).[2] Zaappaaz stipulated to entry of a preliminary injunction that barred Merchandise Rule violations and misrepresentations. ROA.787-800.

[2] Section 19 also authorizes redress following entry of an administrative cease-and-desist order by the Commission. 15 U.S.C. § 57b(a)(2). That provision is not at issue here.

2. The Magistrate Judge Report and Recommendation

Following discovery, the FTC moved for summary judgment and Zaappaaz cross-moved for partial summary judgment as to the FTC's claim for monetary consumer redress (which Zaappaaz incorrectly referred to as a "damages" claim).[3] The FTC submitted a detailed statement of uncontested material facts with its motion (ROA.2081-2143) with 118 supporting exhibits. Among those exhibits were declarations from FTC data analyst Elizabeth Ann Miles, who summarized shipping and delivery information obtained from Zaappaaz and third-party carriers, and FTC forensic accountant Rufus Jenkins, who used that information to calculate Zaappaaz's net revenue from late-shipped and undelivered PPE orders. ROA.3511-30.

Based on Mr. Jenkins's calculations, the FTC's statement assessed the net amount consumers paid for orders that were not shipped on time (including merchandise that was never delivered) at $37,549,472.12, and Zaappaaz's net revenue from undelivered and unrefunded orders at $12,241,035.069. ROA.2139. The FTC sought

[3] As discussed in more detail below, "damages" and "refund of money" are distinct remedies under Section 19. *See* 15 U.S.C. § 57b(b).

refunds to consumers of the full $37.5 million. In its opposition, Zaappaaz sought to exclude the Miles and Jenkins declarations but did not introduce any evidence to rebut them.

The motions were referred to a magistrate judge, who denied Zaappaaz's motion to exclude the Miles and Jenkins declarations. ROA.6241-44. As the magistrate judge noted, Zaappaaz "d[id] not challenge the contents of Mr. Jenkins's summary." ROA.6243. The magistrate judge recommended that the FTC's motion for summary judgment be granted as to both the FTC Act and Merchandise Rule violations. ROA.6244-66.

The magistrate judge agreed with the FTC that Zaappaaz violated all three provisions of the Merchandise Rule. First, Zaappaaz lacked a reasonable basis for its shipping claims. ROA.6252-57. Second, Zaappaaz failed to offer customers a refund-or-consent option. ROA.6257-58. Third, Zaappaaz did not deem orders canceled and provide prompt refunds once it failed to timely ship products. ROA.6258-60. Zaappaaz did not offer any argument as to the latter two violations. ROA.6257, 6258.

As to the FTC Act violations, the magistrate judge concluded that Zaappaaz engaged in deceptive conduct by making material misrepresentations (1) regarding shipping and delivery times, (2) that customers would receive refunds if they were dissatisfied, and (3) that the product shipped would be what customers ordered and not a substitute product. ROA.6260-64. Again, Zaappaaz offered no argument on these points. ROA.6260-61.

With respect to relief, the magistrate judge held that the FTC was not required to prove individualized reliance by each consumer. ROA.6267-69. The magistrate judge applied a rule recognized by seven circuits (*see infra* at 33) that the FTC is entitled to a presumption of reliance where a defendant makes material representations that are widely disseminated. *Id.* The magistrate judge held that the FTC had made that showing and that Zaappaaz offered "no argument or evidence to rebut the presumption of reliance." ROA.6268.

Nonetheless, the magistrate judge recommended denial of summary judgment as to the FTC's request for full refunds, holding that the FTC had not shown such relief was necessary to redress consumer injuries and had made no showing as to a lesser amount,

including for those customers who never received any product at all. ROA.6272. The magistrate judge also recommended denial of Zaappaaz's motion for partial summary judgment on the grounds that there were factual disputes as to the appropriate monetary relief, though it noted that Zaappaaz had not proposed any alternative to the FTC's figures. ROA.6272, 6275. Finally, despite finding that Zaappaaz's violations were not isolated and that the company acted with a high degree of scienter, the magistrate judge recommended against entry of an injunction. ROA.6272-74.

3. The District Court's Pretrial Orders

The district court adopted the magistrate judge's report, ROA.6398-99, and thereafter, granted the FTC's motion under Fed. R. Civ. P. 56(g) to deem the facts set forth in the report as established for trial. ROA.6469-71. Based on the undisputed facts set forth in the Jenkins and Miles declarations, the court also deemed it established that Zaappaaz's net revenue from late and/or undelivered and unrefunded PPE shipments was $37,549,472.14 and that its net revenue from undelivered and unrefunded shipments was $12,241,035.69. ROA.6470.

In a later order, the court clarified that its prior order rejecting a "full refund" remedy did not apply to customers who never received their orders at all, and that these consumers were entitled to a full refund. ROA 6656-57. It held that the remaining issues for trial were whether injunctive relief was appropriate and what remedy "less than full refunds" was necessary to redress injury to consumers who received late-delivered orders. ROA.6657.

4. Findings of Fact and Conclusions of Law

Following a brief trial, the district court issued findings of fact and conclusions of law. ROA.6713-34. The court concluded that an injunction was warranted, citing the "egregious" nature of the violations. ROA.6724-28. The court found that Zaappaaz "took advantage of consumers' desperation to quickly obtain scarce PPE at the onset of a global pandemic with false promises of fast, risk-free PPE deliveries when speed of delivery was of the essence to consumers." ROA.6725. Zaappaaz "knowingly disseminated false advertising about shipping times and then failed to ship most PPE orders on time, if at all." *Id.* It also failed to provide the refund-or-consent option required by the Merchandise Rule and routinely denied refunds to customers who

requested them. *Id.* This conduct continued even past the entry of the stipulated preliminary injunction. *Id.* The court further held that an injunction was warranted because the violations were not isolated, Zaappaaz acted with a high degree of scienter, it offered no assurances against future wrongdoing, it failed to recognize the wrongful nature of its actions, and its business was ongoing and presented ample opportunities for future violations. ROA.6726-27. Accordingly, the court permanently enjoined Zaappaaz from advertising or selling PPE, "misrepresentations involving the sale of any product," and further Merchandise Rule violations. ROA.6228-29.

With respect to the monetary relief, the court held that "upon further review of the facts and applicable law," it was reconsidering its conclusion that full refunds were not necessary to afford redress to consumers who received late shipments. ROA.6730. It applied a rule recognized by numerous courts of appeals (*see infra* at 555555) that where a sale is induced by a material pre-purchase misrepresentation, customers are entitled to a refund. ROA.6730-31. As the court explained, "customers who purchased PPE from Zaappaaz expecting same-day shipping but who received their orders late are entitled to full

refunds because Zaappaaz's false statements tainted their purchasing decisions. Particularly given the widespread need for immediate delivery of PPE in March through December 2020, if customers had been told the truth about Zaappaaz's shipping timelines, they may not have purchased PPE from Zaappaaz." ROA.6731. Furthermore, when orders did not arrive on time, "customers may have purchased PPE from a different supplier, such that their order from Zaappaaz had little value to them once it finally arrived." *Id.* The Court also concluded that the Merchandise Rule itself "requires refunds of these purchases." ROA.6732.

Because "some customers who received late orders may have been satisfied," ROA.6733, the court adopted a redress plan whereby customers who received late-shipped products must affirmatively request refunds from the FTC, while customers who never received products at all are entitled to full refunds without making such a request. ROA.6733. The final judgment thus requires Zaappaaz to pay the FTC a total of $37,549,472.14. ROA.6767. Of that amount, $12,241.035.69 will be refunded to customers whose PPE orders were never delivered. The remaining $25,308,436.45 will be paid to

customers who received late-shipped product and request a refund. ROA.6767-68. Any unclaimed funds will be returned to Zaappaaz. ROA.6769.

SUMMARY OF ARGUMENT

1. The district court properly held that Zaappaaz's Merchandise Rule violations caused consumer injury. That decision should be affirmed on either (or both) of two alternative grounds. First, given the nature of the Merchandise Rule violations here, the FTC was not required to show reliance on Zaappaaz's false shipping promises. Two of Zaappaaz's three violations do not involve misrepresentations but rather the failure to provide refunds required by the Rule. Consumers were entitled to refunds under the Rule whether or not they relied on Zaappaaz's false shipping promises, and Zaappaaz's failure to provide those refunds necessarily caused consumer injury. The Court thus need not address whether consumers relied on Zaappaaz's quick shipping promises. Second, and in any event, the FTC's evidence established that consumers *did* rely on those promises. The FTC produced direct evidence sufficient to support a classwide inference of reliance under this Court's precedent. The FTC also produced evidence

sufficient to establish a presumption of individual reliance by showing that Zaappaaz's misrepresentations were widely disseminated and of a type consumers reasonably rely upon. Seven other circuits have adopted this presumption, and this Court should as well. Zaappaaz's argument that an evidentiary presumption can only be created by express statutory language is wrong. The Supreme Court and this Court have recognized several similar evidentiary presumptions based on considerations of probability, fairness, judicial economy, and public policy, all of which support the presumption here.

2. Section 19 explicitly gives the district court discretion to order refunds as it deems necessary to redress consumer injury. The district court properly gave consumers who received late-shipped merchandise the option to receive a full refund. That ruling should also be sustained on either of two grounds. First, the Merchandise Rule required Zaappaaz to give consumers a refund option. The district court's remedy effectively restores that option, putting consumers as nearly as possible in the position they would have occupied if Zaappaaz had complied with the Rule. Second, at least six circuits have recognized that where a purchase is tainted by a misrepresentation, full

refunds are an appropriate remedy. Those decisions are correct, and this Court should adopt the same rule.

3. The district court did not abuse its discretion under Rule 56(g) by deeming it established for trial that Zaappaaz's net revenue from undelivered and unrefunded PPE orders was $12,241,035.69. The FTC asserted this fact in its summary judgment papers and supported it with evidence, which Zaappaaz failed to controvert. The district court was not required to give Zaappaaz a second chance to produce evidence on this point, and the evidence it now belatedly cites does not raise a genuine dispute of fact anyway.

STANDARDS OF REVIEW

Zaappaaz's first argument challenges the district court's determination that its Rule violations caused consumer injury. Because the district court decided that issue on summary judgment, this Court's review is *de novo*. *E.g.*, *Campos v. Steves & Sons, Inc.*, 10 F.4th 515, 520 (5th Cir. 2021). The Court may affirm on any ground supported by the record, *id.*, so long as "there is no genuine dispute as to any material fact." Fed. R. Civ. P. 56(a).

Zaappaaz's second argument relates to the relief the district court ordered. Because Section 19 gives district courts broad discretion "to grant such relief as the court finds necessary to redress injury to consumers," 15 U.S.C. § 57b(b), appellate courts review the district court's choice of remedy for abuse of discretion. *See FTC v. Am. Screening, LLC*, 105 F.4th 1098, 1102 (8th Cir. 2024); *FTC v. QYK Brands LLC*, No. 22-55446, 2024 WL 1526741, at *2 (9th Cir. Apr. 9, 2024).

Zaappaaz's third argument challenges the district court's decision to deem facts established under Fed. R. Civ. P. 56(g). Because that rule "speaks of what a court 'may' do," appellate courts review for abuse of discretion. *Kreg Therapeutics, Inc.*, v. *VitalGo*, *Inc.*¸ 919 F.3d 405, 415 (7th Cir. 2019); *accord Watchous Enters., LLC v. Mournes*, 87 F.4th 1170, 1178 (10th Cir. 2023); *see also Katherine P. v. Humana Health Plan, Inc.*, 959 F.3d 206, 209 (5th Cir. 2020) (district court had discretion to treat facts as established under Rule 56(g)).

ARGUMENT

Zaappaaz does not challenge the district court's determination that it violated the Merchandise Rule and engaged in deceptive conduct in violation of the FTC Act. Nor does it challenge the district court's injunction. Instead, Zaappaaz raises three arguments about the award of monetary relief. None has merit.

I. THE DISTRICT COURT PROPERLY HELD THAT ZAAPPAAZ'S RULE VIOLATIONS CAUSED INJURY TO CONSUMERS.

Where the FTC sues under Section 19 based on the violation of a consumer protection rule, the district court may award "such relief as the court finds necessary to redress injury to consumers … resulting from the rule violation." 15 U.S.C. § 57b(b).[4] The district court correctly determined that Zaappaaz's rule violations caused consumer injury, such that monetary relief under Section 19 was appropriate. That determination should be affirmed for two reasons, each of which independently supports the judgment.

First, although Zaappaaz attacks the district court's use of a presumption to establish that consumers relied on the company's false

[4] Section 19 also permits relief necessary to redress injury to persons other than consumers, but that is not at issue here.

statements, the Court need not reach this issue because two of the three Rule violations at issue here do not involve false statements. Rather, Zaappaaz failed to provide refunds as required by the plain terms of the Merchandise Rule. Consumers suffered a financial injury when Zaappaaz failed to provide these refunds regardless of whether they relied on the company's false shipping promises. The consumer injury determination can and should be affirmed on that basis.

Second, if the Court deems it necessary to address reliance, the consumer injury determination should be affirmed because the undisputed evidence, including consumer declarations and complaints, establishes that Zaappaaz's customers *did* rely on the company's false shipping promises. Furthermore, the district court properly applied a presumption of reliance based on the FTC's showing that Zaappaaz's representations were widely disseminated and of a kind usually relied on by reasonable prudent persons. That presumption has been adopted by seven different circuits, and Zaappaaz has not shown any reason why this Court should chart a different course.

A. Consumers Were Injured by Zaappaaz's Failure To Provide Refunds They Were Entitled To Receive Under the Merchandise Rule.

Although it is undisputed that Zaappaaz lied to its customers about shipping times, to obtain monetary relief the FTC was not required to show that customers relied on those false representations.[5] Zaappaaz is wrong when it asserts (Br. 1, 24) that Section 19 requires a showing of injury resulting from a defendant's misrepresentations. The requirement is that consumer injury must "result[] from *the rule violation*." 15 U.S.C. § 57b(b) (emphasis added).

In this case, two of Zaappaaz's rule violations do not involve misrepresentations, so no showing of reliance on misrepresentations was required. First, Zaappaaz violated the Merchandise Rule by failing to offer buyers the option of either consenting to delayed shipping or canceling their orders and obtaining a prompt refund. *See* 16 C.F.R. § 435.2(b)(1). Second, having failed to offer that option, Zaappaaz violated the Rule by not automatically deeming the orders canceled and

[5] The FTC's summary judgment motion argued that consumer injury was established by the fact that Zaappaaz failed to provide required refunds. ROA.2057-58. Zaappaaz's assertion that the FTC acknowledged it was required to establish reliance (Br. 24) is incorrect—the FTC merely responded to Zaappaaz's argument. *See* ROA.4182-83.

providing a prompt refund once it failed to make a timely shipment. *See id.* § 435.2(c)(5). Under both provisions, Zaappaaz's customers had a right to receive full refunds regardless of whether they relied on the company's false shipping promises.

Put another way, the text and structure of these Merchandise Rule requirements makes it unnecessary for courts to address consumer reliance. The Rule reflects a determination that a seller's representations about shipping times are presumptively material to a consumer's purchase decision. As the Commission explained when the Rule was originally adopted in 1975, "where a seller solicits orders and states a time for shipment, many buyers will quite reasonably expect shipment within that time." *Mail Order Merchandise Rule*, 40 Fed. Reg. 51582, 51589 (Nov. 5, 1975). If the seller cannot ship within that time, it is effectively altering or breaching the terms of its contract. *Id.* But the Rule also recognizes that in some circumstances, even a well-intentioned seller may be unable to meet its shipping promises. In such cases, the Rule specifies a clear course of action: the seller must offer the buyer the refund-or-consent option. That way, buyers who in fact relied on the shipping promise can get their money back, while any

buyers for whom prompt shipping is not as important can agree to wait longer. But the Rule does not permit sellers to ignore these requirements, ship products late, and keep the money they have collected. Consumers have a right to get their money back under these circumstances.

B. In Any Event, the FTC Properly Established Consumer Reliance on Zaappaaz's False Shipping Promises.

Zaappaaz further violated the Merchandise Rule by soliciting orders for PPE without any reasonable basis to believe that products would ship within the time frames Zaappaaz was advertising (*e.g.*, same-day shipping). *See* 16 C.F.R. § 435.2(a)(1)(i). Because Zaappaaz also violated two other provisions of the Rule, as discussed in I.A, *supra*, the Court need not address whether consumers relied on Zaappaaz's misrepresentations about shipping times. But to the extent the Court concludes the FTC was required to demonstrate consumer reliance, the FTC made that showing in two different ways. First, the FTC produced undisputed direct evidence that many consumers relied on Zaappaaz's false shipping promises. Under this Court's precedent, the FTC was not required to prove reliance on an individualized basis. Second, the FTC

presented evidence sufficient to establish the presumption of reliance that has been recognized by seven other circuits. Zaappaaz failed to rebut that presumption.

1. The FTC presented substantial undisputed evidence that consumers relied on Zaappaaz's false shipping promises.

This Court has recognized that reliance need not be proven on an individualized basis. In *Torres v. S.G.E. Management, L.L.C.*, 838 F.3d 629 (5th Cir. 2016) (en banc), plaintiffs asserted class action claims under the Racketeer Influenced and Corrupt Organizations Act ("RICO") based on the defendant's alleged operation of a pyramid scheme. The question before the Court was whether reliance could be proven on a classwide basis, such that class certification was proper under Fed. R. Civ. P. 23(b)(3). As relevant here, the Court held that individualized proof of reliance was not required. Rather, plaintiffs may employ a "common inference of reliance" when it "follows logically from the nature of the scheme, and there is common, circumstantial evidence that class members relied on the fraud." *Torres*, 838 F.3d at 641. The Court held such an inference appropriate because "it is reasonable to infer that individuals do not knowingly join pyramid schemes" and

there was no evidence in the record that any putative class member joined the challenged program despite knowledge of the fraud. *Id.*

The facts here likewise support a common inference of reliance. The FTC submitted several declarations showing that consumers relied on Zaappaaz's false promises. For example, Amy Russell turned to Zaappaaz, paying $360.63 for one-day shipping, because "there were no local sources with available PPE" and Zaappaaz "represented that PPE would be shipped within 24 hours." ROA.2446. Carol and Larry Faber likewise bought PPE from Zaappaaz, paying $431.93 in rush shipping fees, because Zaappaaz's website claimed it "had PPE in stock, offered same day shipping, and guaranteed delivery dates," whereas other companies "either did not have PPE in stock or could not deliver them quickly." ROA.2567. Susan Alimonti bought face shields from Zaappaaz, paying $52.91 for expedited shipping, "because [Zaappaaz's] website stated that it had face shields in stock, that the masks would ship the same day, and that they guaranteed delivery dates." ROA.2307. All

these consumers (and many others) vigorously complained and tried to cancel their orders when the products did not ship as promised.[6]

These consumer declarations were bolstered by evidence of numerous consumer complaints about Zaappaaz's failure to comply with its quick-shipping promises. *See FTC v. Moses*, 913 F.3d 297, 310 (2d Cir. 2019) (consumer complaints properly considered on summary judgment). An FTC case investigator documented a sharp rise in complaints about Zaappaaz beginning in April 2020. ROA.2166-68. By far the most common categories of complaints were about failure to ship or deliver PPE within the promised time frames. ROA.2167.

As the district court noted, there was also a spike in complaints made directly to Zaappaaz that occurred exactly when the company transitioned to selling PPE. Zaappaaz received zero complaints in January 2020, but 820 in April 2020. ROA.6716. The FTC submitted

[6] *See also* ROA.2395 (Andrew Li "decided to order from [Zaappaaz] because it had the items in stock and because of the quick delivery."); ROA.2417 (Mechelle Braswell's company needed thermometers "as soon as possible" so she bought from Zaappaaz because its website "stated that it had the products in stock and offered expedited shipping, including shipping within 24 hours."); ROA.2370 (Rhiannon Guevin bought PPE from Zaappaaz because "the products were described as in-stock" and were unavailable at other retailers); ROA.2555 (Jason Pierson bought from Zaappaaz because he "saw that the company had thermometers in stock that shipped the same day.").

emails documenting many of these complaints, which plainly show that customers relied on Zaappaaz's shipping promises. For example, one customer complaint states: "I specifically ordered from [Zaappaaz] because the website says that the antibacterial wipes are 'IN STOCK—READY TO SHIP." ROA.3390. It continues: "I ONLY placed the order from [Zaappaaz] because the wipes were 'in stock'—these days, most other companies don't have this product in stock, nor do they imply that they do. I would never have placed the order in the first place, now I am hostage to your company's delay in delivering on a product that you[] said was available." *Id.* Another complaint states: "Our hospital needs this ASAP. We were told that you did have them in stock and would ship April 3rd…. This is a matter than needs resolution NOW." ROA.3476. Yet another states that a shipping delay is "unacceptable because when I log into your website it tells me that these thermometers are in 'stock and that they will ship within 24 hours'. These need to be shipped out immediately." ROA.3489.

In sum, the record contains substantial undisputed evidence that consumers expressly relied on Zaappaaz's representations that it would ship product quickly and were angry when the company failed to live up

to those promises. Zaappaaz did not show that anyone would have bought PPE from its websites absent the quick-shipping claims. Based on this record, the Court may reasonably infer that customers bought PPE from Zaappaaz precisely because of the company's claims that it had PPE products in stock and could ship them immediately. *Torres*, 838 F.3d at 641; *see also FTC v. Figgie Int'l*, 994 F.2d 595, 605 (9th Cir. 1993) (reasonable to conclude that consumers relied on misrepresentations, even without presumption, where record evidence showed that consumer purchases matched recommendations in sales material).

2. The district court properly applied a presumption of reliance.

The district court properly held that the FTC was entitled to a presumption of reliance based on the undisputed evidence that Zaappaaz's false shipping representations were widely disseminated and materially misleading. ROA.6267-69, 6730. Zaappaaz "offered no argument or evidence to rebut the presumption of reliance." ROA.6268.

Seven different circuits (the Second, Sixth, Seventh, Eighth, Ninth, Tenth, and Eleventh) have held that the FTC is entitled to a rebuttable presumption of reliance "upon showing that (1) the

defendant made material misrepresentations or omissions that were of a kind usually relied upon by reasonable prudent persons; (2) the misrepresentations or omissions were widely disseminated; and (3) consumers actually purchased the defendants' products." *FTC v. BlueHippo Funding*, LLC, 762 F.3d 238, 244 (2d Cir. 2014) (cleaned up).[7] Both the Eighth and Ninth Circuits have recently applied the presumption in cases very similar to this one, involving defendants who violated the Merchandise Rule in connection with sales of PPE during the COVID-19 pandemic. *See Am. Screening,* 105 F.4th at 1102-03; *QYK,* 2024 WL 1526741, at *2. No court has ever rejected this presumption.

This Court should follow this overwhelming and uniform body of law from other circuits and apply a rebuttable presumption of reliance in FTC deception cases. The presumption makes sense as a simple evidentiary matter. Under the preponderance of the evidence standard

[7] *Accord Moses*, 913 F.3d at 310; *FTC v. Commerce Planet*, 815 F.3d 593, 604 (9th Cir. 2016); *FTC v. E.M.A. Nationwide, Inc.*, 767 F.3d 611, 631 n.12 (6th Cir. 2014); *FTC v. Trudeau*, 579 F.3d 754, 773 n.15 (7th Cir. 2009); *FTC v. Freecom Commc'ns, Inc.*, 401 F.3d 1192, 1205-06 (10th Cir. 2005); *FTC v. Kuykendall*, 371 F.3d 745, 765-66 (10th Cir. 2004); *McGregor v. Chierico*, 206 F.3d 1378, 1388-89 (11th Cir. 2000); *Figgie,* 994 F.2d at 605-06; *FTC v. Sec. Rare Coin & Bullion Corp.*, 931 F.2d 1312, 1316 (8th Cir. 1991).

that is "generally applicable in civil actions," the FTC need only show that consumers "more likely than not" relied on defendants' misrepresentations. *Herman & Maclean v. Huddleston*, 459 U.S. 375, 390 (1983). Where the FTC has shown that a defendant's misrepresentations were of a kind usually relied upon by reasonable prudent persons, that they were widely disseminated, and that consumers actually purchased the defendants' products, then absent any contrary evidence, it is "more likely than not" that consumers relied on the representations. *Id.*

Furthermore, as the Second Circuit has explained, "[t]o 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." *BlueHippo*, 762 F.3d at 244. Other circuits likewise have recognized that "[r]equiring proof of subjective reliance by each individual consumer would thwart effective prosecutions of large consumer redress actions and frustrate the statutory goals of the section." *FTC v. Freecom Commc'ns., Inc.*, 401 F.3d 1192, 1205-06 (10th Cir. 2005) (quoting *Figgie*, 994 F.2d at 605); *see also FTC v. Trudeau*, 579 F.3d 754, 773 n.15 (7th Cir. 2009);

McGregor v. Chierico, 206 F.3d 1378, 1388 (11th Cir. 2000); *FTC v. Sec. Rare Coin & Bullion Corp.*, 931 F.2d 1312, 1316 (8th Cir. 1991). Demonstrating individualized reliance would require a massive commitment of resources not just by the agency but also by the district courts, which would potentially need to review declarations or hear testimony from thousands or tens of thousands of injured consumers even in the most straightforward cases. Where such declarations or testimony were unavailable, the harm to those consumers would go unredressed, allowing defendants to keep money they obtained under false pretenses and incentivizing further misconduct.

Zaappaaz is incorrect that the presumption "relieve[s] the FTC of its burden" to come forward with evidence in the first instance. Br. 28. The FTC must still produce evidence to establish the facts underlying the presumption. *See, e.g.*, *BlueHippo*, 762 F.3d at 244 (FTC must "make[] a showing sufficient to trigger this presumption"). The presumption simply shifts the burden of producing evidence to the defendants; it does not shift the burden of persuasion, which remains on the FTC. *See* Fed. R. Evid. 301.

Application of the presumption is particularly appropriate in this case. The record plainly shows that Zaappaaz began selling PPE in the early days of the COVID-19 pandemic to take advantage of the huge surge in customer demand for these products. At that time, many Americans were desperate to obtain PPE to protect themselves and their loved ones from a potentially fatal disease, but these lifesaving products were in short supply and often unavailable through ordinary retail channels. Quick shipping was an essential part of what Zaappaaz promised. Zaappaaz advertised PPE on its websites with claims like "IN STOCK—SHIPS SAME DAY" and "GUARANTEED TO SHIP TODAY." ROA.6718. It also sent promotional emails saying "ALL OF THESE PRODUCTS ARE FULLY IN STOCK, READY TO SHIP SAME DAY AND DELIVER IN 24 HOURS." *Id*. Against this background, it is more likely than not that the main reason customers purchased PPE from Zaappaaz's website—and not from a better-known internet retailer or a local brick-and-mortar store—is that they were relying on the company's promises that it had PPE in stock and ready to ship that same day. *See Am. Screening*, 105 F.4th at 1103 ("Suppliers presumably count on consumers to believe and act on promises of prompt

shipping."). The district court could properly conclude that the presumption applied and that absent any contrary evidence, the FTC had sufficiently proven consumer reliance on Zaappaaz's shipping promises. ROA.6267-68.

a. Zaappaaz cites no authority for its claim that a rebuttable evidentiary presumption in civil cases can only be created by express statutory language, and the FTC is aware of none.[8] Judicially-established evidentiary presumptions are commonplace. Presumptions "[a]ris[e] out of considerations of fairness, public policy, and probability, as well as judicial economy," and "serve to assist courts in managing circumstances in which direct proof, for one reason or another, is rendered difficult." *Basic Inc. v. Levinson*, 485 U.S. 224, 245 (1988). As a leading evidence treatise explains, "the most important consideration in the creation of presumptions is probability." *McCormick on Evidence* § 343 (8th ed. 2022). Most presumptions reflect a judicial determination "that proof of fact B renders the inference of the existence of fact A so

[8] Zaappaaz's argument rests on isolated snippets of language quoted out of context and misleadingly strung together. For example, Zaappaaz quotes from *SAS Institute, Inc. v. Iancu*, 584 U.S. 357 (2018) (Br. 26), but that case has nothing to do with evidentiary presumptions in civil cases; it concerns *inter partes* review of patents by the Patent Trial and Appeal Board.

probable that it is sensible and timesaving to assume the truth of fact A until the adversary disproves it." *Id.* In addition to this "judicial estimate of the probabilities," courts also base presumptions on the "difficulties inherent in proving that the more probable event in fact occurred." *Id.*

Both the Supreme Court and this Court have long recognized a variety of judicially-created evidentiary presumptions similar to the one at issue here. For example, the Supreme Court recognizes a rebuttable "fraud-on-the-market" presumption of reliance in securities fraud cases. *See Halliburton Co. v. Erica P. John Fund, Inc.*, 573 U.S. 258, 268-69 (2014); *Basic*, 485 U.S. at 241-47. Investors are presumed to have relied on a defendant's misrepresentations about a company if they can establish that the "misrepresentations were publicly known" and material, the company "stock traded in an efficient market," and "the plaintiff traded the stock between when the misrepresentations were made and when the truth was revealed." *Halliburton*, 573 U.S. at 277-78. Although the plaintiff's claims in a securities fraud case are based on federal statutes and rules, Congress did not set forth the fraud-on-the-market presumption in statutory text. The Supreme Court created

the presumption because requiring proof of individualized reliance "would place an unnecessarily unrealistic evidentiary burden" on plaintiffs and effectively "prevent[] [them] from proceeding with a class action," and because such a presumption is "also supported by common sense and probability." *Basic*, 485 U.S. at 242, 245-46. The Court declined to revisit those conclusions in *Halliburton*, instead reaffirming the fraud-on-the-market presumption of reliance. *Halliburton*, 573 U.S. at 267-68, 283-84.

Courts have recognized several other rebuttable presumptions that were not specifically authorized by Congress. For example, in employment discrimination actions under Title VII of the Civil Rights Act of 1964, once a plaintiff proves a *prima facie* case, a task which is "not onerous," a rebuttable presumption of unlawful discrimination is established. *Texas Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 253-54 (1981). The presumption shifts the burden to the employer to produce evidence of "a legitimate, nondiscriminatory reason" for the employment action. *Id.* at 254. The presumption and burden-shifting framework were not established by Congress, but rather reflect a judicial determination that acts like refusing to hire a qualified member

of a protected class "if otherwise unexplained, are more likely than not based on the consideration of impermissible factors." *Id.*

Similarly, in merger cases under the Clayton Act, this Court has held that the government may "establish[] a *prima facie* case by showing that the transaction in question will significantly increase market concentration, thereby creating a presumption that the transaction is likely to substantially lessen competition." *Chicago Bridge & Iron, N.V. v. FTC*, 534 F.3d 410, 423 (5th Cir. 2008). The presumption shifts the burden back to the merging parties to produce evidence casting doubt on "the Government's evidence as predictive of future anti-competitive effects." *Id.* Again, the presumption is not based on statutory text, but rather a judicial assessment of probabilities. A merger that substantially increases market concentration is "so inherently likely to lessen competition substantially" that it must be enjoined absent contrary evidence. *United States v. Philadelphia Nat'l Bank*, 374 U.S. 321, 363 (1963).

In short, courts regularly create rebuttable evidentiary presumptions without an express statutory mandate based on judicial assessments of probability, fairness, judicial economy, and the

difficulties of presenting direct proof, among other considerations. All those considerations support use of the rebuttable presumption of reliance here.

b. Contrary to Zaappaaz's suggestion (Br. 26), even if Congress had established some rebuttable evidentiary presumptions in the FTC Act itself, that would not preclude courts from adopting other presumptions.[9] In any event, Zaappaaz's assertion that Congress has established such presumptions "elsewhere in the FTC Act" (Br. 26) is misleading at best. Zaappaaz first points to Section 14(a) of the FTC Act, which establishes *criminal* penalties for false advertisements of certain commodities that are injurious to health. 15 U.S.C. § 54(a). Specifically, Section 14(a) provides that meat and meat products that that are properly inspected, marked, and labeled under federal law "shall be *conclusively* presumed not injurious to health at the time the same leave official 'establishments.'" *Id.* (emphasis added). A conclusive presumption, unlike a rebuttable evidentiary presumption, is a

[9] Zaappaaz relies on a criminal case, *United States v. Ayers*, 795 F.3d 168 (D.C. Cir. 2015), which held that a criminal statute did not establish a "presumption" in favor of consecutive sentencing. *Id.* at 173-74. Principles from criminal cases have no bearing on the separate question of when rebuttable evidentiary presumptions may be recognized in civil cases. *See generally McCormick, supra,* § 342.

substantive rule of law rather than a mere tool for allocating burdens of evidentiary production. *See Michael H. v. Gerald D.*, 491 U.S. 110, 119-20 (1989); *McCormick*, *supra*, § 342. The fact that Congress established a conclusive presumption in certain criminal cases to protect those who comply with federal law says nothing about whether a rebuttable presumption of reliance may be recognized in civil cases like this.

The other statutory provision Zaappaaz points to is not part of the FTC Act at all. The Consolidated Appropriations Act of 2023 created a new requirement that online marketplaces collect certain information from high-volume sellers and further provides that information in a valid government-issued tax document "shall be presumed to be verified as of the date" the document was issued. Pub. L. No. 117-328, div. BB, § 301(a)(2)(B) (codified at 15 U.S.C. § 45f(a)(2)(B)). Although this statute grants enforcement authority to the FTC, Congress did not designate it as an amendment to the FTC Act—unelected Congressional staff simply chose to codify it with the FTC Act for convenience.[10]

[10] The codification of federal statutes into sections of the United States Code is performed by the Office of Law Revision Counsel of the House of Representatives, not by Congress itself (except in those cases where a title of the Code has been enacted into positive law). *See* https://uscode.house.gov/about_office.xhtml.

Congress's enactment of this legislation in 2022 thus sheds no light on what Congress intended when enacting Section 19 nearly 50 years earlier.

c. Zaappaaz extensively criticizes the Ninth Circuit's *Figgie* decision, one of the early appellate cases to recognize the presumption of reliance. But *Figgie* does not stand alone: as discussed above, seven different circuits have recognized the presumption in a variety of contexts over four decades. *Figgie* and the recent decisions of the Eighth Circuit in *American Screening* and the Ninth Circuit in *QYK* involved claims for monetary relief under Section 19.[11] Courts also recognized and applied the presumption where the FTC sought monetary relief ancillary to an injunction under Section 13(b) prior to the Supreme Court's decision in *AMG Capital Management*, *LLC v. FTC*, 593 U.S. 67 (2021).[12] The Sixth Circuit recognized the presumption in a case where the FTC sought consumer redress under both Section 13(b) and Section 19. *FTC v. E.M.A. Nationwide*, *Inc.*, 767 F.3d 611, 631 n.12 (6th Cir.

[11] *Am. Screening*, 105 F.4th at 1102-03; *QYK*, 2024 WL 1526741, at *2; *Figgie*, 994 F.2d at 598, 605-06.

[12] *See Moses*, 913 F.3d at 309-10; *Commerce Planet,* 815 F.3d at 603-05; *Freecom*, 401 F.3d at 1206; *Sec. Rare Coin*, 931 F.2d at 1316.

2014). Courts have likewise applied the presumption where the FTC has sought monetary relief as a compensatory civil contempt sanction.[13]

Courts have applied the same presumption in each of these contexts because they all involve the same question: what the FTC must prove to establish that consumers relied on a defendant's misrepresentation. For example, in *American Screening*, the court found it immaterial that it had originally recognized the presumption in *Security Rare Coin*, a Section 13(b) case. *Am. Screening*, 105 F.4th at 1103. Even though *AMG* held that courts may not award monetary relief under Section 13(b), that ruling "did not call into question" the part of *Security Rare Coin* that "shines light on how courts might shape equitable monetary relief (assuming the relevant law makes it available) in cases … where the FTC is seeking a remedy on behalf of a large class of consumers because of a company's widespread deceptive trade practices." *Id.* Courts' application of the same presumption in different statutory contexts further confirms that the presumption is not and need not be based on specific statutory language, but rather is

[13] *See BlueHippo*, 762 F.3d at 243-45; *Trudeau*, 579 F.3d at 773 n.15; *Kuykendall*, 371 F.3d at 765-66; *McGregor*, 206 F.3d at 1388-89.

grounded in basic principles of probability, fairness, efficiency, and judicial economy.

d. Finally, Zaappaaz erroneously argues that the Court cannot consider the practical consequences of requiring the FTC to prove individualized reliance in every case. Br. 29. As discussed above, the Supreme Court relied on exactly these types of practical considerations in *Basic* and *Halliburton* when it established and reaffirmed the analogous presumption of reliance in securities fraud cases. *See Halliburton*, 573 U.S. at 267-68, 283-84; *Basic*, 485 U.S. at 242, 245.

Zaappaaz's fallback assertion (Br. 31) that an individualized reliance requirement would not actually thwart the agency's ability to bring large consumer redress actions is wrong. For example, in this case, an individualized reliance requirement would have required the FTC to obtain declarations or other evidence of reliance from over 50,000 consumers. That would impose a huge practical burden on the agency and the district court. It would be an enormous waste of time, money, and resources in a case like this, where all the available evidence shows that the primary reason consumers bought PPE from

Zaappaaz was because of the company's prominent—but false—claims that it would ship product quickly.

For all these reasons, if the Court reaches the reliance issue, it should follow the overwhelming and uniform body of precedent from other circuits and recognize a presumption of reliance in FTC cases where the defendant has made material misstatements that were widely disseminated.

II. THE DISTRICT COURT PROPERLY GAVE CUSTOMERS WHO RECEIVED LATE-SHIPPED MERCHANDISE THE OPPORTUNITY TO OBTAIN FULL REFUNDS.

Zaappaaz received some $25.3 million in net revenue from PPE orders that were shipped late but ultimately delivered, though often weeks after the promised date. The district court properly held that customers who received late-shipped merchandise should be entitled to receive full refunds if they affirmatively request them. That relief was appropriate for two reasons, each of which is independently sufficient. First, consumers were entitled to receive full refunds under the Merchandise Rule. Second, it is well settled in FTC Act cases that a full refund is a proper remedy where a sale has been induced by misrepresentations.

A. Full Refunds Are a Proper Remedy Because the Merchandise Rule Requires Refunds.

The district court properly held that the Merchandise Rule "requires refunds of [consumers'] purchases." ROA.6732. As the court explained, the Rule required Zaappaaz either to "seek consumers' consent to late shipment or to offer a refund." *Id.* If it did not offer this option, Zaappaaz was required to "consider the order cancelled and make a 'prompt refund.'" *Id.* (quoting 16 C.F.R. § 435.2(c)(5)). Because Zaappaaz "never offered" the refund-or-consent option, all late-shipped orders were "cancelled by operation of law, entitling customers to full refunds." *Id.* In short, refunds were the proper remedy because the Merchandise Rule provisions that Zaappaaz violated expressly entitled customers to refunds.

Given the nature of the violations, the district court would have been justified in ordering automatic refunds to all consumers who received late-shipped merchandise, as the FTC requested. But it did not do so. Instead, the court held that because "some customers who received late orders may have been satisfied with their PPE orders," customers would be required to affirmatively request refunds from the FTC. ROA.6733, 6768. Any unclaimed funds will be returned to

Zaappaaz. ROA.6733, 6769. This remedy is consistent with the relief plans that courts have approved in other cases involving the same kind of Merchandise Rule violations. *See Am. Screening*, 105 F.4th at 1103; *QYK*, 2024 WL 1526741, at *2. As the Eighth Circuit explained, this remedy is "tailored to ensure that dissatisfied consumers are made whole while also ensuring that [the defendant] does not have to pay unharmed customers as punishment." *Am. Screening*, 105 F.4th at 1103-04. If Zaappaaz had complied with the Merchandise Rule, customers would have had the option to receive a refund if they wanted one. The district court's remedy effectively restores that option to them.

The district court was not required to make customers return any product they received as a condition of receiving a refund. First, Zaappaaz did not expressly ask for return of products in the district court. *See Am. Screening*, 105 F.4th at 1104 ("[W]e could hardly fault the district court [for not requiring returns] since [defendant] did not ask it to order consumers to return their purchases."). Second, it is "doubt[ful] that [return] is even feasible for PPE products that were ordered four years ago." *Id.* Indeed, in some cases, the cost of shipping unused PPE product back to Zaappaaz might well exceed the current

value of the products.[14] Third, requiring return of products would "reward [Zaappaaz] for shipping items late rather than complying with MITOR's refund-or-consent obligation." *See id*. The Rule makes clear that where a seller does not provide the refund-or-consent option, it cannot simply ship the product late and keep the money. Finally, as the district court properly held, since Zaappaaz was legally required to deem late-shipped orders cancelled, any such goods that were eventually shipped were "gifts under the law that customers had no obligation to pay for or return." ROA.6733; *see* 39 U.S.C. § 3009(b) (unordered merchandise "may be treated as a gift by the recipient, who shall have the right to retain, use, discard, or dispose of it in any manner he sees fit without any obligation whatsoever to the sender.").

Zaappaaz's arguments to the contrary are unavailing.

a. Zaappaaz offers a misleading hypothetical involving sale of a "top-of-the line flat-screen TV" that is delivered one day late. Br. 32. A better analogy would be the following. Suppose that the week before the Super Bowl, a large retailer advertises on its website: "BIG-SCREEN TVS IN STOCK AND READY TO SHIP TODAY. GET YOURS

[14] Some PPE products, like hand sanitizer, also have a limited shelf life.

BEFORE THE BIG GAME." In fact, the retailer does not have sufficient stock to ship all orders on a same-day basis. The Merchandise Rule provides a simple procedure to follow. The retailer needs to contact consumers and give them a choice between agreeing to delayed shipping or cancelling and receiving a refund. If the retailer does not do so, and ships the products late so that they arrive after the Super Bowl (weeks afterwards in some cases), customers are entitled to the refund they would have received if the retailer had complied with the Rule—though, of course, the district court would have discretion to order return of the TVs as a condition of receiving a refund if the retailer requests that relief.

So too here. The key distinction is that Zaappaaz did not specifically ask for return of PPE products, and there is a huge practical difference between an expensive durable product like a big-screen TV and low-priced consumable products like face masks and hand-sanitizer. The district court did not abuse its discretion by not requiring returns in this case.

b. Zaappaaz's assertion that relief under Section 19 must be "limited to compensatory damages" (Br. 40) ignores the text of the

statute. Section 19 gives courts discretion to award *any* relief "necessary to redress injury to consumers," including but not limited to "rescission or reformation of contracts, the refund of money or return of property, [and] the payment of damages." 15 U.S.C. § 57b(b). A court may choose between these remedies or other forms of redress as appropriate in a particular case. Moreover, Section 19 explicitly authorizes courts to order a "refund of money," which is a distinct remedy from the "payment of damages." *Id.* The district court here did not abuse its discretion in determining that the opportunity to receive a refund was necessary to redress consumer injury resulting from the specific Merchandise Rule violations at issue in this case.

Notably, consumers who received late-shipped product also may have suffered consequential damages as a result of Zaappaaz's rule violations. For example, a business like the peanut-shelling plant where Ms. Braswell works (see *supra* at 10) might have needed to slow down or stop operations if it did not have the PPE necessary to protect its workers. Businesses and individuals might also have incurred additional expense buying PPE elsewhere when the products they ordered from Zaappaaz failed to arrive. Although Section 19 permits

district courts to award damages for these types of injuries, the FTC did not seek such relief here. The FTC limited its request to the refunds that customers were entitled to receive under the Merchandise Rule.

c. Zaappaaz's assertion that the Merchandise Rule requires refunds only "when no delivery has yet occurred" (Br. 40-41) is contrary to the plain text of the Rule. As discussed above, the Rule requires a seller to cancel the order and provide a prompt refund whenever it fails to offer the refund-or-consent option and fails to ship on time. 16 C.F.R. § 435.2(c)(5). If the seller ignores its obligations under the Rule and ships a product late, the consumer's entitlement to a refund does not disappear simply because the product is eventually delivered, possibly weeks after the promised date.

Zaappaaz is also off-base when it cites the preamble to the original 1975 version of the Merchandise Rule, which stated that in most cases, a substantial majority of consumers who are offered the refund-or-consent option will consent to the delay. Br. 41 (citing 40 Fed. Reg. at 51590). That may be true as a general matter, but not here, where consumers were desperate to receive scarce supplies of PPE, Zaappaaz prominently advertised same-day shipping, consumers paid extra for

rush shipping, and many customers who did not receive their orders promptly expressly sought to cancel the orders and receive a refund. In any event, Zaappaaz did not offer the refund-or-consent option, and in those circumstances the Rule leaves sellers no discretion: if they ship late, they must cancel and provide a refund. As the Commission explained in 1975, "[t]he Rule obviously cannot permit a seller who (1) fails to ship as required and (2) in addition violates the Rule's requirement of an offer to the buyer to cancel the order to retain any benefits from the transaction." 40 Fed. Reg. at 51592.

Zaappaaz is flatly wrong in arguing (Br. 41-42) that its violations did not "vitiate[] a consumer's consent to ship." That is exactly what the Merchandise Rule provides. Under the Rule, if a company knows it will not be able to ship on time, it must obtain the customer's express consent to delayed shipment or offer a refund. If it fails to do so, it is required to deem the order canceled and provide a prompt refund. The district court thus properly held that late shipments in violation of these requirements constituted unordered merchandise under § 3009. ROA.6732-33.

B. Full Refunds Are a Proper Remedy Where a Sale Is Induced By Misrepresentations.

The district court also properly held that where a consumer's purchase was tainted by the defendant's misrepresentations, the consumer is entitled to a full refund, and not simply the difference in value between what was advertised and what was received (*i.e.*, a damages remedy). ROA.6730-31. Six circuits (the Second, Seventh, Eighth, Ninth, Tenth, and Eleventh) have adopted this rule.[15] None has reached a contrary result. To the extent the Court deems it necessary to reach this issue, it should again follow this overwhelming and uniform body of precedent from other circuits.

Several courts have used a hypothetical originally posed by the Ninth Circuit to explain why a full refund is a proper remedy for sales induced by misrepresentations. *See Figgie*, 994 F.2d at 604, 606; *Am. Screening*, 105 F.4th at 1104; *Kuykendahl*, 371 F.3d at 766. As these courts have explained, it is not unlawful to sell rhinestones, but if a dishonest merchant claims to be selling diamonds but actually sells

[15] *See Am. Screening*, 105 F.4th at 1104; *BlueHippo*, 762 F.3d at 244-45; *FTC v. IAB Mktg. Assocs. LP*, 746 F.3d 1228, 1235 (11th Cir. 2014); *Trudeau*, 579 F.3d at 773 n.16; *Freecom*, 401 F.3d at 1192; *Kuykendall*, 371 F.3d at 766; *McGregor*, 206 F.3d at 1388-89; *Figgie*, 994 F.2d at 606.

rhinestones, "[t]he seller's misrepresentations tainted the customers' purchasing decisions. If they had been told the truth, perhaps they would not have bought rhinestones at all or only some." *Figgie*, 994 F.2d at 606. In these circumstances, customers "should have the opportunity to get all of their money back," not merely "the difference between what they paid and a fair price for rhinestones." *Id.* "The fraud in the selling, not the value of the thing sold is what entitles consumers … to full refunds." *Id.*

The district court properly applied this reasoning to conclude that consumers here should have the opportunity to receive a refund. As the court explained, "customers who purchased PPE from Zaappaaz expecting same-day shipping, but who received their orders late, are entitled to full refunds because Zaappaaz's false statements tainted their purchasing decisions." ROA.6731. "Particularly given the widespread need for immediate delivery of PPE in March through December of 2020, if customers had been told the truth about Zaappaaz's shipping timelines, they may not have purchased PPE from Zaappaaz" or might have purchased from a different supplier "such that

their order from Zaappaaz had little value to them once it finally arrived." *Id.* The only way to address this harm is to offer full refunds.

The fact that consumers ultimately received a product does not change the analysis. Consumers wanted what Zaappaaz advertised: shipment of PPE products *now*. What they got was PPE shipped far later—often weeks afterwards, and in some cases, after they had secured PPE elsewhere and therefore no longer needed or wanted what they ordered from Zaappaaz. Because Zaappaaz's misrepresentation tainted the purchasing decision from the get-go, the proper remedy is an opportunity to receive full refunds.

a. Zaappaaz attempts to distinguish *Figgie's* diamond-rhinestone discussion as involving "an extreme example in which the seller lied about the fundamental nature of the product being sold." Br. 38. But here, Zaappaaz's "GUARANTEED TO SHIP TODAY" and similar promises of immediate shipment were fundamental to what the company was selling and were the main reason for customers' purchases. ROA.6718, 6731. Zaappaaz may be correct that other forms of relief are sometimes appropriate (Br. 38), but the district court did

not abuse its discretion by giving consumers the opportunity to obtain full refunds in this case.

b. Zaappaaz misplaces its reliance on various cases and authorities involving remedies for common law fraud and misrepresentation (Br. 35-37) because this is not a common-law fraud case. Congress has specified that a district court's authority under Section 19 is not limited to damages but may include any relief necessary to redress injury to consumers, including refunds of money or rescission of contracts. Moreover, Zaappaaz acknowledges that even at common law, rescission—*i.e.*, a refund coupled with return of the property—was an appropriate remedy. As discussed above, in this case Zaappaaz did not ask for return of PPE, and it was not an abuse of discretion for the court to order refunds without requiring return of property. Contrary to Zaappaaz's assertion (Br. 36-37), the district court did not say a refund remedy was necessary "in all cases"—just that it was necessary to afford consumer redress in *this* case.

c. Zaappaaz also misses the mark in emphasizing the district court's pretrial rulings initially rejecting the full-refund remedy for late-shipped products. As the district court correctly observed, it had

"considerable discretion" to revisit and correct earlier nonfinal rulings based on further review of the facts and the law. ROA.6730 (quoting *U.S. Bank, N.A. v Verizon Comm'ns, Inc.*, 761 F.3d 409, 428 (5th Cir. 2014)). This Court reviews the district court's final ruling.

d. Finally, Zaappaaz is wrong in contending (Br. 42-43) that the FTC failed to present evidence of actual harm that would justify full refunds. As shown above, the FTC presented evidence that customers were entitled to refunds both under the terms of the Merchandise Rule and because they bought PPE in reliance on Zaappaaz's false shipping promises.

III. THE DISTRICT COURT PROPERLY DEEMED IT ESTABLISHED FOR TRIAL THAT ZAAPPAAZ RECEIVED $12.2 MILLION IN NET REVENUE FOR UNDELIVERED PRODUCTS.

Based on the parties' summary judgment filings, the district court properly deemed it established for trial that Zaappaaz's net revenue from undelivered and unrefunded PPE orders was $12,241,035.69. ROA.6470. Zaappaaz does not dispute that customers whose orders were never delivered are entitled to full refunds, but it argues that the district court erred by deeming the $12.2 million figure established. Br. 46-56. The argument is baseless. Rule 56(g) provides that "[i]f the court

does not grant all the relief requested by [a summary judgment] motion, it may enter an order stating any material fact—including an item of damages or other relief—that is not genuinely in dispute and treating the fact as established in the case." Fed. R. Civ. P. 56(g). The district court properly exercised its discretion to deem the $12.2 million figure established for trial because the summary judgment papers established that there was no genuine dispute as to this figure. As the court explained, relitigating these issues "would be duplicative and would contravene the purpose of Rule 56(g)." ROA.6470.

In support of its summary judgment motion, the FTC submitted a statement of undisputed material facts which asserted that "[Zaappaaz's] net revenue from undelivered and unrefunded orders was $12,241,035.69." ROA.2139. In support, the FTC cited the declaration of Mr. Jenkins, who calculated the $12.2 million figure using data obtained from Zaappaaz and third-party carriers, as set forth in the declaration of Ms. Miles. ROA.3512-17, 3523, 3528-29.

Zaappaaz did not present evidence to rebut Mr. Jenkins's calculations or offer a calculation of its own. Instead, Zaappaaz simply moved to exclude the Jenkins and Miles declarations. The magistrate

judge denied that motion and noted that Zaappaaz "d[id] not challenge the contents of Mr. Jenkins's summary." ROA.6243-44. In its Rule 56(g) order, the district court explained that by adopting the magistrate judge's report, it had denied the motion to exclude the Jenkins and Miles declarations and "established that there is no factual dispute as to the content of these declarations." ROA.6470; *see also* ROA.6656 (reiterating that the Court "rejected [Zaappaaz's] attempts to undermine the calculations that generated this figure" when it adopted the magistrate judge's report and issued the Rule 56(g) order).

Because Zaappaaz failed to challenge the substance of Mr. Jenkins's calculations in its summary judgment opposition, the district court did not abuse its discretion by deeming the $12.2 million figure established. *Cf. Kreg Therapeutics*, 919 F.3d at 411-12, 415 (no abuse of discretion in deeming issues of breach and performance established in breach-of-contract action where defendant failed to respond to plaintiff's statement of undisputed material facts).

Zaappaaz does not even acknowledge the abuse-of-discretion standard, much less show that the district court abused its discretion.

a. Zaappaaz misleadingly asserts that the FTC's summary judgment papers did not specifically reference the $12.2 million figure and that it therefore did not have sufficient notice of that figure. Br. 48-49. Zaappaaz claims that if it had known about the $12.2 million figure, it would have introduced rebuttal evidence to show that amount was in dispute. Br. 51.

In fact, the FTC's summary judgment motion argued that some consumers never received products "at all," and the FTC provided the $12.2 million figure in its statement of uncontested material facts and supported that assertion with evidence. ROA.2036, 2139, 3529. Moreover, Zaappaaz's summary judgment opposition shows that it was fully on notice of the $12.2 million figure. Zaappaaz expressly noted that Mr. Jenkins's declaration "purported to show what products were delivered, on time, late, and *not at all*", specifically cited the $12 million figure, and attached Mr. Jenkins's deposition transcript explaining his calculations in detail. ROA.4287, 4302-03, 5318-5481. But Zaappaaz did not controvert Mr. Jenkins's declaration—*i.e.*, offer evidence to show that the $12.2 million figure was inaccurate. ROA.6243, 6470. Instead, Zaappaaz put all of its efforts into trying to exclude the declaration.

Because Zaappaaz was on notice of the argument and failed to produce rebuttal evidence, the court did not abuse its discretion in treating the unchallenged $12.2 million figure as an established fact.

b. Zaappaaz errs in several respects in arguing (Br. 49) that the FTC's summary judgment reply "disavowed" the $12.2 million figure. First, because Zaappaaz did not make this argument in opposing the FTC's Rule 56(g) motion, the district court's failure to address it cannot be an abuse of discretion. Second, the FTC's reply came after Zaappaaz had filed its opposition, and thus could not have affected Zaappaaz's decision not to challenge the substance of Mr. Jenkins's calculations. Third, the FTC did not in fact "disavow" anything. The FTC simply clarified, in response to Zaappaaz's arguments, that the total consumer harm from late- or never-shipped PPE orders was $37.5 million and was not limited to the $12.2 million for undelivered product.

Nor does Zaappaaz show any abuse of discretion by emphasizing (Br. 49) the magistrate judge's statement that the FTC "made no showing as to any lesser amount" than the $37.5 million. ROA.6272. The district court agreed with and adopted the magistrate judge's findings that Zaappaaz did not challenge the substance of Mr. Jenkins's

calculations. And the court had discretion to reconsider the magistrate judge's assertion that the FTC did not show an entitlement to a lesser amount. *See Verizon*, 761 F.3d at 428.

c. Zaappaaz also argues that a Rule 56(g) determination was improper because the 2010 advisory committee note permits a nonmovant to "accept a fact for purposes of the motion only." Br. 55-56. But as the Seventh Circuit explained in *Kreg Therapeutics*, a litigant must tell the district court if it is accepting certain facts solely for purposes of a summary judgment motion. 919 F.3d at 415. Here, Zaappaaz made no such statement—it simply failed to produce rebuttal evidence.

d. Zaappaaz is not aided by its argument (Br. 51) that Mr. Jenkins's declaration merely addressed merchandise not "known to have been delivered." Mr. Jenkins relied on Zaappaaz's own business records, supplemented with information from carriers. To the extent that those records did not affirmatively show delivery, Mr. Jenkins could properly treat them as undelivered. *See* Fed. R. Evid. 803(7) (absence of record of regularly conducted business activity admissible to show matter did not occur or exist); 16 C.F.R. § 435.2(d) (absence of

records or documentary proof establishing use of systems to ensure compliance with the Merchandise Rule creates rebuttable presumption that seller failed to comply).

e. Finally, the district court also did not abuse its discretion by declining to consider the declaration from Mr. Makanojiya that Zaappaaz submitted with its Rule 56(g) opposition. By that time, discovery was closed and the summary judgment record was complete. It would have been highly prejudicial to the FTC to allow the introduction of new exhibits and analysis that Zaappaaz never disclosed in discovery. In any event, even if considered, the declaration would not establish a dispute of material fact as to the $12.2 million figure. First, the declaration was not based on personal knowledge. Mr. Makanojiya purports to describe a review of customer orders identified by the FTC as undelivered, but the review was done by someone else, and no declaration was submitted from the person who actually conducted it. ROA.6436. Second, although Mr. Makanojiya stated that Zaappaaz "believes" the orders were shipped, he did not attach shipment records; he merely says Zaappaaz did not have records of *complaints* about these orders. *Id.* Third, although Mr. Makanojiya attached a spreadsheet

(created by someone else) purportedly "confirm[ing]" that 307 of the orders were delivered, *id.*, the spreadsheet shows no such thing. It contains vague notes, apparently entered by Zaappaaz or its agents, which do not clearly show that any of these orders were shipped or delivered. ROA.6438-56. Even if the district court were required to consider this untimely declaration, the error would be harmless because the declaration does not create a genuine factual dispute.

CONCLUSION

The district court's judgment should be affirmed.

Respectfully submitted,

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November 18, 2024

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CERTIFICATE OF COMPLIANCE

I certify that the foregoing brief complies with the typevolume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 12,550 words, excluding the parts of the Brief exempted by Fed. R. App. P. 32((f). I further certify that the Brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and 5th Cir. Rule 32.1, and the type-style requirements of Fed. R. App. P. 32(a)(6), because it was prepared in a proportionally spaced typeface using Microsoft Word for Microsoft 365 in 14-point Century Schoolbook in text and 12-point Century Schoolbook in footnotes.

/s/ Matthew M. Hoffman
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November 18, 2024

ADDENDUM OF RELEVANT STATUTES AND REGULATIONS

United States Code, 2023 Edition
Title 15 - COMMERCE AND TRADE
CHAPTER 2 - FEDERAL TRADE COMMISSION; PROMOTION OF EXPORT TRADE AND PREVENTION OF UNFAIR METHODS OF COMPETITION
SUBCHAPTER I - FEDERAL TRADE COMMISSION
Sec. 45 - Unfair methods of competition unlawful; prevention by Commission
From the U.S. Government Publishing Office, www.gpo.gov

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

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

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

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

* * *

United States Code, 2023 Edition
Title 15 - COMMERCE AND TRADE
CHAPTER 2 - FEDERAL TRADE COMMISSION; PROMOTION OF EXPORT TRADE AND PREVENTION OF UNFAIR METHODS OF COMPETITION
SUBCHAPTER I - FEDERAL TRADE COMMISSION
Sec. 57b - Civil actions for violations of rules and cease and desist orders respecting unfair or deceptive acts or practices
From the U.S. Government Publishing Office, www.gpo.gov

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

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

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

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

(b) Nature of relief available

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

* * *

Code of Federal Regulations
Title 16 - Commercial Practices
Volume: 1
Date: 2024-01-01
Original Date: 2024-01-01
Title: Section 435.2 - Mail, Internet, or telephone order sales.
Context: Title 16 - Commercial Practices. CHAPTER I - FEDERAL TRADE COMMISSION. SUBCHAPTER D - TRADE REGULATION RULES. PART 435 - MAIL, INTERNET, OR TELEPHONE ORDER MERCHANDISE.

§ 435.2 Mail, Internet, or telephone order sales.

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

(a)(1) To solicit any order for the sale of merchandise to be ordered by the buyer through the mail, via the Internet, or by telephone unless, at the time of the solicitation, the seller has a reasonable basis to expect that it will be able to ship any ordered merchandise to the buyer:

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

(ii) If no time is clearly and conspicuously stated, within thirty (30) days after receipt of a properly completed order from the buyer. * * *

* * *

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

(b)(1) Where a seller is unable to ship merchandise within the applicable time set forth in paragraph (a)(1) of this section, to fail to offer to the buyer, clearly and conspicuously and without prior demand, an option either to consent to a delay in shipping or to cancel the

buyer`s order and receive a prompt refund. Said offer shall be made within a reasonable time after the seller first becomes aware of its inability to ship within the applicable time set forth in paragraph (a)(1) of this section, but in no event later than said applicable time.

* * *

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

* * *

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

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