25-12-cv(L)

25-16-cv(CON)

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

FEDERAL TRADE COMMISSION and PEOPLE OF THE STATE OF NEW YORK, by Letitia James, Attorney General of the State of New York,

Plaintiffs-Appellees,

v.

(*For continuation of caption see inside cover*)

On Appeal from the United States District Court
for the Southern District of New York
No. 1:17-cv-00124-LLS (Hon. Louis L. Stanton)

PAGE PROOF BRIEF FOR PLAINTIFF-APPELLEE FEDERAL TRADE COMMISSION

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QUINCY BIOSCIENCE HOLDING COMPANY, INC., a corporation; QUINCY BIOSCIENCE, LLC, a limited liability company; PREVAGEN, INC., a corporation d/b/a Sugar River Supplements; QUINCY BIOSCIENCE MANUFACTURING, LLC, a limited liability company; and MARK UNDERWOOD, individually and as an officer of Quincy Bioscience Holding Company, Inc., Quincy Bioscience, LLC, and Prevagen, Inc.,

Defendants-Appellants.

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INTRODUCTION

The Federal Trade Commission ("FTC" or "Commission") and the New York Attorney General ("NYAG") sued to enjoin Quincy Bioscience Holding Company and its affiliates (collectively, "Quincy") and its president and co-founder, Mark Underwood, from making unsubstantiated claims that a dietary supplement called Prevagen improves memory and provides other cognitive benefits. These claims were misleading: they were based on a study that did not, in fact, demonstrate that Prevagen had any effect on the subjects' memories. At a trial on the NYAG's claims, a jury evaluated eight statements in Prevagen advertising under New York law and found that they were not supported by competent and reliable scientific evidence and that they had a capacity or tendency to deceive. The jury also found that two of the statements were "materially" misleading, *i.e.*, that they would likely affect a reasonable consumer's conduct regarding Prevagen, such as a decision to buy or use it. Based on those findings, the district court held that Quincy violated both New York state law and the Federal Trade Commission Act. The court entered a nationwide injunction under the FTC Act barring Quincy from making all eight claims.

That injunction is amply supported by the law and the facts, and Quincy's challenges are meritless. The FTC Act permits the Commission to seek a permanent injunction against deceptive conduct in federal district court without also filing a separate administrative proceeding to obtain essentially the same relief. Every court of appeals to consider the question agrees, and the Supreme Court's decision in *AMG Capital Management, LLC v. FTC*, 593 U.S. 67 (2021), supports that unanimous interpretation of the statute.

The evidence presented to the jury was more than sufficient to support a determination of FTC Act liability. Having found a violation of the FTC Act, the district court did not abuse its discretion in crafting an injunction that barred Quincy from making all eight of the challenged statements. The jury found that two of the statements were materially misleading, which establishes that they violate the FTC Act. Although the jury did not find the other six statements *materially* misleading, those statements were far from innocent, and Quincy is wrong to describe them as "acquitted." The jury found that *all* the statements were unsupported by competent and reliable scientific evidence, which makes them all misleading under the FTC Act. The

jury also found that all the statements had a capacity or tendency to deceive. The statements all made similar claims regarding memory or cognition. The Supreme Court and this Court have long recognized that relief under the FTC Act may extend beyond the specific conduct found to violate the statute. Under this "fencing-in" principle, the district court had ample discretion to prohibit Quincy from using all eight misleading statements in its marketing nationwide.

Underwood separately challenges the district court's personal jurisdiction over him with respect to the FTC's claims. But Congress expressly authorized nationwide service of process in the FTC Act, permitting the district court to exercise personal jurisdiction over anyone found in the United States, regardless of their contacts to the forum state. Underwood's argument that proper venue is a precondition to the exercise of nationwide jurisdiction is wrong, but in any case, the venue was proper and Underwood waived any venue objection.

JURISDICTION

The FTC filed this action under Section 13(b) of the FTC Act, 15 U.S.C. § 53(b). The district court had subject matter jurisdiction over the FTC's claims under 28 U.S.C. §§ 1331, 1337(a), and 1345, and

supplemental jurisdiction over New York's claims under 28 U.S.C. § 1367(a). Dkt.1 at 2. The district court issued its memorandum and judgment on November 18, 2024, Dkt.513, and issued an order clarifying its injunction and denying New York's request to alter the judgment on December 6, 2024. Dkt.524. Quincy and Underwood both appealed on December 19, 2024. Dkt.525, 526.[1] This Court has appellate jurisdiction under 28 U.S.C. § 1291.

QUESTIONS PRESENTED

1. Does Section 13(b) of the FTC Act permit the FTC to sue for a permanent injunction in federal district court without also commencing a parallel administrative proceeding to obtain essentially the same relief?

2. Did the district court properly exercise its discretion in issuing a nationwide permanent injunction under the FTC Act barring use of all eight statements that the jury found were unsubstantiated, as well as similar statements?

3. Was the evidence at trial sufficient to support a finding of liability under the FTC Act?

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[1] New York cross-appealed on February 4, 2025. Dkt.535.

4. Did the district court properly exercise personal jurisdiction over Underwood based on the FTC Act's nationwide service provision?

STATEMENT OF THE CASE

The FTC brought this case to enjoin Quincy's deceptive marketing of Prevagen, alleging that the company's advertising violated the FTC Act because Quincy made health-related claims that were material and not supported by competent and reliable scientific evidence.

A. The FTC Act and the Substantiation Requirement

Section 5 of the FTC Act prohibits unfair or deceptive acts or practices in or affecting commerce. 15 U.S.C. § 45(a)(1). Section 12 of the FTC Act specifically bars false advertisements for the purpose of inducing the purchase of food, drugs, devices, services, or cosmetics, and provides that the dissemination of such advertisements is an unfair or deceptive act or practice. *Id.* § 52. A false advertisement is any advertisement (other than labeling) that is "misleading in a material respect," taking account not only of representations made or suggested but also the extent to which the advertisement fails to reveal material facts. *Id.* § 55(a)(1).

Congress "empowered and directed" the FTC to enforce these prohibitions through various means. *Id.* § 45(a)(2). Section 13(b) of the

FTC Act, the provision at issue here, authorizes the Commission to sue in district court in "proper cases" for a permanent injunction against FTC Act violations. *Id.* § 53(b). Alternatively, the Commission may choose to enforce the Act through its own internal administrative proceedings under Section 5(b). In administrative cases, the Commission acts as an adjudicatory body; if it finds a violation, it may issue a cease-and-desist order, which is subject to review in the courts of appeals. *Id.* § 45(b), (c).[2] When the Commission pursues administrative enforcement, it may also sue under Section 13(b) for a preliminary injunction to stop unlawful conduct during the pendency of the administrative proceeding. *Id.* § 53(b).

Regardless of which procedural route the FTC employs, the substantive legal standards for determining whether conduct is unfair or deceptive are the same. Deceptiveness requires (1) a representation, omission, or practice (2) that is likely to mislead consumers acting reasonably under the circumstances and (3) that is material. *E.g.*, *FTC*

[2] Administrative cases are ordinarily assigned to an administrative law judge for discovery and an initial hearing. The ALJ then issues a recommended decision, which is reviewed *de novo* by Commission. *See generally* 16 C.F.R. Pt. 3.

v. Verity Int'l, Ltd., 443 F.3d 48, 63 (2d Cir. 2006). An advertisement is misleading under the second prong of this test if it makes claims that are not adequately substantiated. *See generally* FTC, *FTC Policy Statement Regarding Advertising Substantiation* (Nov. 23, 1984), *appended to Thompson Med. Co.*, 104 F.T.C. 648, 839 (1984), *aff'd*, 791 F.2d 189 (D.C. Cir. 1986).[3] The level of required substantiation depends on context, but claims relating to health and safety must be supported by competent and reliable scientific evidence. *See, e.g.*, *Bristol-Myers Co. v. FTC*, 738 F.2d 554, 560 (2d Cir. 1984); *POM Wonderful, LLC v. FTC*, 777 F.3d 478, 500-05 (D.C. Cir. 2015).

B. Quincy's Marketing of Prevagen

Quincy is a biotechnology company started by Underwood with the primary purpose of commercializing Prevagen, a dietary supplement containing apoaequorin, a synthetic version of a protein found in jellyfish. Dkt.224 at 2, 224-2 at 2, 412 at 3. In 2016, Quincy added vitamin D to its Prevagen formulation. Dkt.412 at 2. Quincy's marketing emphasized apoaequorin's purported beneficial effects on

[3] Also available at www.ftc.gov/legal-library/browse/ftc-policy-statement-regarding-advertising-substantiation.

memory, particularly with respect to aging. *See, e.g.*, Dkt.224 at 2-6. National advertising campaigns touted Prevagen as clinically shown to improve memory within 90 days, reduce memory problems associated with aging, and provide other cognitive benefits. Dkt.1 at 21-23.

Quincy told consumers that it had verified the benefits of Prevagen through a "large double blind, placebo-controlled trial," which "show[ed] statistically significant improvements in word recall, in executive function, and also in short-term memory." Dkt.1-1 at 110. That trial, known as the Madison Memory Study, took place in 2009-2011 and had 218 participants. Dkt.412 at 3. The results failed to show a statistically significant improvement in the treatment group over the placebo group on any of the nine cognitive tasks assessed by the study. Dkt.426 at 178-79, 428 at 109-10, 114. Faced with that failure, Quincy's researchers attempted to spin the study in a favorable light, conducting dozens of post hoc analyses that broke down the data into smaller subgroups for each cognitive task. Dkt.426 at 178-79, 428 at 108-110, 113-14, 117-18. Although Prevagen had no statistically significant beneficial effect on the majority of subgroups, Quincy rested its advertising claims on a few positive results for isolated subgroups,

despite the fact that those results could have been false positives occurring by chance. *Id.*

C. The FTC and NYAG's Lawsuit and the Evidence at Trial

The FTC and NYAG sued Quincy and Underwood in 2017, alleging false advertising of Prevagen. The FTC filed its case as a standalone action for a permanent injunction under Section 13(b) of the FTC Act, alleging that defendants engaged in deceptive acts or practices and disseminated false advertising in violation of Sections 5 and 12. The NYAG alleged violations of New York General Business Law Sections 349 and 350, as well as Executive Law Section 63(12), and sought both injunctive relief and monetary relief in the form of statutory penalties, disgorgement, and costs. Dkt.1 at 1-2.

The complaint challenged eight statements made by Quincy in its marketing of Prevagen:

a. Prevagen improves memory;

b. Prevagen is clinically shown to improve memory;

c. Prevagen improves memory within 90 days;

d. Prevagen is clinically shown to improve memory within 90 days;

e. Prevagen reduces memory problems associated with aging;

f. Prevagen is clinically shown to reduce memory problems associated with aging;

g. Prevagen provides other cognitive benefits, including but not limited to healthy brain function, a sharper mind, and clearer thinking; and

h. Prevagen is clinically shown to provide other cognitive benefits, including but not limited to healthy brain function, a sharper mind, and clearer thinking.

Id. at 26-29.

The district court initially dismissed the case for failure to state a claim. Dkt.45. This Court reversed, holding that "[t]he FTC and New York have made plausible allegations that Quincy's marketing campaign for Prevagen contained deceptive representations." *FTC v. Quincy Bioscience Holding Co.*, 753 F. App'x 87, 89 (2d Cir. 2019). On remand, the district court denied Underwood's motion to dismiss the FTC Act claims for lack of personal jurisdiction because Section 13(b) authorizes nationwide personal jurisdiction and thus a defendant need not have minimum contacts with the forum state. Dkt.72 at 14. The

court later denied Quincy's motion for summary judgment. Dkt.331. It held that what constitutes competent and reliable scientific evidence in any given case—and in particular whether a randomized and controlled clinical trial is required to substantiate claims—was a disputed question of fact that needed to be resolved at trial based on expert testimony. *Id.* at 12-16. It further held that evidence of consumer perceptions was not needed to establish liability because claims that are not adequately substantiated are deceptive as a matter of law. *Id.* at 16.

Because the NYAG (unlike the FTC) sought monetary penalties, the New York claims were tried to a jury. The district judge told the jury at voir dire that the FTC's claims would be determined in a "second phase" following the "first phase" of the jury trial on the NYAG's claims, and that the jury would not be involved in the second phase. Tr. at 7 (Feb. 21, 2024).[4] At trial, dozens of exhibits showed that Quincy made the challenged claims in its marketing of Prevagen, including advertisements and packaging. Dkt.424 at 46-79. And expert testimony

[4] The FTC was permitted to participate in the jury trial only in a limited capacity; for example, it was not permitted to make opening or closing statements and FTC lawyers were not permitted to identify themselves as such. FTC lawyers were, however, permitted to examine witnesses and offer evidence.

showed that the claims were unsubstantiated and therefore misleading. Dr. Mary Sano, a professor of psychiatry and director of research in the Alzheimer's Disease Research Center at Mount Sinai Medical School, opined that, in this case, the "competent and reliable scientific evidence" standard required an RCT—a randomized, controlled, double-blinded clinical trial—to substantiate claims of the efficacy of Prevagen for memory and other cognitive benefits. Dkt.426 at 93-97, 128-29. She testified that the RCT on which Quincy relied, the Madison Memory Study, was insufficient to support claims that Prevagen could improve memory or cognition. *Id.* at 96-97, 102, 104-05, 108-10, 113-17, 122-23. Dr. Sano also testified that open-label research studies could not serve as reliable evidence of Prevagen's efficacy because the subjects knew that they were taking Prevagen, and that neither in vitro nor animal studies could establish that a treatment is effective in humans. *Id.* at 119, 121-22. Furthermore, after reviewing meta-analyses and clinical trials related to vitamin D, Dr. Sano found no evidence that vitamin D improves memory or cognition for consumers who are not vitamin D-deficient. *Id.* at 117-19.

Similarly, Dr. Janet Wittes, an expert in the field of biostatistics and the design and analysis of clinical trials, testified that the results of the Madison Memory Study were not reliable evidence of Prevagen having any benefit over a placebo for multiple reasons, including that the results were not statistically significant for the entire study population and because the purportedly statistically significant subgroup results that Quincy cited were unreliable and could not be used to attribute any effect to Prevagen. *Id.* at 178-79. Dr. Wittes testified that all available evidence suggested that the subgroups were examined "post hoc," *i.e.*, after Quincy had already examined the data collected, a situation she analogized to picking the winner of a horse race after the race was already over. *Id.* at 179, Dkt.428 at 103-04, 108-10, 128-29. In addition, even if the subgroup statistical analyses had been part of the original study design, Quincy would have needed to apply a statistical correction (which they did not) in order to account for the increased risk of false positives that occurs when conducting numerous analyses. Dkt.428 at 113-14, 117-18, 124-25, 128-29.[5]

[5] Testimony from Quincy's market development director, Todd Olson confirmed how Quincy's advertising further misrepresented the results

Quincy also presented testimony from several experts in an effort to support Quincy's position that its proffered evidence, including the Madison Memory Study, was sufficient to substantiate the claims under the "competent and reliable scientific evidence" standard. Additionally, Quincy sought to suggest that vitamin D might improve cognitive function. But Quincy conducted no studies on the formulation of Prevagen with vitamin D, Dkt.412 at 5, and Quincy's nutrition expert, Dr. Mindy Kurzer, who testified about vitamin D for Quincy, offered no opinion on whether the vitamin D studies she evaluated showed that Prevagen improves memory or provides cognitive benefits and conceded that they did not demonstrate that taking vitamin D caused improvement in memory or cognitive function in the general population. Dkt.436 at 50, 79, 80.

D. The Jury Verdict, Liability Findings, and Injunction

Applying New York law, the jury found that (1) Quincy made all eight challenged statements, (2) none of the statements was supported by competent and reliable scientific evidence, and (3) that statements e

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of the Madison Memory Study by omitting data that did not conform to an overall "trend" line and omitting the placebo group from a graph that purported to present the study results. Dkt.424 at 52-53, 63, 79-81

and f, about reduction of memory problems associated with aging, were materially misleading. Dkt.421 at 1-5. The jury also found that all eight statements have a capacity or tendency to deceive. *Id.* at 8. The district court denied Quincy's renewed motion for judgment as a matter of law ("JMOL"), holding that "[t]he trial record supports the verdict." Dkt.457 at 2.

The court later held that because the FTC Act and the New York law claims share "essentially the same legal elements," it was bound to follow the jury verdict and hold the defendants liable under the FTC Act for statements e and f. Dkt.493 at 2-3. The court thus entered judgment against the defendants. Dkt.513. Reiterating the jury's findings that "none of [the eight] statements was supported by competent and reliable scientific evidence, … two of them … were materially misleading," and "[e]ach of them has a tendency to deceive," the court issued an injunction requiring defendants to "immediately remove all [eight] statements (and any others similar to them) from use in connection with any and all forms of promotion of Prevagen, and cease their use in the promotion of Prevagen in any way." *Id.* at 2. The court

held that the injunction was "[t]he full, fair and proper determination of this action." *Id.*

Quincy sought clarification of the injunction's scope, arguing that it should be limited geographically to New York. Dkt.515 at 3. In response, the court clarified that the injunction applies "nationally wherever Prevagen is marketed." Dkt.524 at 2. The court further explained that it was appropriate to enjoin all eight of the challenged statements under the FTC Act and the well-established "fencing-in" doctrine, which permits remedies that reach conduct beyond the specific activities found to be unlawful. *Id.* at 2-4. The court explained that Quincy "continued to use the Challenged Statements after trial and the Court's order imposing FTC Act liability, which demonstrates a high likelihood—indeed a near assurance—of future violations that may deceive consumers nationwide." *Id.* at 3. Furthermore, each of the eight statements "asserts similar, unsupported claims regarding memory or cognition, and although only two statements were materially misleading, all have the capacity or tendency to deceive, which is inconsistent with the purpose of the FTC Act." *Id.* at 3-4. The court thus

deemed an injunction against all eight statements to be appropriate. *Id.* at 4.

This appeal followed.[6]

SUMMARY OF ARGUMENT

Section 13(b) authorizes a district court to issue a permanent injunction against violations of the FTC Act, including the statutory prohibitions against unfair or deceptive acts or practices and false advertising. Here, the court properly concluded that the jury's findings based on the evidence presented at trial compelled the conclusion that Quincy and Underwood violated Sections 5 and 12 of the FTC Act by making materially misleading statements about the health benefits of Prevagen. And the court properly exercised its equitable discretion to prohibit the defendants from making all eight statements—all of which the jury found were unsubstantiated and have a capacity or tendency to deceive—and any similar statements.

Contrary to Quincy's argument, Section 13(b) of the FTC Act does not require the FTC to initiate a separate administrative proceeding

[6] Quincy sought a stay of the injunction pending appeal in the district court and this Court. The district court denied the request on January 13, 2025, and this Court denied the request on May 13, 2025.

when it sues for a permanent injunction. That conclusion is compelled by the text and structure of the statute, 40 years of consistent case law from multiple circuits, and an unambiguous statement in the relevant legislative history. A contrary reading would make no sense. Since an administrative cease and desist order has the same effect as a permanent injunction, there would be no point in requiring the Commission to seek both—and such a requirement would effectively nullify Section 13(b)'s permanent injunction proviso.

Furthermore, the Supreme Court's recent decision in *AMG* expressly recognized that the Commission may seek an injunction under Section 13(b) either when administrative proceedings are foreseen or in progress or when it wishes to dispense with administrative proceedings altogether. Since *AMG* was decided, courts have continued to recognize that Section 13(b) gives the FTC authority to sue for a standalone permanent injunction under Section 13(b). No court before or after *AMG* has ever held to the contrary.

The scope of the injunction is proper. The district court properly exercised its discretion to enjoin all eight challenged statements, given the jury's findings that all eight statements were unsubstantiated (and

therefore misleading under the FTC Act) and that they all had the capacity or tendency to deceive. The court was not required to limit the injunction to the two statements the jury found to be *materially* misleading. The law is clear that the remedy for that violation need not be limited only to the specific conduct that violated the statute; those who are caught violating the FTC Act must expect some fencing in. That principle squarely applies here where all of the statements were similar in character and they were all found to be unsubstantiated.

The district court also properly enjoined Quincy from making statements similar to the challenged statements. This provision was appropriate to ensure that Quincy does not evade the injunction by making essentially the same claims in another form. Quincy waived its argument that the injunction does not meet Rule 65(d)'s specificity requirement by failing to raise that claim in the district court. In any case, the injunction does not violate the specificity requirement because read in context it gives Quincy adequate notice of what is prohibited.

Quincy's challenges to the sufficiency of the evidence also fail. Extrinsic evidence of consumer perception was not needed in this case, because the claims could be assessed from the face of the advertising

and consumer perception is not relevant to a determination of whether claims are adequately substantiated. Whether claims are supported by competent and reliable scientific evidence is a case-specific inquiry that must be determined based on the testimony of experts in the relevant fields. Here, the expert testimony at trial amply supports the jury's finding that the eight statements were not supported by competent and reliable scientific evidence.

Finally, the district court correctly exercised personal jurisdiction over Underwood because Section 13(b) of the FTC Act authorizes nationwide service of process, and thus permits the exercise of personal jurisdiction regardless of a defendant's ties with the forum state. Underwood's argument that nationwide service is available only where venue is proper cannot be squared with the text of the statute. But in any case, venue was proper and Underwood waived any venue objection.

STANDARDS OF REVIEW

The district court's authority to issue a permanent injunction is a question of law that may be reviewed de novo. *See, e.g.*, *Monasky v. Taglieri*, 589 U.S. 68, 83 (2020) ("Generally, questions of law are

reviewed *de novo*."). The scope of the injunction is reviewed for abuse of discretion. *See. e.g.*, *Deere & Co. v. MTD Prods., Inc.*, 41 F.3d 39, 46 (2d Cir. 1994). Relief under the FTC Act must be affirmed unless "the remedy selected has no reasonable relation to the unlawful practices found to exist." *FTC v. Colgate-Palmolive Co.*, 380 U.S. 374, 394-95 (1965). The Court reviews de novo whether the form of an injunction complies with Rule 65(d). *City of New York v. Mickalis Pawn Shop, LLC*, 645 F.3d 114, 143 (2d Cir. 2011).

Orders denying summary judgment (to the extent they are reviewable at all) and judgment as a matter of law are reviewed de novo.[7] *See, e.g.*, *Sanders v. N.Y.C. Human Res. Admin.*, 361 F.3d 749, 755 (2d Cir. 2004). The standards for summary judgment and JMOL are essentially the same. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986). The question is ultimately whether there is a "legally sufficient evidentiary basis" for a reasonable jury to have reached the result that it did. Fed. R. Civ. P. 50(a)(1).

[7] Factual issues addressed in summary judgment denials are unreviewable, though rulings on purely legal issues are not. *Dupree v. Younger*, 598 U.S. 729, 735-36 (2023).

This Court reviews a district court's assertion of personal jurisdiction de novo. *PDK Labs, Inc. v. Friedlander*, 103 F.3d 1105, 1108 (2d Cir. 1997).

ARGUMENT

I. THE FTC CAN SUE FOR A PERMANENT INJUNCTION UNDER SECTION 13(B) WITHOUT A DUPLICATIVE ADMINISTRATIVE PROCEEDING.

Section 13(b) of the FTC Act authorizes the Commission to sue in federal district court for a permanent injunction without separately commencing a parallel administrative proceeding under Section 5(b). *See* 15 U.S.C. §§ 45(b), 53(b). The plain terms of the statute make this clear, and every court of appeals to consider the question agrees. The Supreme Court's recent decision in *AMG* confirms this reading, which is also supported by the statute's legislative history.

A. Statutory Text and Uniform Precedent Establish That Section 13(b) Authorizes Standalone Injunction Actions.

On its face, Section 13(b) authorizes two different kinds of actions. The first part of the statute permits the FTC to bring an action for a TRO or preliminary injunction in aid of an administrative proceeding, *i.e.*, to temporarily halt allegedly unlawful conduct pending the outcome of a Commission proceeding under Section 5(b). But a proviso following

the language about preliminary injunctions and administrative proceedings states that "in proper cases the Commission may seek, and after proper proof, the court may issue, a permanent injunction." 15 U.S.C. § 53(b). The Ninth Circuit analyzed the statutory text in *FTC v. H.N. Singer, Inc.*, 668 F.2d 1107 (9th Cir. 1982), and held that the proviso "does not on its face condition the issuance of a permanent injunction upon the initiation of administrative proceedings." *Id.* at 1110. The court held that this interpretation was "the natural reading of the statute" and produced "a clear and coherent policy." *Id.* at 1111.

Other circuits have reached the same conclusion. In *United States v. JS&A Group., Inc.*, 716 F.2d 451 (7th Cir. 1983), the Seventh Circuit noted that although the first part of Section 13(b) "limits the availability of preliminary injunctive relief to situations 'pending issuance of a complaint by the Commission,' … [n]o similar language is found in the second proviso relating to permanent injunctive relief." *Id.* at 456 (quoting 15 U.S.C. § 53(b)). The court held that because "[p]reliminary relief and a permanent injunction are entirely different animals," the text shows that "Congress clearly intended that each be governed by a separate statutory provision." *Id.* "Had Congress

intended the initiation or not of an administrative cease and desist proceeding to affect the ability of the Commission to seek permanent injunctive relief, it undoubtedly would have included language similar to that found in the provision governing preliminary injunctive relief." *Id.* The Eleventh Circuit likewise rejected the argument that the FTC must file an administrative proceeding when it sues under the permanent injunction proviso. *FTC v. U.S. Oil & Gas Corp.*, 748 F.2d 1431, 1434-35 (11th Cir. 1984).

Consistent with these decisions, this Court (along with many other courts of appeals) has repeatedly upheld permanent injunctions issued under Section 13(b) without requiring a parallel administrative proceeding. *See, e.g.*, *FTC v. Bronson Partners, LLC*, 654 F.3d 359, 375 (2d Cir. 2011); *Verity* 443 F.3d at 65. No court has ever held that the permanent injunction proviso requires the FTC to initiate an administrative proceeding.

Ordinary principles of statutory interpretation confirm this reading. Statutes should be interpreted "to give effect, if possible, to every clause and word and to avoid statutory interpretations that render provisions superfluous." *E.g.*, *Starbucks Corp. v. Wolfe's Borough*

Coffee, Inc., 736 F.3d 198, 209 (2d Cir. 2013). Reading Section 13(b) to require an administrative proceeding in every case would make the permanent injunction proviso useless. There is no need for the Commission to seek a permanent injunction when it proceeds administratively because the only remedy available in an administrative case—a cease-and-desist order—serves the same function as a permanent injunction; both remedies prospectively bar a party from future conduct that violates the FTC Act. By contrast, as *Singer* and *JS&A* recognize, reading the preliminary injunction language and the permanent injunction proviso as alternative enforcement mechanisms produces a coherent enforcement scheme that gives effect to all parts of Section 13(b).

The fact that the permanent injunction authorization appears in a proviso after the main body of the statute further confirms that it grants an additional, separate power. As the Supreme Court has explained, a proviso need not "refer only to things covered by a preceding clause"; "it may also "state a general, independent rule." *Alaska v. United States*, 545 U.S. 75, 106 (2005). For example, in *Republic of Iraq v. Beaty*, 556 U.S. 848 (2009), the Court held that the

principal clause of a statute "granted the President a power," while a proviso "purported to grant him an *additional* power" and "was not, on any fair reading, an exception to, qualification of, or restraint on the principal power." *Id.* at 858. The same logic applies here. The first part of Section 13(b) authorizes the FTC to seek and the district court to grant a preliminary injunction in aid of an administrative proceeding. The permanent injunction proviso grants an *additional* power, authorizing the FTC to seek and the court to issue a permanent injunction, without filing an administrative case.

And if there were any doubt as to the correct reading of Section 13(b), the legislative history (cited in both *Singer* and *JS&A*) makes it crystal clear that Congress intended to authorize the FTC to bring standalone actions for permanent injunctions. The relevant Senate Report explains that "the Commission will have the ability … to *merely* seek a permanent injunction *in those situations in which it does not desire to further expand upon the prohibitions of the Federal Trade Commission Act through the issuance of a cease-and-desist order*." S. Rep. 93-151, at 31 (1973) (emphasis added). By allowing the FTC to forgo administrative proceedings and simply sue in district court, the

Report explains, "Commission resources will be better utilized, and cases can be disposed of more efficiently." *Id.*[8]

Thus, a "proper case" for a permanent injunction is one that the Commission determines can most efficiently and effectively be litigated in federal court without the need for an administrative proceeding and in which the ordinary requirements for a permanent injunction are satisfied. The Commission is uniquely positioned to make the assessment as to which enforcement mechanism will best serve the public interest and how agency resources are best deployed, and the statute gives it the authority to make that choice.

B. *AMG* Confirms That Section 13(b) Authorizes Standalone Injunction Actions.

The Supreme Court's decision in *AMG* confirms that the Commission may sue for a standalone permanent injunction under Section 13(b) without also pursuing an administrative complaint and a cease-and-desist order. In *AMG*, the Supreme Court held that Section 13(b)'s permanent injunction authority is limited to prospective relief

[8] Quincy ignores the Senate Report, instead citing only an irrelevant floor comment from a House member that does not address the permanent injunction proviso. Quincy Br. 49.

and does not permit the FTC to obtain equitable monetary relief, which is retrospective in nature. *AMG*, 593 U.S. at 70. But the Court agreed that the permanent injunction proviso in Section 13(b) can be "read … as granting authority for the Commission to go one step beyond the provisional and ('in proper cases') dispense with administrative proceedings to seek what the words literally say (namely, an *injunction*)." *Id.* at 76. And it went on to say that "the Commission may use § 13(b) to obtain injunctive relief while administrative proceedings are foreseen or in progress, *or* when it seeks only injunctive relief." *Id.* at 78 (emphasis added). The Court thus recognized that the FTC could obtain injunctive relief when administrative proceedings are not "foreseen or in progress." *Id.*

In the wake of *AMG*, courts have continued to hold that Section 13(b) permits the Commission to file standalone actions for permanent injunctions without also commencing an administrative proceeding. Just last year, this Court held that Section 13(b) "authorizes the FTC to bring actions seeking injunctive relief for violations of the Act," and that "[u]pon a proper showing, a district court may issue a permanent injunction." *FTC v. Shkreli*, No. 22-728, 2024 WL 1026010, at *2 (2d

Cir. Jan. 23, 2024). Likewise, the Eleventh Circuit held that "*AMG* reaffirmed district courts' authority to award prospective injunctive relief, like the injunction the district court entered here"—in a standalone injunction case—"under § 13(b)." *FTC v. Nat'l Urological Grp., Inc.,* 80 F.4th 1236, 1243 (11th Cir. 2023). The Fourth Circuit has similarly held that "*AMG* did not impair courts' ability to enter injunctive relief under Section 13(b)." *FTC v. Pukke*, 53 F.4th 80, 106 (4th Cir. 2022). And the Ninth Circuit has issued two unpublished decisions holding that *AMG* does not undermine *Singer*'s holding that the FTC can obtain a permanent injunction without initiating administrative proceedings. *See FTC v. Elegant Sols.*, No. 20-55766, 2022 WL 2072735, at *2 (9th Cir. June. 9, 2022); *FTC v. Hoyal & Assocs., Inc.*, 859 F. App'x 117, 120 (9th Cir. 2021) (FTC "can obtain injunctive relief without initiating administrative proceedings" and "the district court did not err in concluding that this is a 'proper case'").

Furthermore, the Ninth Circuit on remand in *AMG* left intact the permanent injunction it had previously affirmed, vacating only the grant of monetary relief. *FTC v. AMG Cap. Mgmt., LLC*, 998 F.3d 897 (9th Cir. 2021). Likewise, in *FTC v. Credit Bureau Center, LLC*, 937

F.3d 764 (7th Cir. 2019), which created the circuit split over monetary relief that the Supreme Court resolved in *AMG*, the Seventh Circuit affirmed the permanent injunction and only vacated the district court's award of monetary relief. *Id.* at 770-71. Those cases confirm that *AMG* did not undermine the longstanding authority establishing that the FTC can seek a permanent injunction without initiating an administrative proceeding.

C. The "Proper Cases" Language Does Not Prohibit Standalone Injunction Actions.

Despite the decades-long string of unbroken precedent establishing that Section 13(b) permits standalone injunction actions, Quincy argues that a "proper case" for a permanent injunction requires the FTC to pursue an administrative proceeding at the same time. Quincy Br. 47-49. That argument is entirely unfounded. Quincy not only ignores the extensive case law cited above from both before and after *AMG*, but it misunderstands the decision in *AMG* itself, which states that "the Commission may use § 13(b) to obtain injunctive relief while administrative proceedings are foreseen or in progress, *or* when it seeks only injunctive relief." 593 U.S. at 78 (emphasis added). Instead, Quincy focuses on the portion of *AMG* explaining that Section 13(b),

"[t]aken as a whole … focuses upon relief that is prospective, not retrospective," and thus does not authorize monetary relief for past harms. *Id.* at 76. In that context, the Court observed that "the appearance of the words 'permanent injunction' (as a proviso) suggests that those words are directly related to a previously issued preliminary injunction." *Id.* As the context makes clear, those statutory references are "related" because both refer to prospective injunctive relief.

Quincy is wrong to suggest that the quoted passage reflects any holding about the question at issue in this case—whether a permanent injunction is available apart from an FTC administrative proceeding. Instead, the Court was linking the statute's references to prospective injunctions—both preliminary and permanent—to illustrate that the reference to a permanent injunction did not encompass retrospective equitable monetary relief. The Court emphasized this point in the very next sentence, which goes on to say that these words "might also be read … as granting authority for the Commission to go one step beyond the provisional and ('in proper cases') dispense with administrative proceedings to seek what the words literally say (namely, an injunction)." *Id.* The Court implicitly acknowledged that the

Commission might "dispense with administrative proceedings" when seeking a permanent injunction but observed that the statute could not be read to allow the Commission "to obtain monetary relief as well" in such a circumstance. *Id.* at 76-77. *AMG* thus does not support Quincy's argument. The Court did not purport to hold, or even suggest, that the FTC may seek a permanent injunction under Section 13(b) only if it also initiates an administrative proceeding. Consistent case law applying *AMG* in recent years confirms that reading.

Quincy also misapplies the canon against surplusage, suggesting that allowing a permanent injunction in *all* cases under Section 13(b) would deprive "proper cases" and "proper proof" of any meaning. Quincy Br. 48. Not so. As discussed above, a "proper case" is one in which the Commission has determined that the public interest is best served by judicial rather than administrative enforcement and the usual requirements for a permanent injunction are satisfied. "Proper proof" means that the FTC must introduce evidence to prove the FTC Act violation. By contrast, Quincy's reading of the statute would render the permanent injunction proviso surplusage because there would be no need for the FTC to seek a permanent injunction from a court when it is

also seeking a cease-and-desist order with respect to the same conduct in an administrative proceeding.

Quincy's reliance on the heading of Section 13(b) that appears in the U.S. Code (Br. 47-48) is misplaced. That heading is not part of the statutory text that Congress enacted. *See* Pub. L No. 93-153, tit. IV, § 408(f), 87 Stat. 576, 592 (1973). The heading was added by the Office of Law Revision Counsel, congressional staff who compile the U.S. Code. Headings that are not enacted by Congress have no weight in statutory interpretation. *See, e.g.*, *United States v. Ehmer*, 87 F.4th 1073, 1112 (9th Cir. 2023).

II. THE SCOPE OF THE INJUNCTION IS PROPER.

Because the district court concluded (based on the jury's findings) that two of Quincy's statements violated the FTC Act—*i.e.*, they were conveyed and were both unsubstantiated and material—it had authority to enter a nationwide injunction under Section 13(b). The district court properly exercised that authority to bar Quincy from making all eight of the challenged statements and other similar statements. Quincy's challenges to the scope and form of the injunction are meritless.

A. The District Court Properly Barred Quincy From Making All Eight Challenged Statements.

Although the district court only found that statements e and f (relating to reduction of memory problems associated with aging) violated the FTC Act, it nonetheless properly enjoined defendants from making all eight of the challenged statements. Quincy's assertion that the other six statements were "acquitted" or "held to be *lawful*" (Br. 21, 22) mischaracterizes both the court's decision and the jury's findings, and ignores the evidence in the record. The jury found that *all* eight statements were unsupported by competent and reliable scientific evidence. Dkt.421 at 2. That in itself establishes that the statements were misleading for purposes of the FTC Act. *See, e.g.*, *ECM Biofilms, Inc. v. FTC*, 851 F.3d 599, 616-17 (6th Cir. 2017).[9] The jury's additional finding that all eight statements had the capacity or tendency to deceive is icing on the cake.[10]

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[9] Consistent with the FTC Act standard, the district court instructed the jury that "[a] challenged statement is misleading to a reasonable customer if the Quincy defendants lacked, did not have, competent and reliable scientific evidence to support it." Dkt.442 at 81.

[10] The Court need not address Quincy's argument (Br. 25-26) that the "capacity to deceive" finding made under the New York Executive Law is based on a legal standard different from the standard for deception

To be sure, materiality is also an element of deceptiveness under the FTC Act, *see, e.g.*, *Verity*, 443 F.3d at 63, and the jury found that only two of the statements were *materially* misleading. Consistent with the FTC Act standard, the district court instructed the jury under New York law that "[a] challenged statement is material if it involves information important to consumers and is likely to affect their conduct regarding a product, such as a decision to buy it or use it." Dkt.442 at 82. The only plausible reading of the jury's verdict is that even though all eight statements were misleading, only two of those statements were likely to affect consumers' decisions to purchase or use Prevagen. That is certainly not an exoneration of the other statements.

Under these circumstances, the district court acted well within its discretion in enjoining the use of all eight statements. It is well settled that a remedial order for violations of the FTC Act may extend beyond the specific practices found to be unlawful. For example, in *FTC v.*

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under the FTC Act, since the finding that the claims were unsubstantiated shows they were misleading under the FTC Act. In any case, the capacity to deceive finding further undermines Quincy's argument that claims were "acquitted" and reinforces the district court's conclusion that an injunction against all eight statements was appropriate.

National Lead Co., 352 U.S. 419 (1957), where lead pigment producers engaged in a price fixing conspiracy, the Commission barred them from utilizing a "zone pricing" plan, even though that system "might be used for some lawful purposes." *Id.* at 430. Rejecting a challenge to the remedy, the Court explained that "those caught violating the Act must expect some fencing in." *Id.* at 431. Such a remedial plan must be affirmed unless it has "no reasonable relation to the unlawful practices found to exist." *Id.* at 428.

The Supreme Court reiterated these principles in *Colgate-Palmolive.* In that case, the respondents advertised a shaving cream with television commercials that falsely presented a "sandpaper test" as genuine when in fact a mock-up or prop was used in lieu of sandpaper. 380 U.S. at 376. The Commission's order was not limited to shaving cream but also prohibited "similar practices with respect to 'any product'" advertised. *Id.* at 394. The Court applied *National Lead's* "reasonable relation" test and concluded that it was "reasonable for the Commission to frame its order broadly enough to prevent respondents from engaging in similarly illegal practices in future advertisements." *Id.* at 394-95. The Court again emphasized that parties "caught

violating the Act … 'must expect some fencing in.'" *Id* at 395 (quoting *National Lead*, 352 U.S. at 431).

Applying these principles, this Court held in *Bristol-Myers* that under the 'fencing-in' doctrine, an FTC Act remedy may "extend[] beyond the precise illegal conduct found." 738 F.2d at 561. That case involved several deceptive claims about a pharmaceutical company's aspirin products. Most notably, the company deceptively advertised that its products contained "unusual" or "special" ingredients so as to conceal that the products were aspirin-based. *Id.* at 557-58. The Commission's order barred special ingredient advertising for all over-the-counter products when the ingredient was commonly used in other products for the same purpose. *Id.* at 558. The company argued that the order was overbroad because the Commission had resolved one of the special-ingredient allegations in the company's favor. *Id.* at 562. But the Court disagreed, holding that the order was proper fencing-in relief because it was "reasonably related to the violation made by misrepresenting that [the products] do not contain aspirin." *Id.* at 563.[11]

[11] The Court also held that the Commission properly ordered the company "not to make 'any therapeutic performance or freedom-from-

Although *National Lead*, *Colgate-Palmolive*, and *Bristol-Myers* all involved petitions for review of Commission orders in administrative cases, courts have applied the same fencing-in doctrine to district court permanent injunctions in cases under Section 13(b). *See, e.g.*, *Pukke*, 53 F.4th at 110; *FTC v. Grant-Connect, LLC*, 763 F.3d 1094, 1105 (10th Cir. 2014). The district court properly applied these principles in issuing the injunction here, noting that it had "broad discretion in framing an injunction in terms it deems reasonable to prevent wrongful conduct." Dkt.524 at 2-3 (quoting *Shkreli*, 2024 WL 1026010, at *2). Citing *Bristol-Myers*, the court correctly noted that the fencing-in doctrine permits a court to "enjoin lawful conduct or statements … to prevent future misconduct." *Id.* at 3. The court explained that although only two of the challenged statements were *materially* misleading, all eight

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side-effects claim'" without "competent and reliable scientific evidence supporting that claim." *Id.* at 557. The company argued that the order was overbroad because "the only effectiveness claim … found to be without a reasonable basis" was a claim that the aspirin products "relieved tension." *Id.* at 561. But the Court applied the fencing-in doctrine and held that it was proper for the Commission to "rely on false establishment claims as a basis for extending the Order's coverage to deceptive nonestablishment claims." *Id.* "To rule otherwise would allow Bristol to continue to make the same unsubstantiated and false claims by simply removing the 'doctors recommend' language from its advertisements." *Id.*

statements asserted "similar, unsupported claims regarding memory or cognition," and "all have the capacity or tendency to deceive, which is inconsistent with the purpose of the FTC Act." *Id.* at 2-4. The court therefore deemed it appropriate to enjoin all eight statements.

The fact that some of Quincy's misleading claims may not independently violate the FTC Act (because the jury was not persuaded that they would influence consumer purchase or use decisions) does not prevent the district court from enjoining those statements as part of a comprehensive remedy for the violations the court found. Because the statements have a "reasonable relation to the unlawful practices found to exist," *Colgate-Palmolive*, 380 U.S. at 394-95, it was within the court's discretion to enjoin them all. While Quincy might prefer a narrower injunction, a defendant that has violated the FTC Act is not entitled to dictate the terms of the remedy for its violations.

Quincy erroneously claims (Br. 23) that this Court in *ITT Continental Baking Co. v. FTC*, 532 F.2d 207 (2d Cir. 1976), prohibited the extension of an injunction to "exonerated" conduct. As discussed above, the six statements at issue here were in no meaningful way "exonerated"; they were all unsubstantiated and they all have a

capacity or tendency to deceive. But in any case, Quincy misreads *ITT*, which did not announce any such categorical rule. The Court described "exoneration" on several claims as "a factor to be weighed in judging the reasonableness of an order," but nonetheless concluded that "as a general rule," the failure to prove all charges originally brought does "not necessarily preclude" broad relief based on the violations found. *Id.* at 221.

Furthermore, the exoneration in *ITT* stemmed from the fact that the Commission found that eleven of the twelve statements challenged in the administrative complaint were not in fact made—not that those statements would not have been deceptive if they had been made. *Id.* at 212-13, 221. The cease-and-desist order barred misrepresentations about the nutritional properties of the product (Wonder Bread), but "the Commission specifically found that Wonder Bread had *not* been misrepresented as nutritionally superior to other breads, or as necessary for children's healthy growth and development." *Id.* at 221. The Court thus held that remedial provisions directed toward nutrition claims were not "reasonably calculated to prevent future violations of the sort found to have been committed." *Id.* That is not the case here,

where the statements all related to memory or cognition and the jury found that that all of the statements were in fact made and were misleading. There was no reason for the district court to deviate from the "general rule" recognized in *ITT* that a minor failure of proof with respect to one claim does not preclude the entry of a broader order to prevent future violations of the law.

Quincy's reliance on *Mickalis Pawn Shop* (Br. 21-22) is also misplaced. That case did not involve the FTC Act at all, and the injunction at issue was nothing like the one the district court entered here. In *Mickalis*, this Court concluded that Rule 65(d) prohibited an unusual form of injunction that delegated expansive authority to a Special Master to ensure that defendant's firearm sales were "in full conformity with applicable laws" and that the defendant "adopts appropriate prophylactic measures to prevent violation" of firearms laws. 645 F.3d at 142 (cleaned up). The Court's concerns about the injunction extending to "legal conduct, or … illegal conduct that was not fairly the subject of litigation" resulted from the injunction's failure to enumerate any practices that would be prohibited other than the one type of illegal conduct identified in the complaint. *Id.* at 145. The

Court's concern was not merely that some lawful activity might be swept up in the injunction's broad delegation of power to the Special Master but that its terms violated the requirement that a defendant must be directed to do more than merely obey the law. *Id.*

Victorinox AG v. B&F System, Inc., 709 F. App'x 44 (2d Cir. 2017) is even farther afield. *Victorinox* was a trademark infringement case involving Swiss Army knives. This Court there rejected one provision of the permanent injunction because it could be read to prohibit "arguably legal conduct," specifically, the production of multifunction pocketknives that did not use the trademarked element or resemble the plaintiff's products, and "conduct outside the scope of [the] litigation," such as other types of products. *Id.* at 51-52. Here, by contrast, the covered statements were not only at issue and related to the materially misleading statements but were found by the jury and the district court to be unsupported and to have a tendency to deceive.

Finally, the Court can disregard Quincy's argument (Br. 25-27) that the injunction impermissibly applies New York's Executive Law nationwide. The district court properly entered the nationwide

injunction to remedy defendants' violations of the FTC Act, which prohibits deceptive acts or practices throughout the United States.

B. The District Court Properly Barred Quincy From Making Statements Similar to the Eight Challenged Statements.

The district court properly barred Quincy from making "any other[] [statements] similar to" the eight specifically prohibited statements so as to prevent Quincy from evading the order. Dkt.513 at 2. That prohibition was well within the district court's discretion and does not violate Rule 65(d)'s specificity requirement.

1. The Similar-Statements Language Prevents Quincy From Evading the Order.

The similar-statements prohibition is a proper safeguard against evasion of the injunction to ensure that Quincy no longer violates the FTC Act with false or misleading advertising about the health effects of Prevagen. It makes clear (to the extent that there might otherwise be doubt) that Quincy cannot evade the court's order and continue to violate the FTC Act by varying words in the statements, *e.g.*, changing "memory problems associated with aging" to "memory problems that *accompany* aging" or "*aging-related* memory problems." Likewise, it would prohibit Quincy from making the same claims in the form of

testimonials (*e.g.*, "as I've gotten older, I worry about my memory not keeping up—but I use Prevagen and it really helps") or questions and answers (*e.g.*, "Do you worry about problems with your memory as you get older? Prevagen can help"). The district court correctly closed the door on any effort to vary the form of a statement while making essentially the same claims found by the jury to be misleading.

The district court could reasonably conclude that a prohibition on similar statements was necessary in light of the length and persistence of Quincy's conduct in marketing Prevagen as a memory and cognitive aid without competent and reliable scientific evidence supporting its claims. Dkt.524 at 3-4. The district court specifically noted that "Quincy continued to use the Challenged Statements after trial and the Court's order imposing FTC Act liability, which demonstrates a high likelihood—indeed a near assurance—of future violations that may deceive consumers nationwide." *Id.* at 3. Because the district court was justifiably concerned about future violations, it was well within its discretion to issue an injunction extending to statements similar to those challenged in the lawsuit. When a district court considers the likelihood of continuing violation, its "discretion is necessarily broad

and a strong showing of abuse must be made to reverse it." *United States v. Diapulse Corp. of Am.*, 457 F.2d 25, 29 (2d Cir. 1972); *U.S. Dept. of Just. v. Daniel Chapter One*, 650 F. App'x 20, 23-24 (D.C. Cir. 2016) (upholding broad injunction under the FTC Act due to likelihood of continuing violations). Quincy has not made and cannot make any showing of abuse here.

2. Quincy Waived Its Specificity Argument, but the Injunction Satisfies Rule 65(d) in Any Case.

Quincy argues that the injunction's use of the word "similar" is categorically prohibited as impermissibly vague under Rule 65(d). Br. 29. Quincy did not raise this challenge in the district court and cannot do so for the first time on appeal. This Court ordinarily "decline[s] to consider arguments first raised on appeal where, as here, those arguments were available to a party and the party offers no reason for its failure to raise it in the district court in the first instance." *Havens v. James*, 76 F.4th 103, 128 n.7 (2d Cir. 2023). A party waives its objection to the form of an injunction under Rule 65(d) by failing to raise it before the district court. *See, e.g.*, *H-D Michigan, LLC v. Hellenic Duty Free Shops S.A.*, 694 F.3d 827, 845-46 (7th Cir. 2012). After the district court entered the initial version of the permanent injunction, Quincy moved

to clarify the scope of injunctive relief but did not raise any challenge under Rule 65(d) or otherwise argue that the prohibition on "similar" statements was invalid. *See* Dkt.515. To the extent Quincy has concerns about the scope of the injunction, the proper course would be to raise them initially in the district court, rather than bringing them to this Court for review in the first instance.

In any event, Rule 65(d) does not bar the district court's use of the "similar" language to prevent Quincy from evading the specific terms of the injunction. *See, e.g.*, *McComb v. Jacksonville Paper Co.*, 336 U.S. 187, 193 (1949) (noting "necessity of decrees that are not so narrow as to invite easy evasion"). Rule 65(d) requires only that "[e]very order granting an injunction . . . must: (A) state the reasons why it was issued; (B) state its terms specifically; and (C) describe in reasonable detail . . . the act or acts restrained or required." Fed. R. Civ. P. 65(d). To comply with this rule, "an injunction must be specific and definite enough to apprise those within its scope of the conduct that is being proscribed." *S.C. Johnson & Son, Inc. v. Clorox Co.*, 241 F.3d 232, 240-41 (2d Cir. 2001) (cleaned up). But the rule "does not require the district court to predict exactly what [defendants] will think of next." *Id.* at 241

(cleaned up). It neither prohibits the use of contextually understandable terms such as "similar" nor compels a court to identify in painstaking detail every possible variation of prohibited conduct.

In short, the district court was not obliged to describe all possible future marketing statements that Quincy might imagine as a way of evading the prohibition on the statements considered by the jury in this case. *Sterling Drug, Inc. v. Bayer AG*, 14 F.3d 733, 748 (2d Cir. 1994). A district court is entitled to frame an injunction without "specifically enjoin[ing]" every "plan or scheme" that the defendants might hatch in the future. *McComb*, 336 U.S. at 192; *see also FTC v. Mandel Bros.*, 359 U.S. 385, 392 (1959) (relief "is not limited to prohibiting the illegal practice in the precise form existing in the past"). Such considerations are "in the broadest sense for the discretion of the trial court which is best qualified to form a judgment as to the likelihood of a repetition of the offense." *Diapulse*, 457 F.2d at 29 (cleaned up).

The district court's prohibition on using "any similar statements" in Quincy's advertising is also well within the bounds set by other deceptive marketing cases. For instance, in *S.C. Johnson*, where the district court enjoined the defendant from certain ads falsely

representing that the plaintiff's resealable storage bags would leak if turned upside down, this Court recognized that the defendant was "on notice that other advertisements that similarly fail to accurately depict the risk of leakage" from the plaintiff's product would violate the Lanham Act and the injunction. 241 F.3d at 241.

Even closer to this case is *Eli Lilly & Co. v. Arla Foods, Inc.*, 893 F.3d 375 (7th Cir. 2018), which rejected a Rule 65(d) challenge to a preliminary injunction barring the defendant from disseminating the challenged ads and others "substantially similar" to them. The court explained that the Lanham Act's prohibition on implied falsehoods "makes the use of somewhat inexact language unavoidable." *Id.* at 384. Given "the inability of words to describe the variousness of experience," courts "may prefer brief imprecise standards to prolix imprecise standards." *Id.* at 384-85 (quoting *Scandia Down Corp. v. Euroquilt, Inc.*, 772 F.2d 1423, 1432 (7th Cir. 1985)). "Read as a whole," the injunction essentially barred the defendant from "portraying [an artificial growth hormone] as something it's not." *Id.* at 385. The court deemed that "sufficiently definite, especially considered in the context of the rest of the order." *Id.*; *see also Republic Techs. (NA), LLC v. BBK*

Tobacco & Foods, LLP, 135 F.4th 572, 588 (7th Cir. 2025) (injunction that barred nine categories of statements and required additional concrete steps "to safeguard against future violations" was sufficiently definite and appropriate where such violations "may fairly be anticipated from the defendant's conduct in the past").

Quincy relies on a handful of cases where courts have held that injunctions were not sufficiently specific, but none of those cases involve facts similar to those presented to the jury here and none purport to set forth a per se rule that Rule 65(d) prohibits the use of the word "similar." The injunction addressed in *McCarthy v. Fuller,* 810 F.3d 456 (7th Cir. 2015), a defamation case, is far more wide-ranging than the one here: it prohibited statements related to an entire course of dealing, including bribery, theft, and a car chase, among several individuals and members of the clergy, and extending to "any similar statements that contain the same sorts of allegations or inferences, in any manner or forum." *Id.* at 460. That language goes well beyond the terms of the injunction here, and the reference in that case to "any similar statements" was only a small aspect of the Seventh Circuit's criticisms of that injunction. *See id.* at 460-62. The court was primarily concerned

with the First Amendment implications of the injunction. *See id.* at 461-63. It explained that an injunction in a defamation case "must not through careless drafting forbid statements not yet determined to be defamatory, for by doing so it could restrict lawful expression," and that the district court's broad injunction was "of that character, owing to its inclusion of vague, open-ended provisions for which there is no support in the jury verdict or, so far as appears, in the district judge's own evaluation of the evidence." *Id.* at 462. Here, by contrast, the injunction's prohibitions are well grounded in the record evidence and the jury verdict, and Quincy raises no First Amendment argument on appeal.

In *Rocket Jewelry Box, Inc. v. Quality International Packaging, Ltd.*, 90 F. App'x 543 (Fed. Cir. 2004), a case involving infringement of a design patent, the district court entered an injunction that barred the defendant from marketing not just the lines of jewelry box products that were found to infringe but "any similar such boxes, which infringe [the design] patent." *Id.* at 547. The court's unpublished decision held that the order did not comply with Rule 65(d) because "[t]he district court neither set forth the reasons for issuing this broad injunction nor

specified and described in reasonable detail the parameters for determining the extent of any such 'similarity.'" *Id.* at 548. By contrast, here the district court here made clear that Quincy's past misconduct and the likelihood of future violations justified the injunction.

In *FEC v. Furgatch*, 869 F.2d 1256 (9th Cir. 1989), where the defendant violated the Federal Elections Campaign Act ("FECA") by failing to properly report expenditures, the Ninth Circuit held that provision of the injunction barring "similar violations" was impermissibly vague because it was ambiguous in the context of that case. The phrase was "susceptible to a number of different interpretations"; it could mean violations of specific FECA reporting provisions at issue involving similar facts, all violations of those provisions, or all violations of FECA. *Id.* at 1263. The injunction in this case is much more specific. It does not purport to prohibit "similar violations" of the FTC Act or even "similar violations" of the substantiation requirement. It merely prohibits variations on the eight specific statements found to be unsubstantiated and misleading.

Quincy also cites *ALPO Petfoods, Inc. v. Ralston Purina Co.*, 913 F.2d 958 (D.C. Cir. 1990), but if anything, that case supports the

propriety of the similar-statements language here. The injunction in *ALPO* barred "advertising or *other related claims* that are false, misleading, deceptive or made without substantiation in fact concerning the effects of Ralston Dog food products on hip joint formation, hip joint laxity, Canine Hip Dysplasia, Degenerative Joint Disease *and similar conditions*." *Id.* at 971 (emphasis added). The court held that the "other related claims" language was overbroad because it was not "closely tailor[ed]" to the harm caused by false advertising." *Id.* at 972-73. But the court did not identify any problem with the "similar conditions" language. Just as the defendant in *ALPO* could reasonably identify what conditions are "similar" to those specifically listed in that injunction, Quincy can reasonably determine what statements are "similar" to those identified in this injunction. If Quincy has serious questions about whether the injunction prohibits a particular statement, it can return to the district court for clarification. But this Court should not grant Quincy a license for evasion by the use of statements that are merely variations on those the jury found to be unsubstantiated and to have a tendency to deceive.

III. THE EVIDENCE PRESENTED TO THE JURY WAS SUFFICIENT TO ESTABLISH LIABILITY UNDER THE FTC ACT.

The evidence presented to the jury at trial was more than sufficient to establish that Quincy's claims about Prevagen were not supported by competent and reliable scientific evidence for purposes of both the FTC Act and New York law. Accordingly, the district court did not err either in denying Quincy's pretrial motion for summary judgment (where plaintiffs relied on that same evidence) or its post-trial JMOL motion. Quincy's arguments (Br. 50-59) largely focus on New York law (the only law the jury was asked to apply), and the FTC adopts by reference the NYAG's response to these arguments to the extent they apply to the FTC. Fed. R. App. P. 28(i). We make the following additional points insofar as Quincy's arguments relate to liability under the FTC Act.

A. Extrinsic Consumer Perception Evidence Was Not Required To Support Deceptiveness Claims Under the FTC Act.

Although extrinsic evidence of consumer perception, such as surveys, may be relevant to deceptiveness claims under the FTC Act in some contexts, no such evidence was required here. Courts have uniformly rejected efforts to require the FTC to present consumer

survey evidence in every case to prove the meaning of an ad or the message that is taken away by consumers, including whether certain claims are conveyed or whether the claims are misleading. *See Colgate-Palmolive,* 380 U.S. at 391-92 ("Nor was it necessary for the Commission to conduct a survey of the viewing public before it could determine that the commercials had a tendency to mislead."); *Bristol-Myers*, 738 F.2d at 563 ("In interpreting advertisements the Commission may rely on its own expertise in this area and need not resort to surveys and consumer testimony."); *Kraft, Inc. v. FTC*, 970 F.2d 311, 319 (7th Cir. 1992) ("[T]he Commission may rely on its own reasoned analysis to determine what claims, including implied ones, are conveyed in a challenged advertisement, so long as those claims are reasonably clear from the face of the advertisement."). Consumer perception evidence is not necessary for express claims or implied claims that are "reasonably clear from the face of the advertisement." *Kraft*, 970 F.2d at 320.

This case involves exactly the type of advertising where consumer survey evidence is not required. The claims Quincy made about Prevagen's effect on memory and cognition were express or so strongly

implied that they were clear from the face of the advertising. Whether those claims were misleading turned on whether they were supported by competent and reliable scientific evidence, and consumer perceptions are irrelevant to that question. The evidence at trial amply supports the jury's determinations that each of the challenged claims was conveyed and that none of the claims were adequately substantiated. The district court followed those findings in determining liability under the FTC Act.[12] Quincy's argument (Br. 50-53) that extrinsic evidence of consumer perception is needed to support liability therefore must be rejected with respect to the FTC Act claims.

B. Expert Testimony Supports the Conclusion That the Claims Are Unsubstantiated For Purposes of the FTC Act.

The expert testimony at trial was more than sufficient to establish that Quincy's claims were not supported by competent and reliable scientific evidence, as required for a finding of liability under the FTC Act. The level of substantiation required to meet the "competent and

[12] None of the cases Quincy cites involves the FTC Act and none involves a situation remotely like this case, where the issue is whether express or clearly implied health-related claims are adequately substantiated.

reliable scientific evidence" standard is case-specific, to be determined by the testimony of experts in the relevant fields. *See, e.g.*, *POM Wonderful*, 777 F.3d at 478. Although RCTs are not necessarily required in every case, if experts in the relevant fields would require an RCT to support a given claim, that is the standard the advertiser must meet. For example, in *Bristol-Myers*, this Court affirmed "the Commission's factual determination supported by substantial evidence, that only two well-controlled clinical studies could establish" comparative freedom-from-side-effects claims. 738 F.2d at 559. Similarly, in *POM Wonderful*, the DC Circuit held that where "experts in the relevant fields" would require RCTs to support certain claims, the Commission could properly apply that standard and bar the advertiser from making such claims without at least one supporting RCT. 777 F.3d at 493-97, 500-05; *see also Daniel Chapter One v. FTC*, 405 F. App'x 505, 506 (D.C. Cir. 2010) (holding there was nothing "unreasonable about the specific type of basis required by the Commission, namely,

'competent and reliable scientific evidence' including clinical trials with human subjects."). [13]

In this case, as in *Bristol-Myers* and *POM Wonderful*, there was testimony from an expert in the relevant fields that an RCT was required to support the claims at issue. As Quincy concedes (Br. 56-57), Dr. Sano opined that the appropriate evidence needed to establish that Prevagen improves memory or cognition would be an RCT. Dkt.426 at 97, 128-29. She further testified (and Dr. Wittes agreed) that the Madison Memory Study and other evidence relied on by Quincy did not

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[13] The cases Quincy cites are not to the contrary. They involve contempt sanctions, which require a higher standard of proof than the preponderance-of-the-evidence standard that applies to an initial liability determination. In *FTC v. Garden of Life, Inc.*, 516 F. App'x 852 (11th Cir. 2013), the FTC moved to hold a dietary supplement manufacturer in contempt for allegedly violating an injunction that required claims to be substantiated with competent and reliable scientific evidence. The district court held that the FTC had not proven a violation of the injunction by clear and convincing evidence (the contempt standard) where the expert testimony was in conflict, and the Eleventh Circuit found no abuse of discretion. *Id.* at 856-59. The unreported district court decision in *United States v. Bayer*, No. 07-cv-01, 2015 WL 5822595 (D.N.J. Sept. 24, 2015), recognized that "the definition of 'competent and reliable scientific evidence' looks to the view of experts in the relevant field." *Id.* at *14. But the court held that the government could not recover contempt sanctions based on the failure to substantiate claims with an RCT where the injunction did not explicitly require an RCT. *Id.*

come close to meeting the standard of competent and reliable scientific evidence. *Id.* at 96-97, 104-05, 108-10, 113-17, 178-79, Dkt.428 at 108-10, 113-14, 117-18, 129. Dr. Sano further testified that she found no evidence that vitamin D improves memory or cognition in the general population, *i.e.*, the population to whom Prevagen is marketed. Dkt.426 at 117-19. To be sure, defendants' experts disagreed. But the jury heard all that testimony, and it was entitled to decide for itself what constitutes "competent and reliable scientific evidence" in this context and whether Quincy's evidence satisfied that standard. The expert testimony of Dr. Sano and Dr. Wittes provides an ample basis for the jury's verdict and is more than sufficient to support a finding of liability under the FTC Act.

Quincy places great weight on the Commission's 1998 Guidance.[14] Quincy Br. 6, 55-56. But that document merely summarizes the standards that the Commission and the courts have applied in assessing whether health-related claims are adequately substantiated.

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[14] FTC, *Dietary Supplements: An Advertising Guide for Industry* (1998) ("1998 Guidance"), available at www.ftc.gov/system/files/documents/plain-language/bus09-dietary-supplements-advertising-guide-industry.pdf.

The guidance explains that the FTC's substantiation standard is "flexible," but that "[w]hen evaluating claims about the efficacy and safety of foods, dietary supplements and drugs, the FTC has typically applied a substantiation standard of competent and reliable scientific evidence." 1998 Guidance at 3. It further explains that a "guiding principle for determining the amount and type of evidence that will be sufficient is what experts in the relevant area of study would generally consider to be adequate." *Id.* at 10. And it notes that "[a]s a general rule, well-controlled human clinical studies are the most reliable form of evidence." *Id.*

Quincy's assertion that the testimony of Dr. Sano and Dr. Wittes was somehow deficient because they had not read the 1998 Guidance (Br. 56) is a red herring. Whether or not they had read the guidance, the experts were entitled to opine on the level of scientific evidence required in the relevant scientific fields to support the claims at issue and whether Quincy's evidence met that standard, and the jury was free to accept or reject their conclusions.

Quincy's argument that expert testimony about the necessary level of substantiation somehow violated its due process rights is barely

developed and makes no sense. Br. 58-59. As discussed above, what constitutes "competent and reliable scientific evidence" in any given context is ultimately a question for the trier of fact to determine based on the opinions of experts in the relevant field. Quincy had a full and fair opportunity to present expert evidence on this question; the fact that the jury apparently did not accept the views of Quincy's experts is not a violation of due process. Moreover, Quincy was certainly on notice from cases like *Bristol-Myers* and *POM Wonderful* that high levels of substantiation consisting of rigorous scientific evidence are required for health and safety related claims. The 1998 Guidance also "gave notice that a reasonable basis for a claim concerning a dietary supplement consists of scientific evidence, including clinical trials." *Daniel Chapter One*, 405 Fed. App'x at 506. And the FTC is not seeking to penalize Quincy for its past misconduct; an injunction simply requires Quincy to conform its conduct to what the law requires going forward. None of the cases Quincy cites are remotely on point; indeed, none of them even mentions due process.[15]

[15] In *Christopher v. SmithKline Beecham Corp.*, 567 U.S. 142 (2012), the Supreme Court declined to apply *Auer* deference to the Department

IV. THE DISTRICT COURT PROPERLY EXERCISED PERSONAL JURISDICTION OVER UNDERWOOD.

The district court properly exercised personal jurisdiction over Underwood under FTC Act Section 13. The statute provides that "[i]n any suit under this section, process may be served on any person, partnership, or corporation wherever it may be found." 15 U.S.C. § 53(a). This language plainly authorizes nationwide service of process, which is Congress's "typical mode of providing for the exercise of personal jurisdiction." *BNSF Ry. v. Tyrrell*, 581 U.S. 402, 409 (2017); *see also Dynegy Midstream Servs. v. Trammochem*, 451 F.3d 89, 95-96 (2d Cir. 2006) ("[W]hen Congress intends to permit nationwide personal jurisdiction it uses language permitting service "wherever the

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of Labor's interpretation of an ambiguous regulation where doing so would have "impose[d] potentially massive liability" in the form of backpay and liquidated damages "for conduct that occurred before the interpretation was announced." *Id.* at 155-56. *NLRB v. Majestic Weaving Co.*, 355 F.2d 854 (2d Cir. 1966) involved a situation where an agency had overruled a prior precedent, such that conduct previously deemed permissible was now impermissible. *Id.* at 857-58, 860-61. That is not the case here. In *Stoller v. CFTC*, 834 F.2d 262 (2d Cir. 1987), the agency sought sanctions against a commodities trader based on a rule interpretation of which the public had no notice and where "the policy apparently remained unenforced for years and the allegedly proscribed conduct apparently remained commonplace," and the agency "abruptly changed its own interpretation in the middle of the proceedings." *Id.* at 265, 267.

defendant may be found" or "anywhere in the United States."). Indeed, the Supreme Court has cited the FTC Act as a paradigmatic example of a statute authorizing nationwide service. *BNSF*, 581 U.S. at 409; s*ee also FTC v. Ams. For Fin. Reform*, 720 F. App'x 380, 383 (9th Cir. 2017) (FTC Act nationwide service of process authorized personal jurisdiction).

Where Congress has enacted a statute authorizing nationwide service, the defendant need not have minimum contacts with the forum state to be subject to personal jurisdiction. That is because due process in such cases is governed by the Fifth Amendment, rather than the Fourteenth. As the Supreme Court recently explained, the Fourteenth Amendment's "requirement that a defendant have minimum contacts with the forum State" reflects "interstate federalism concerns" that "do not apply" to limitations on the federal government, including Congress's legislative authority, and the federal courts under the Fifth Amendment. *Fuld v. Palestine Liberation Org.*, 145 S. Ct. 2090, 2104 (2025). Because "[t]he Constitution confers upon the Federal Government—and it alone—both nationwide and extraterritorial

authority," the Court "decline[d] to import the Fourteenth Amendment minimum contacts standard into the Fifth Amendment." *Id.*

In *Fuld*, the Supreme Court did not address the outer bounds of what Fifth Amendment due process requires with respect to foreign defendants (other than clarifying that it does not require minimum contacts with a forum State). The decision thus left open the question of whether that Amendment imposes any territorial limits on personal jurisdiction when Congress hales a foreign defendant into federal court. *Id.* at 2106. But with respect to defendants present in the United States, *Fuld* left undisturbed prior circuit court decisions that have consistently held that a defendant's minimum contacts with the United States as a whole will suffice. *See, e.g.*, *Double Eagle Energy Servs., LLC v. MarkWest Utica EMG, LLC*, 936 F.3d 260, 264 (5th Cir. 2019).[16]

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[16] Several decisions of this Court stretching back to 1974 appear to adopt this position. *See Okla. Firefighters Pension & Ret. Sys. v. Banco Santander (México) S.A.*, 92 F.4th 450, 456 n.5 (2d Cir. 2024) (collecting cases). But a 2014 decision suggested that the issue is still open in this Circuit. *See Gucci Am. v. Bank of China*, 768 F.3d 122, 142 n.21 (2d Cir. 2014). Regardless, the uniform view of other circuits (at least prior to *Fuld*) was that courts must "look to whether the defendant's contacts with the nation as a whole, rather than with the forum state, are sufficient to satisfy due process.' 16 *Moore's Federal Practice - Civil* § 108.123(b)(ii) (online ed. 2025). And the Supreme Court's decision in

Here, Underwood does not dispute that he has minimum contacts with the United States. The extent of his contacts with New York are irrelevant for Fifth Amendment purposes.

Underwood's argument that Section 13(b) makes proper venue a "precondition" for the exercise of nationwide personal jurisdiction (Underwood Br. 16-30) is wrong for the reasons set forth by the district court. Dkt.72 at 9-11. The district court explained that the statutory language and structure of Section 13(b) of the FTC Act is meaningfully different from Section 12 of the Clayton Act, which was the subject of the cases cited by Underwood, including *Daniel v. American Board of Emergency Medicine*, 428 F.3d 408 (2d Cir. 2005), and *Goldlawr, Inc. v. Heiman*, 288 F.2d 579 (2d Cir. 1961). This Court in *Daniel* held that Clayton Act Section 12 limited nationwide service to cases where venue was proper because the statutory phrase "in such cases" there "plainly refers to those cases qualifying for venue in the immediately preceding clause." *Daniel*, 428 F.3d at 423-24.[17] FTC Act Section 13(b), however,

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Fuld leaves no room for a state-based minimum contacts analysis under the Fifth Amendment.

[17] Clayton Act Section 12 provides:

does not limit nationwide service to "such cases" where venue is proper. Instead, Section 13(b) separates the service and venue provisions, making clear that one is not dependent on the other. And the FTC Act provides for nationwide service in any suit under Section 13, not a category of cases defined by venue.

Daniel cautioned that analyses of venue and service provisions must be specific to the statute. *Id.* at 426. The Court expressly distinguished the venue and service provisions of the Clayton Act from those in the Racketeer Influenced and Corrupt Organizations Act ("RICO"), *see* 18 U.S.C. § 1965. Rather than dealing with both venue and service in a single sentence, RICO separates them into separate lettered subsections and "[m]ore important still … does not limit [the service provision's] application to 'such cases' as are referred to in the

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> Any suit, action, or proceeding under the antitrust laws against a corporation may be brought not only in the judicial district whereof it is an inhabitant, but also in any district wherein it may be found or transacts business; and all process *in such cases* may be served in the district of which it is an inhabitant, or wherever it may be found.

15 U.S.C. § 22 (emphasis added).

statute's venue provision," indicating that Congress was viewing venue and service independently. *Daniel*, 428 F.3d at 427.

As the district court correctly held, "[t]he language in the FTC Act is similar to that of the RICO Act, not the Clayton Act[]" because (1) "it does not discuss venue and service of process in the same sentence" and (2) "it does not limit the application of the service of process provision to 'such cases' in which the venue provision is satisfied." Dkt.72 at 11.[18] Rather, it authorizes nationwide service in "any suit" under Section 13(b). While Section 13(b) does not have separate letter or number headings for venue and service, the provisions are in separate sentences, separated by an intervening sentence, indicating that there

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[18] The full text of Section 13's venue and service provisions reads:

> Any suit may be brought where such person, partnership, or corporation resides or transacts business, or wherever venue is proper under section 1391 of title 28. In addition, the court may, if the court determines that the interests of justice require that any other person, partnership, or corporation should be a party in such suit, cause such other person, partnership, or corporation to be added as a party without regard to whether venue is otherwise proper in the district in which the suit is brought. In any suit under this section, process may be served on any person, partnership, or corporation wherever it may be found.

15 U.S.C. § 53(a), (b).

is no link between them. Furthermore, that intervening sentence authorizes courts to permit joinder of a defendant "without regard to whether venue is otherwise proper" if the interests of justice so require, which makes clear that Congress did not regard venue as a critical factor that needed to be satisfied as to every defendant in every case. Finally, as *Daniel* indicates, the absence of the "such case" language is the "[m]ore important" factor that distinguishes RICO and Section 13(b) from Clayton Act Section 12. 428 F.3d at 427. The text of the statute here imposes no link between venue and service.

Underwood's arguments for reading such a link into the statute (Underwood Br. 25-30) are meritless. Reading the service and venue provisions separately does not nullify either of them. Although a court may exercise nationwide personal jurisdiction under Section 13(b), the FTC must still establish proper venue if the defendant objects. Nor is it absurd to suggest that Congress intended to permit the FTC to hale defendants into court regardless of their ties to the forum State; that is precisely what nationwide service is intended to do. Because the statutory language is unambiguous, "any reliance on legislative history to reach a contrary result is precluded." *Springfield Hosp., Inc. v.*

Guzman, 28 F.4th 403, 422 (2d Cir. 2022). But in any case, none of the legislative history Underwood cites remotely suggests that Congress did not know what it was doing when it authorized nationwide service or that it intended to link service and venue.

Even if Underwood's reading were correct, the exercise of personal jurisdiction would still have been proper. Underwood does not and cannot contend that the district court in this case lacked venue; he waived any venue objection by failing to raise it as required by Rule 12. Dkt.67 at 11-12. In any event, venue was proper here under Section 13(b) because as Quincy's president, Underwood transacted business in New York and under 28 U.S.C. § 1391(b) because a substantial portion of the events giving rise to the claim occurred in New York. And even if venue were improper, Section 13(b) provides that in the interests of justice the court can permit a party to be joined "without regard to whether venue is otherwise proper in the district in which suit is brought." 15 U.S.C. § 53(b).

CONCLUSION

The Court should affirm the judgment that defendants violated the FTC Act and the nationwide injunction issued under the FTC Act.

Respectfully submitted,

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July 17, 2025

CERTIFICATE OF COMPLIANCE

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July 17, 2025

/s/ Matthew M. Hoffman
Matthew M. Hoffman

STATUTORY ADDENDUM

INDEX TO STATUTORY ADDENDUM

(Text of statutes appears as enacted by Congress)

Federal Trade Commission Act

Federal Trade Commission Act
Section 5
Act of Sept. 26, 1914, ch. 311, § 13, as amended
Codified at 15 U.S.C. § 45

SEC. 5 (a)(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 * * * from using unfair methods of competition in or affecting commerce and unfair or deceptive acts or practices in or affecting commerce.

* * *

(b) Whenever the Commission shall have reason to believe that any such person, partnership, or corporation has been or is using any unfair method of competition or unfair or deceptive act or practice in or affecting commerce, and if it shall appear to the Commission that a proceeding by it in respect thereof would be to the interest of the public, it shall issue and serve upon such person, partnership, or corporation a complaint stating its charges in that respect and containing a notice of a hearing upon a day and at a place therein fixed at least thirty days after the service of said complaint. The person, partnership, or corporation so complained of shall have the right to appear at the place and time so fixed and show cause why an order should not be entered by the Commission requiring such person, partnership, or corporation to cease and desist from the violation of the law so charged in said complaint. * * * If upon such hearing the Commission shall be of the opinion that the method of competition or the act or practice in question is prohibited by this Act, it shall make a report in writing in which it shall state its findings as to the facts and shall issue and cause to be served on such person, partnership, or corporation an order requiring such person, partnership, or corporation to cease and desist from using such method of competition or such act or practice. * * *

(c) Any person, partnership, or corporation required by an order of the Commission to cease and desist from using any method of competition or act or practice may obtain a review of such order in the circuit court of appeals of the United States, within any circuit where

the method of competition or the act or practice in question was used or where such person, partnership, or corporation resides or carries on business, by filing in the court, within sixty days from the date of the service of such order, a written petition praying that the order of the Commission be set aside. * * * The findings of the Commission as to the facts, if supported by evidence, shall be conclusive. To the extent that the order of the Commission is affirmed, the court shall thereupon issue its own order commanding obedience to the terms of such order of the Commission. * * *

* * *

Federal Trade Commission Act
Section 12
Act of Sept. 26, 1914, ch. 311, § 13, as added Act of Mar. 21, 1938, ch. 49, § 4, 52 Stat. 114, as amended
Codified at 15 U.S.C. § 52

SEC. 12 (a) It shall be unlawful for any person, partnership, or corporation to disseminate, or cause to be disseminated, any false advertisement—

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

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

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

Federal Trade Commission Act
Section 13
Act of Sept. 26, 1914, ch. 311, § 13, as added Act of Mar. 21, 1938, ch. 49, § 4, 52 Stat. 114, as amended.
Codified at 15 U.S.C. § 53

SEC. 13 (a) * * *

* * *

(b) Whenever the Commission has reason to believe—

(1) that any person, partnership, or corporation is violating, or is about to violate, any provision of law enforced by the Federal Trade Commission, and

(2) that the enjoining thereof pending the issuance of a complaint by the Commission and until such complaint is dismissed by the Commission or set aside by the court on review, or until the order of the Commission made thereon has become final, would be in the interest of the public—

the Commission by any of its attorneys designated by it for such purpose may bring suit in a district court of the United States to enjoin any such act or practice. Upon a proper showing that, weighing the equities and considering the Commission's likelihood of ultimate success, such action would be in the public interest, and after notice to the defendant, a temporary restraining order or a preliminary injunction may be granted without bond: *Provided, however*, That if a complaint is not filed within such period (not exceeding 20 days) as may be specified by the court after issuance of the temporary restraining order or preliminary injunction, the order or injunction shall be dissolved by the court and be of no further force and effect: *Provided further*, That in proper cases the Commission may seek, and after proper proof, the court may issue, a permanent injunction. Any suit may be brought where such person, partnership, or corporation resides or transacts business, or wherever venue is proper under section 1391 of title 28, United States Code. In addition, the court may, if the court determines that the interests of justice require that any other person, partnership, or corporation should be a party in such suit, cause such other person, partnership, or corporation to be added as a party without

regard to whether venue is otherwise proper in the district in which the suit is brought. In any suit under this section, process may be served on any person, partnership, or corporation wherever it may be found.

Federal Trade Commission Act
Section 15
Act of Sept. 26, 1914, ch. 311, § 13, as added Act of Mar. 21, 1938, ch. 49, § 4, 52 Stat. 114, as amended
Codified at 15 U.S.C. § 55

SEC. 15. For the purposes of sections 12, 13, and 13—

(a)(1) The term "false advertisement" means an advertisement, other than labeling, which is misleading in a material respect; and in determining whether any advertisement is misleading, there shall be taken into account (among other things) not only representations made or suggested by statement, word, design, device, sound, or any combination thereof, but also the extent to which the advertisement fails to reveal facts material in the light of such representations or material with respect to consequences which may result from the use of the commodity to which the advertisement relates under the conditions prescribed in said advertisement, or under such conditions as are customary or usual. No advertisement of a drug shall be deemed to be false if it is disseminated only to members of the medical profession, contains no false representation of a material fact, and includes, or is accompanied in each instance by truthful disclosure of, the formula showing quantitatively each ingredient of such drug.

* * *