25-12-cv(L),
25-16-cv(CON), 25-274-cv(XAP)

United States Court of Appeals

for the

Second Circuit

FEDERAL TRADE COMMISSION,

Plaintiff-Appellee,

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

Plaintiff-Appellee-Cross-Appellant,

– v. –

(For Continuation of Caption See Inside Cover)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

PAGE PROOF BRIEF FOR DEFENDANT-APPELLANT-CROSS-APPELLEE MARK UNDERWOOD

ROBERT S. CLARK
COZEN O'CONNOR
1650 Market Street, Suite 2800
Philadelphia, Pennsylvania 19103
(215) 665-2000

MICHAEL B. DE LEEUW
TAMAR S. WISE
AMANDA GIGLIO
COZEN O'CONNOR
Three World Trade Center
175 Greenwich Street, 55th Floor
New York, New York 10007
(212) 509-9400

Attorneys for Defendant-Appellant-Cross-Appellee Mark Underwood

CP COUNSEL PRESS (800) 4-APPEAL • (379210)

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

Defendants-Appellants-Cross-Appellees,

MICHAEL BEAMAN, individually and as an officer of Quincy Bioscience Holding Company, Inc., Quincy Bioscience, LLC, and Prevagen, Inc.,

Defendant.

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PRELIMINARY STATEMENT

This appeal arises out of challenges by the Federal Trade Commission (the "FTC") and the New York Attorney General (the "NYAG") to certain marketing claims made by Quincy Bioscience Holding Company, Inc., Quincy Bioscience LLC, Prevagen, Inc., and Quincy Bioscience Manufacturing, LLC (together "Quincy") and its president, Mark Underwood ("Mr. Underwood" and, together with Quincy, "Defendants"), regarding the dietary supplement Prevagen®.

In this brief, Mr. Underwood details the grounds for his appeal of the District Court's error in denying his motion to dismiss the FTC's claims against him for lack of personal jurisdiction under Section 13(b) of the FTC Act. As detailed below, Section 13(b) permits nationwide service of process—and therefore personal jurisdiction nationwide—*only* where the FTC brings its challenge in a proper venue. But the District Court misread the plain language of Section 13(b) and failed to read the venue requirements for FTC Act challenges together with its nationwide service of process provision as Congress intended. In doing so, the District Court permitted the FTC to litigate challenges to Mr. Underwood's conduct in a state to which Mr. Underwood is a complete stranger. This error is particularly striking given that the FTC could have brought its challenges in an alternative venue that complied with Section 13(b)'s venue requirements—for example, the state of Mr. Underwood's residence. The FTC chose not to do so. Allowing the District Court's misreading

of Section 13(b) to stand would have far-reaching consequences, as it would effectively permit the FTC to bring challenges against litigants in any state in the nation, regardless of the litigant's connection to that forum. Neither the plain language nor the legislative history of Section 13(b) supports such a broad reading.

Separately, pursuant to Fed. R. App. P. 28(i), Mr. Underwood incorporates by reference the portions of Quincy's principal brief related to additional errors made by the District Court in deciding the FTC's claims against Defendants. Specifically, Mr. Underwood incorporates Quincy's arguments that: (i) the District Court erred in issuing a nationwide permanent injunction as a remedy to the FTC's claims under Sections 5 and 12 of the FTC Act in that it prohibited conduct *found to be legal* under those statutes; (ii) the District Court erred in issuing a nationwide permanent injunction that otherwise fails to comply with Fed. R. Civ. P. 65(d); (iii) the District Court erred in denying both summary judgment and judgment as a matter of law as to the FTC's claims as the below is not a "proper case" for injunctive relief under Section 13(b) of the FTC Act; and (iv) the District Court erred in denying summary judgment as to the FTC's claims in light of Plaintiffs' failure to present any consumer perception evidence and in light of Plaintiffs' failure to challenge Defendants' evidence of substantiation for its claims using the proper evidentiary standard.

Mr. Underwood also incorporates the portions of Quincy's principal brief related to errors made by the District Court in deciding the NYAG's claims against Quincy (properly dismissed as to Mr. Underwood for lack of personal jurisdiction) to the limited extent that, if the jury's factual findings are disturbed on appeal, then the District Court also erred in applying such factual findings in adjudicating Defendants' liability under the FTC Act.

JURISDICTIONAL STATEMENT

The District Court had subject matter jurisdiction over the FTC's federal statutory claim under 28 U.S.C. §§ 1331, 1337, and 1345. The District Court had subject matter jurisdiction over the NYAG's claims, which are not at issue in Mr. Underwood's appeal, under 28 U.S.C. § 1367. This Court has jurisdiction over the instant appeal under 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

1. Whether the District Court erred in denying Mr. Underwood's motion to dismiss the FTC's claims under Section 13(b) of the FTC Act for lack of personal jurisdiction.

STATEMENT OF THE CASE

I. Prevagen

Mr. Underwood co-founded Quincy Bioscience Holding Company, Inc. in June 2004, and currently serves as its President. [Trial Tr. at 734:25-735:1.]

Quincy's primary product is called Prevagen, which is a dietary supplement that Quincy has sold since the fall of 2007. [Trial Tr. at 753:19-20.] The active ingredient in Prevagen's original formula—apoaequorin—is a calcium-binding protein derived from aequorin, which was originally found in the Aequorea Victoria jellyfish. [Trial Tr. at 147:5-10.] Starting in 2016, Prevagen products were reformulated to include 50 micrograms of vitamin D3 (in addition to apoaequorin) per capsule or chewable tablet, which is equivalent to 2000 IU of vitamin D. [JX 0095 ¶5.]

II. The Complaint and the Challenged Statements

On January 9, 2017, after a years-long investigation, the NYAG and the FTC filed their Complaint alleging that Defendants made certain claims about Prevagen that were unsubstantiated and violated both New York law and the FTC Act. [Dkt.1.] The NYAG and the FTC challenged the following specific claims about Prevagen:

(1) "Prevagen improves memory";

(2) "Prevagen is clinically shown to improve memory";

(3) "Prevagen improves memory within 90 days";

(4) "Prevagen is clinically shown to improve memory within 90 days";

(5) "Prevagen reduces memory problems associated with aging";

(6) "Prevagen is clinically shown to reduce memory problems associated with aging";

(7) "Prevagen provides other cognitive benefits, including but not limited to healthy brain function, a sharper mind, and clearer thinking"; and

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

[Dkt.1 ¶¶36-45.] (the "Challenged Statements").

The FTC brought its challenge pursuant to Sections 5 and 12 of the FTC Act. [Dkt.1 ¶¶36-39.] The NYAG challenged the same claims pursuant to Sections 349 and 350 of New York's General Business Law ("the GBL") and Section 63(12) of New York's Executive Law (the "Executive Law"). [Dkt.1 ¶¶42-45.]

III. Mr. Underwood's Motions to Dismiss for Lack of Personal Jurisdiction

On April 6, 2017, Mr. Underwood moved to dismiss both the NYAG's and the FTC's claims for lack of personal jurisdiction. [Dkt.36.] The motion was granted on other grounds, appealed, and reversed. [Dkts.45, 51.] On remand, the District Court allowed Mr. Underwood to renew his motion and file a supplemental brief.

On June 18, 2019, Mr. Underwood filed a supplemental brief and argued, based on both the plain language of Section 13(b) and prior decisions from this Court, that the FTC could only take advantage of the FTC Act's nationwide service of process provision if it *first* brought suit where the defendant "resides or transacts business" or where venue is otherwise proper. [Dkt.65.] Mr. Underwood argued that this threshold requirement was not met because he has no connection to New

York, and therefore the FTC's claims against him must be dismissed for lack of personal jurisdiction. [*Id.*] The District Court denied Mr. Underwood's motion. [Dkt.72] It found that the nationwide service of process provision in Section 13(b) of the FTC Act conferred nationwide jurisdiction over all FTC Act claims, regardless of the proper venue for the case. [*Id.*]

IV. Defendants' Motions for Summary Judgment

On March 18, 2022, following extensive discovery, Mr. Underwood filed a motion for partial summary judgment seeking dismissal of the NYAG's claims against him for lack of personal jurisdiction. [Dkt.210.] Mr. Underwood argued that, to the extent the Court found there was personal jurisdiction over the FTC's claims under the "nationwide service of process" provision in the FTC Act (a decision for which it reserved appellate rights), the FTC Act's nationwide service of process provision could not operate to confer personal jurisdiction in New York for the NYAG's claims. [Dkt.211 at 2, n.3, 9-15.]

Separately, on April 14, 2022, both Mr. Underwood and Quincy filed a joint motion for summary judgment seeking dismissal of all claims. [Dkt.220.] As relevant here, Defendants argued: (i) for dismissal of the FTC's claims because this case failed to present a "proper case" for permanent injunctive relief under Section 13(b) of the FTC Act; and (ii) for dismissal of all claims in light of Plaintiffs' failure to proffer *any* consumer perception evidence at all and Plaintiffs' failure to proffer

challenges to Defendants' substantiation for its claims using the proper evidentiary standards. [Dkt.227 at 18-24, 31-34, 34-38.]

By Order dated July 5, 2022, the District Court granted Mr. Underwood's motion for partial summary judgment regarding the NYAG's claims, agreeing that the doctrine of pendent party personal jurisdiction did not apply and that the NYAG otherwise failed to demonstrate any ground for long-arm jurisdiction under New York law. [Dkt.272.]

By Order dated December 19, 2022, the District Court denied Defendants' joint motion for summary judgment. [Dkt.331.] As a result, the FTC proceeded with its claims against both Mr. Underwood and Quincy, and the NYAG proceeded with claims against only Quincy.

While the NYAG and FTC both initially sought injunctive relief and monetary relief, on September 17, 2021, the District Court properly dismissed the FTC's claims for monetary relief in light of the United States Supreme Court's decision in *AMG Capital Mgmt., LLC v. Federal Trade Commission*, 141 S. Ct. 1341 (2021). [Dkt.184.] Accordingly, the District Court held that—as the FTC's claims were now limited to injunctive relief—only the NYAG's claims, but not the FTC's claims, were subject to a jury trial. [Dkt.170.]

While recognizing that it was not trying its claims before a jury, the FTC asked the District Court to participate in the NYAG's trial, acknowledging that, given the

similarities in the NYAG's and FTC's challenges, the FTC would be bound by the factual findings rendered by the jury. [Dkt.362.] The FTC told the District Court it understood that the jury's factual findings in adjudicating the NYAG's claims would "conclusively determine" the FTC's claims. [Dkt.363 at 2.] The District Court granted this request and allowed counsel for the FTC and Mr. Underwood to participate in the NYAG trial by examining witnesses and introducing evidence. [Dkt.377.]

V. Jury Trial and Verdict

From February 21, 2024, through March 11, 2024, the District Court presided over a jury trial regarding the NYAG's state law claims against Quincy. [*See* Dkts.422-445 (notices and copies of official transcripts).]

On March 11, 2024, the jury rendered its verdict. [Dkt.421.] *First*, the jury decided the NYAG's claims under the GBL by assessing whether each of the Challenged Statements was conveyed to consumers by Quincy; whether each of the Challenged Statements lacked the support of "competent and reliable scientific evidence"; whether each of the Challenged Statements was "materially misleading"; and whether each of the Challenged Statements was "consumer oriented." [Dkt.421 at 1-6.] The jury was instructed to assess these questions from "the perspective of the reasonable consumer acting reasonably under the circumstances" or an "objective standard." [Trial Tr. at 1421:8-12, 1445:1-4.] The jury concluded that

all of the Challenged Statements were conveyed to consumers by Quincy and that all of the Challenged Statements lacked support by "competent and reliable scientific evidence." [Dkt.421 at 2-6.] But the jury concluded that six of the eight Challenged Statements were *not* "materially misleading" to consumers. [*Id.* at 2-3, 5.] Accordingly, the jury found Quincy liable under the GBL for only *two* of the eight Challenged Statements. [Dkt.421 at 1-6.]

Second, the jury decided the NYAG's claims under the Executive Law by assessing whether each of the Challenged Statements "ha[d] the capacity or the tendency to deceive" under the far lower standard that the NYAG proffered under the Executive Law. [Dkt.421 at 7-9.] The jury was instructed to assess these questions from "the perspective of the unthinking or gullible consumer, one who does not stop to analyze, but is governed by appearances and general impressions." [Trial Tr. at 1448:18-23.] The jury was also instructed that "[i]f you do not find the Quincy defendants l[iable] under General Business Law sections, then you do not need to reach the Attorney General's charge under the New York Executive Law because, in effect, that charge has already been disposed of. If, however, you find that one or more of the Quincy defendants violated the general business law, then you will decide the executive law section." [Trial Tr. at 1447:21-1448:2.] Despite this instruction, the jury found Quincy liable under the Executive Law for all eight

of the Challenged Statements (even the six for which no liability was found under the GBL). [Dkt.421.]

VI. The District Court's Disposal of the FTC's Claims

Following the jury trial, the District Court adjudicated the FTC's claims against Quincy and Mr. Underwood. On August 29, 2024, the District Court held that liability under Sections 5 and 12 of the FTC Act was limited to the two statements that the jury found actionable under the GBL. [Dkt.493.] In reaching its conclusion, the District Court noted that "New York General Business Law Sections 349 and 350 are modeled upon Sections 5 and 12 of the FTC Act and the statutes share essentially the same legal elements" and that such similarities rendered the jury's factual determinations "determinative of the Quincy defendants' liability under Sections 5 and 12 of the FTC Act." [Dkt.493 at 2-3.]

VII. The District Court's Injunction

With all liability findings rendered, the District Court then turned to the issue of remedies. On September 26, 2024, the NYAG filed a motion for a permanent injunction against Quincy as to all eight of the Challenged Statements in light of the jury verdict. [Dkt.502.] The NYAG's proposed injunction sought to enjoin Quincy "from engaging in conduct in or affecting the State of New York or any New York consumer." [Dkt.502-1 ¶1.] Quincy opposed. [Dkt.507.]

On November 5, 2024, the FTC and Defendants submitted a joint letter to the District Court, explaining that the parties were in the midst of negotiating an agreed-upon form of injunction as the remedy for the adjudicated violations of the FTC Act. [Dkt.509.] The parties made clear that they were "currently engaged in discussions to see if agreement on a consent order under the FTC Act can be reached," and that the FTC would only seek court intervention if those discussions failed. [*Id.* at 1.]

Without any further update by the parties or motion by the FTC, on November 18, 2024, the District Court issued a "Memorandum and Judgment" that addressed both the NYAG and FTC's claims (the "November Judgment"). [Dkt.513.] In the November Judgment, the District Court ordered Defendants to "immediately remove all [the Challenged 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 November Judgment further stated that, "Defendants' personnel must be clearly informed that no challenged statement may be made in a communication about Prevagen's performance, or in any situation in which it might be relied on." [*Id.*] The District Court did not award the NYAG any monetary relief, noting that "[t]here was no evidence that Prevagen, or the challenged statements, had actually caused harm or economic injury" and because the jury "acquitted all but the two aging memory statements of being materially misleading." [*Id.*]

On November 22, 2024, Quincy sought clarification as to the scope of the November Judgment. [Dkt.514.] Specifically, Quincy sought to clarify that, given the language of the injunction (which relied on the jury's findings under New York's Executive Law) and the fact that the FTC had not yet moved for injunctive relief, the November Judgment applied only in New York and solely in connection with the NYAG's claims against Quincy. [Dkt.515.] The NYAG and FTC submitted separate oppositions. [Dkts.522, 523.] On December 2, 2024, the NYAG similarly filed a motion to alter the portions of the judgment denying the NYAG any monetary relief. [Dkt.517.]

On December 6, 2024, the District Court denied both motions and upheld its original judgment (the "December Order" and, together with the November Judgment, the "Injunction"). [Dkt.524.] In the December Order, the District Court "clarifie[d] that its injunction forbidding defendants from using the eight marketing statements in connection with the promotion of Prevagen takes effect forthwith and applies *nationally* wherever Prevagen is marketed." [*Id.* at 2 (emphasis added).] The District Court again pointed to the jury's findings that "the claimed scientific support for all the Challenged Statements was lacking, although only two statements were materially misleading" and that "each of the Challenged Statements had a tendency to deceive under N.Y. Exec. Law § 63(12)." [*Id.*] The District Court further noted its own finding that "Quincy violated the Federal Trade Commission

Act," but failed to note the narrow scope of that prior finding. [*Id.*] Instead, the District Court opined that—despite the distinct jury findings as to each of the Challenged Statements—"[e]ach of the Challenged 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.]

Mr. Underwood timely filed this appeal pursuant to 28 U.S.C. § 1291 on December 19, 2024. [Dkt.526.]

SUMMARY OF THE ARGUMENT

The District Court erred in denying Mr. Underwood's motion to dismiss the FTC's claims against him for lack of personal jurisdiction. The District Court held that Section 13(b) of the FTC Act contains a nationwide service of process provision, and that compliance with that provision can establish personal jurisdiction where "authorized by federal statute." But the District Court ignored the plain language of Section 13(b), which states that nationwide service of process can establish jurisdiction under Section 13(b) *only* where the FTC raises its challenge in a proper venue. The construction of the statute underscores this interpretation: the venue requirement specifically *precedes* the nationwide service of process provision in Section 13(b), the two provisions were consolidated into the same subsection of Section 13(b), and the two provisions use parallel language found nowhere else in Section 13(b).

This read of the statute is also supported by Section 13(b)'s legislative history and the canons of statutory construction. As detailed below, the legislative history of Section 13(b) indicates that its *venue* provision—not the nationwide service of process provision—was intended to dictate (and, at times, expand) the reach of the FTC's jurisdictional authority, and lacks any indication that Congress intended to confer jurisdiction over any person the FTC is able to serve. And the canons of statutory construction caution against the broad reading adopted by the District Court, which would permit the FTC to force litigants to defend claims lodged under the FTC Act in *any district court in the country*, even those to which they are strangers—an absurd result that this Court cannot condone. Finally, the District Court's reading of Section 13(b) renders the venue provision superfluous, as read alone, it adds nothing more than the venue provision that governs all federal litigation. For these reasons, the District Court erred in failing to grant Mr. Underwood's motion to dismiss for lack of personal jurisdiction.

STANDARDS OF REVIEW

This Court "review[s] a district court's legal conclusions concerning its exercise of personal jurisdiction *de novo* . . . ," *Marvel Characters, Inc. v. Kirby*, 726 F.3d 119, 128 (2d Cir. 2013), including whether a plaintiff must first satisfy the FTC Act's venue provision before it may invoke its nationwide service provision, *Daniel v. Am. Bd. of Emergency Med.*, 428 F.3d 408, 422 (2d Cir. 2005).

ARGUMENT

I. The District Court Erred in Finding that Section 13(b) of the FTC Act Permitted the District Court to Exercise Jurisdiction over the FTC's Claims against Mr. Underwood.

The District Court erred in finding that Mr. Underwood was subject to personal jurisdiction in New York on the FTC's claims under Section 13(b) of the FTC Act. Pursuant to Fed. R. Civ. P. 4(k)(1)(C), service of process can establish personal jurisdiction over a defendant where "authorized by federal statute." But, while Section 13(b) of the FTC Act contains a nationwide service of process provision, there is a threshold condition that must be satisfied before it can be invoked. As both the statutory text and the legislative history make clear, Section 13(b) permits nationwide service of process *only* when the action is brought in a proper venue. Because the FTC failed to show that the Southern District of New York is a proper venue to adjudicate its claims against Mr. Underwood, it could not seek refuge in Section 13(b)'s allowance for nationwide service of process to establish personal jurisdiction over him. The District Court erred as a matter of law in holding otherwise.

A. Section 13(b) of the FTC Act Does Not Provide a Statutory Basis for Exercising Personal Jurisdiction over Mr. Underwood.

Service of process "establishes personal jurisdiction" over a party "when authorized by federal statute." Fed. R. Civ. P. 4(k)(1)(C). This manner of personal jurisdiction over a defendant is proper when: (1) the service of process was

"procedurally proper"; (2) there is a "statutory basis for personal jurisdiction that renders such service of process effective"; and (3) the exercise of personal jurisdiction "comport[s] with constitutional due process principles." *Waldman v. Palestine Liberation Org.*, 835 F.3d 317, 327 (2d Cir. 2016) (citation omitted).

Consistent with Fed. R. Civ. P. 4(k)(1)(C), certain federal statutes authorize nationwide service of process. These statutes typically include language "permitting service 'wherever the defendant may be found' or 'anywhere in the United States.'" *Dynegy Midstream Servs. v. Trammochem*, 451 F.3d 89, 95-96 (2d Cir. 2006) (quoting *Omni Cap. Int'l, Ltd. v. Rudolf Wolff & Co., Ltd.*, 484 U.S. 97, 105-06 (1987)). In some instances, however, Congress imposes additional prerequisites for nationwide service of process to be rendered "effective" under Rule 4(k)(1)(C), including the selection of a proper venue for the lawsuit. *See, e.g.*, *Daniel*, 428 F.3d at 423. The FTC Act is one such statute.

1. The Plain Language of Section 13(b) Provides that Proper Venue is a Prerequisite to Jurisdiction.

The nationwide service of process provision in Section 13(b) is clear on its face. The plain text of Section 13(b) authorizes nationwide service of process ***only*** when the suit is brought in the district where the defendant "resides or transacts business" or "wherever venue is proper under [28 U.S.C. § 1391]." 15 U.S.C. § 53(b) (emphasis added). Specifically, Section 13(b) states:

> ***Any suit may be brought where such person, partnership, or corporation resides or transacts business, or wherever venue is proper under [28 U.S.C. § 1391]***. 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.***

Id. (emphasis added).

The only logical reading of Section 13(b) reads the first sentence (requiring proper venue) and the last sentence (authorizing nationwide service of process) together. In other words, the nationwide service provision is limited to "any suit under this section"—that is, a suit "brought where such person, partnership, or corporation resides or transacts business, or wherever venue is proper under section 1391 of Title 28." *Id.* Only when this precondition is satisfied may the FTC effect service "on any person, partnership or corporation wherever it may be found." *Id.*

Indeed, the term "any suit" appears only twice in this section of the FTC Act—first in the venue provision and then in the nationwide service provision. "*Any suit* may be brought" where the defendant "resides or transacts business," or "wherever venue is proper under [28 U.S.C. § 1391]," and "[i]n *any suit* under this section, process may be served on any person, partnership, or corporation wherever it may be found." *Id.* (emphasis added). The repetition of "any suit" in the service

provision plainly shows that such manner of nationwide service is available only when the suit has been brought as prescribed "under this section"—*i.e.*, where venue is proper. *See FTC v. HCA Healthcare, Inc.*, No. 23-1103 (ABJ), 2023 WL 11872582, at *6 (D.D.C. May 23, 2023) (noting that "it appears that one must also interpret the nationwide service provision in section 13(b) to be predicated on the availability of venue" but ultimately declining to resolve the issue); *FTC v. Mallett*, 818 F. Supp. 2d 142, 147 n.4 (D.D.C. 2011) ("Under Section 13(b) of the FTC Act, the propriety of nationwide service of process is tied in part to the question of proper venue."). This is the plain reading of the statute and the only reading that gives effect to the entire paragraph and honors the language and structure that Congress chose to use in Section 13(b).[1]

[1] The portion of Section 13(b) that permits district courts to add parties to litigation without regard to venue where "the interests of justice require" does not apply in this situation. Neither the FTC nor the District Court relied on that exception—nor could they have: it applies only where the FTC *cannot* properly join all necessary parties in a single jurisdiction. *Cf. PT United Can Co. Ltd. v. Crown Cork & Seal Co., Inc.*, No. 96 Civ. 3669 (JGK), 1997 WL 31194, at *4 (S.D.N.Y. Jan. 28 1997) (holding that because all the defendants could be sued in Pennsylvania, the "ends of justice" in a RICO case did not require exercise of jurisdiction over the individual defendants in the Southern District of New York), *aff'd*, 138 F.3d 65, 71-72, n.5 (2d Cir. 1998); *see also Bayshore Capital Advisors, LLC v. Creative Wealth Media Finance Corp.*, 667 F. Supp. 3d 83, 118 (S.D.N.Y. 2023) ("Courts in the Second Circuit have interpreted the phrase 'the ends of justice' to permit the exercise of 'personal jurisdiction if, otherwise, the entire RICO claim could not be tried in one civil action.'" (quoting *RXUSA Wholesale, Inc. v. Steel City Pharm., LLC*, No. 06-CV-3885, 2008 WL 11417667, at *2 (E.D.N.Y. Aug. 7, 2008))). The FTC could have brought this lawsuit in a jurisdiction that had personal jurisdiction over all defendants—namely, Wisconsin. Therefore, the "interests of justice" would not

2. This Court's Prior Precedent Supports Reading the Venue Provision of Section 13(b) as a Prerequisite for Nationwide Service of Process.

This Court has never directly addressed the conditions under which the FTC can rely upon the nationwide service provision in Section 13(b). But this Court's prior decisions construing materially similar language in Section 12 of the Clayton Act[2] strongly support Mr. Underwood's read of the statute. In *Goldlawr, Inc. v. Heiman*, 288 F.2d 579, 581 (2d Cir. 1961), this Court interpreted the interplay between the venue and nationwide service of process provisions of Section 12. The Court explained:

> [Section 12] specifies where suit against a corporation under the antitrust laws may be brought, namely, in a district where it is an inhabitant and also where "it may be found or transacts business." Conversely, it should follow that if a corporation is not an inhabitant of, is not found in, and does not transact business in, the district, suit may not be so brought. By statutory grant if suit is brought as prescribed in this section "all process in such cases may be served in the district of which it (the corporation) is an inhabitant, or wherever it may be found." Thus, "in such cases," Congress has seen fit to enlarge the limits of the otherwise restricted territorial areas of process. ***In other***

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permit the FTC to join Mr. Underwood as a party to an action brought in the Southern District of New York. Recognizing this, the FTC did not argue below that this language permitted its claims against Mr. Underwood. [Dkt.67.]

[2] Section 12 of the Clayton Act reads: "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.

> ***words, the extraterritorial service privilege is given only when the other requirements are satisfied.***

Id. (emphasis added). *Goldlawr* interpreted the phrase "in such cases" in the Clayton Act's nationwide service of process provision to mean that such nationwide service of process is available "if suit is brought as prescribed by this section"—*i.e.*, in compliance with the foundational venue requirements. *Id.*

In the decades since this Court decided *Goldlawr*, this Court, the D.C. Circuit, and the Seventh Circuit have embraced and reaffirmed this reading of Section 12 of the Clayton Act, with this Court most recently finding, in 2005, that the "plain language of Section 12 indicates that its service of process provision applies (and, therefore, establishes personal jurisdiction) only in cases in which its venue provision is satisfied."[3] *Daniel*, 428 F.3d at 423; *accord GTE New Media Servs. Inc. v. BellSouth Corp*., 199 F.3d 1343, 1351 (D.C. Cir. 2000) (stating that the Second Circuit's "unadorned interpretation of Section 12 is clearly correct"); *KM Enters., Inc. v. Global Traffic Techs., Inc*., 725 F.3d 718, 729-30 (7th Cir. 2013) (stating that the Circuit "s[aw] nothing in the text, purpose, or history of Section 12 that casts doubt" on this interpretation of Section 12). In reaching that conclusion, this Court relied upon "important structural clues" in Section 12 of the Clayton Act to find that

[3] There is a circuit split on this issue. The Third and Ninth Circuits have interpreted Section 12 differently. *See, e.g.*, *Action Embroidery Corp. v. Atlantic Embroidery, Inc.*, 368 F.3d 1174, 1179–80 (9th Cir. 2004); *In re Auto. Refinishing Paint Antitrust Litig.*, 358 F.3d 288, 296–97 (3d Cir. 2004).

there was a venue prerequisite to allowing nationwide service of process. *Daniel*, 428 F.3d at 423. This included the fact that "Section 12 of the Clayton Act discusses venue and service of process in one sentence," reflecting that the two concepts do not operate independently. *Id.* at 427. This Court also relied on the fact that Section 12's nationwide service of process provision is expressly limited to "***such cases***," *i.e.*, those cases "referred to in the statute's venue provision" in the immediately preceding clause. *Id.* This Court noted the relevance of Section 12's deliberate use of the limiting phrase "such cases"—as distinct from other statutes that use the broader phrasing "actions or proceedings *under this chapter*" in their nationwide service of process provisions. *Id.* (referring to the RICO Act nationwide service of process provision).

The plain language of Section 13(b) of the FTC Act is just as clear. Just as the Clayton Act's nationwide service provision is limited to "any such cases" that satisfy the Clayton Act's venue provision, the phrase "[i]n any suit under this section" in Section 13(b)'s nationwide service of process provision must refer to cases that meet the venue requirement set forth earlier in the same *section*. The same "important structural clues" this Court looked to in *Daniel* support this conclusion. Like Section 12 of the Clayton Act, Section 13(b) does not separate its venue and service of process provisions into separate, non-sequential subsections—instead, Section 13(b)'s venue requirement is set forth at the start of the section, with

the nationwide service of process allowance *immediately* following it in the same section. Moreover, just as with Section 12 of the Clayton Act, the drafters of Section 13(b) chose to limit nationwide service of process only to a suit brought "under this section," namely, the *section* setting forth the venue prerequisite.

Congress could have included more expansive language applying the nationwide service provision more broadly, as it has done in other contexts. But Congress did not. In fact, Congress did the opposite, expressly limiting the nationwide service provision to "any suit *under this section*," rather than under the chapter as a whole. Not even the Clayton Act's Section 12 contains such clear limiting language referencing a section, rather than a chapter. Therefore, this Court's analysis in *Daniel* applies with even greater force to Section 13(b) of the FTC Act.

3. The District Court Erred in Reading Section 13(b)'s Venue and Nationwide Service of Process Provisions Independently.

Despite the plain language of Section 13(b) and this Court's analysis in *Goldlawr* and *Daniel*, the District Court found Section 13(b) more similar to the RICO Act (where venue is *not* linked to the nationwide service of process provision) than the Clayton Act (where they are linked). [Dkt.72.] The District Court noted that, unlike the Clayton Act, the venue and nationwide service of process provisions in Section 13(b) are not in the same sentence. [Dkt.72 at 11.] Moreover, the District Court found that the phrase "in any suit under this Section" in Section 13(b) is not

limiting in the same manner as the phrase "such cases" in the Clayton Act. [*Id.*] On this basis, the District Court held that the nationwide service of process provision in Section 13(b) operates independently of the venue provision, and the FTC's failure to demonstrate that the Southern District of New York was a proper venue did not support dismissal for lack of personal jurisdiction.[4] [*Id.*]

The District Court's rationale was erroneous on both accounts. *First*, as this Court observed in *Daniel*, the RICO statute "separates [its venue and service] provisions into non-sequential, lettered subsections." 428 F.3d at 427. There is no such separation in Section 13(b), which discusses venue and service sequentially and *in the same paragraph*. Inclusion of both venue and nationwide service of process in the *same paragraph* (Section 13(b)) clearly links the two together, particularly

[4] Even the FTC does not appear to agree with the District Court's expansive reading of Section 13(b). Less than two years ago, the FTC told the District Court for the District of Columbia that it could properly exercise personal jurisdiction under Section 13(b) over the respondent *because* venue was proper. Petitioner's Mem. of P. & A. in Opp'n to LCMC's Mot. to Dismiss, or Alternatively Transfer for Lack of Personal Jurisdiction at 2, *FTC v. La. Children's Med. Ctr.*, No. 23-cv-1103-ABJ (D.D.C. Apr. 26, 2023), Dkt.24 ("As we show in our opposition to [respondent]'s motion to transfer, this Court has venue. Thus, Section 13(b) gives this Court personal jurisdiction over [respondent]."); *see also id.* at 3–4 (explaining in its personal jurisdiction analysis under Section 13(b) that venue is proper); LCMC's Reply Mem. in Support of its Mot. to Dismiss or, Alternatively, Transfer the Action for Want of Jurisdiction at 3, *FTC v. La. Children's Med. Ctr.*, No. 23-cv-1103-ABJ (D.D.C. Apr. 28, 2023), Dkt.27 ("Distilled to simplest terms, the FTC argues that Section 13(b) establishes nationwide service of process where venue is proper, and that this service supplies personal jurisdiction." (citing Opp'n at 3–4)).

when the nationwide service sentence expressly references the rest of the paragraph by limiting itself to "any suits under this section."

Second, the limiting language in Section 13(b)'s nationwide service of process provision is plainly more similar to the Clayton Act, with its own limiting language, than to the RICO statute, which contains no limiting language at all. As this Court reasoned in *Daniel*, the RICO statute's nationwide service of process provision includes language applying it broadly to "'any action or proceeding *under this chapter*,' that is, the chapter dealing with racketeering." *Id.* The language in Section 13(b) is nowhere near that expansive. The nationwide service of process provision uses a distinct phrase—"any suit"—that appears only one other time in that Section: when it describes the proper venue threshold for bringing a claim. The deliberate use of the same term in both the venue and nationwide service of process clauses, along with the choice of the word "section" rather than "chapter," evidences a limitation that does not appear in the RICO Act. *Compare* Black's Law Dictionary (12th ed. 2024) (defining "chapter" as "[a] major division within a statute, regulation, or other legal instrument") *with* Black's Law Dictionary (12th ed. 2024) (defining "section" as "[a] *distinct* part or division of a writing, esp. a legal instrument. In some documents, a section is an organizational unit within a hierarchy of units. For example, in many federal statutes a section is a unit below the subpart but above the subsection.") (emphasis added). If the FTC cannot show

that venue was proper in the Southern District of New York under Section 13(b), then it is not a "suit under [that] section"; it is a suit that must be dismissed for lack of personal jurisdiction.

4. Canons of Statutory Interpretation Support Mr. Underwood's Reading of the Statute.

The District Court's interpretation of Section 13(b) also fails to comport with basic canons of statutory construction.

First, the District Court's reading of Section 13(b) improperly renders its venue provision superfluous. Courts interpreting statutes are meant to avoid interpretations that fail to give meaning to *all* parts of the statute or that render any provision surplusage. *See State St. Bank & Trust Co. v. Salovaara*, 326 F.3d 130, 139 (2d Cir. 2003) (surplusage canon); *see also J.E.M. AG Supply, Inc. v. Pioneer Hi-Bred Int'l, Inc.*, 534 U.S. 124, 146 (2001) (Scalia, J., concurring) ("[S]tatutes must be construed in their entirety, so that the meaning of one provision sheds light upon the meaning of another."). Section 13(b)'s venue provision repeats what is already separately codified in 28 U.S.C. § 1391(b) (which governs venue under federal law, generally)—that venue is proper in any district where the defendant resides or where the defendant is subject to the reviewing court's personal jurisdiction. Because, on its own, the venue language in the FTC Act would not add anything beyond what is already in the federal venue statute, the District Court's read of Section 13(b)'s venue and nationwide service of process provisions as

disconnected would render its venue provision superfluous. *See KM Enters., Inc.*, 725 F.3d at 729–30 (applying same analysis to the Clayton Act; "Reading the two clauses of Section 12 independently creates textual problems of its own. If the clauses are not linked, then the venue language is superfluous."). Section 13(b)'s venue provision only has independent meaning if it is intended to be read alongside with, as a threshold requirement for, the nationwide service provision.

Second, the District Court's reading of Section 13(b) leads to an absurd result. Under the District Court's reading, the FTC could hale *any* individual defendant into *any* federal court in the country to answer for his employer's alleged deceptive advertising, regardless of the individual defendant's ties to the jurisdiction in question (*i.e.*, the propriety of the venue). Such a broad reading of the jurisdictional bounds of Section 13(b) is unsupported by the statute itself, but it is also unsupported by the trend of limiting the exercise of personal jurisdiction over individual defendants to address due process concerns, which the District Court failed to acknowledge. *See, e.g.*, *Walden v. Fiore*, 571 U.S. 277, 291 (2014) (holding that "[p]etitioner's relevant conduct occurred entirely in Georgia and the mere fact that his conduct affected plaintiffs with connections to the forum State [Nevada] does not suffice to authorize jurisdiction."); *Herlihy v. Sandals Resorts Int'l, Ltd.*, 795 Fed. App'x 27, 29-30 (2d Cir. 2019) (affirming ruling that this Circuit lacked jurisdiction over defendant where plaintiff failed to show that defendant

"purposefully directed" its conduct to forum state in a way that established the required "substantial connection between the cause of action and the alleged minimum contacts with the state"). "Courts should interpret statutes to avoid absurd results." *In re Nine West LBO Sec. Litig.*, 87 F.4th 130, 145 (2d Cir. 2023).

5. The Legislative History of Section 13(b) Supports Mr. Underwood's Reading of its Nationwide Service of Process Provision.

Finally, Section 13(b)'s legislative history confirms Mr. Underwood's straightforward reading of the nationwide service of process provision. From 1973 to 1994, the FTC Act contained a narrow venue provision that allowed suit to be brought only "in the district in which such person, partnership, or corporation resides or transacts business." Act of Nov. 16, 1973, Pub. L. No. 93-153, tit. IV, § 408(f), 87 Stat. 576, 592. The FTC explained that this venue clause "create[d] significant problems in suits involving multiple defendants who do not all reside or do business in a single district." S. Hrg. 103-327, *FTC Reauthorization: Hearing Before the S. Subcomm. on Consumer of the Comm. on Commerce, Science, & Transp.*, 103d Cong. 23 (1993) (statement of Janet Steiger, Chairwoman, FTC). "In these situations," the FTC said, it "may be forced to file separate suits in different districts, even though the case involves a single set of transactions." *Id.*

In a precursor to the current venue and nationwide service of process provisions, Congress drafted the following language to fix the problem:

> Whenever it appears to the court that the interests of justice require that any other person, partnership, or corporation should be a party in such suit, the court may cause such person, partnership, or corporation to be summoned without regard to whether they reside or transact business in the district in which the suit is brought, *and to that end process may be served in any district*.

S. 3150, 102d Cong. § 11(a) (1992) (emphasis added). Concerned about extraterritorial application, the FTC said that although it supported the expanded venue provision and the "related service of process amendment of the bill," the FTC "prefer[red] adoption of the more expansive formulation now found in section 12 of the Clayton Act and many other statutes, *i.e.*, allowing service on the corporate defendant 'wherever it may be found.'" S. Hrg. 102-1033, *FTC Reauthorization: Hearing Before the S. Subcomm. on Consumer of the Comm. on Commerce, Science, & Transp.*, 102d Cong. 16 (1992) (statement of Janet Steiger, Chairwoman, FTC).

The following year, a bill was introduced with the current venue and service provisions. S. 1179, 103d Cong. § 12(a) (1993). The FTC praised the bill for "clarify[ing] the Commission's authority to bring a suit not only where defendants reside or transact business, but also wherever venue is proper under 28 U.S.C. § 1391." S. Hrg. 103-327, 103d Cong. 23 (statement of Janet Steiger, Chairwoman, FTC). These provisions were ultimately incorporated into H.R. 2243, which became law. Federal Trade Commission Act Amendments of 1994, Pub. L. No. 103-312, § 10(a), 108 Stat. 1691, 1695.

In the 1994 Amendments, Congress struck the sentence that said suit may be brought only "in the district in which such person, partnership, or corporation resides or transacts business" and replaced it with the current venue and nationwide service provisions. *Id.* It also added Section 13(c), which sets forth procedures for service of process. *Id.* § 10(b), 108 Stat. at 1695–96. Explaining these changes, Congress said:

> Subsection (a) of this section amends section 13 of the FTC Act to permit defendants from different districts to be brought into FTC actions in Federal district court. In addition, service of process provisions are added *to facilitate notification for parties to the actions*. Subsection (b) of this section provides that process may be served by various means, including service to an officer of a corporation, delivery to the office of a corporation, or service through the mail.

S. Rep. No. 103-130, at 15, 1993 WL 322671 (emphasis added). The Ranking Republican of the Consumer Subcommittee added that the changes enlarged the FTC's "enforcement arsenal" by "includ[ing] a crucial expanded venue provision," "based in part on 28 U.S.C. § 1391," which "will permit the FTC to bring defendants scattered throughout the country to justice in a single forum." 140 Cong. Rec. S11316, 11317 (daily ed. Aug. 11, 1994) (statement of Sen. Slade Gorton). A co-sponsor in the House, Rep. Al Swift (D-Wash.), listed "expanded venue authority" as one of the "procedural reforms . . . requested by the FTC." 140 Cong. Rec. H6162, 6163 (daily ed. July 25, 1994) (statement of Rep. Al Swift). But not even the FTC's

Chairwoman thought that Section 13(b) and its "expanded venue authority" authorized suit against a corporate defendant in *any* forum, which is exactly what the District Court's interpretation would permit. *Cf. Daniel*, 428 F.3d at 425-26 (rejecting expansive interpretation of Section 12 of the Clayton Act as "nothing in the legislative history [of Section 12] suggests that any member [of Congress] intended to extend service of process *beyond* the carefully expanded venue provision.").

B. The District Court's Exercise of Personal Jurisdiction over Mr. Underwood Does Not Comport with Due Process.

Whether through the plain text or resorting to canons of statutory construction and legislative history, the result is the same: to enjoy the privilege of nationwide service under Section 13(b), a plaintiff must first show that venue is proper in the district as prescribed by the immediately preceding venue provision. The FTC failed to make this showing and thus cannot rely on Section 13(b)'s nationwide service provision to establish personal jurisdiction. Absent a statutory basis for personal jurisdiction, this Court does not need to reach the question of whether exercising jurisdiction comports with due process. *See Best Van Lines, Inc. v. Walker*, 490 F.3d 239, 242 (2d Cir. 2007) (stating "[i]f, but only if," there is a statutory basis for jurisdiction "must [the Court] then determine whether asserting jurisdiction under that provision would be compatible with requirements of due process").

In any event, even if Section 13(b) did authorize nationwide service of process in this instance, the District Court's denial of Mr. Underwood's motion to dismiss was erroneous because the District Court could not constitutionally exercise personal jurisdiction over Mr. Underwood. Personal jurisdiction is rooted in the Due Process Clause. *Insurance Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 702 (1982). It therefore restricts "judicial power not as a matter of sovereignty, but as a matter of individual liberty." *Id.*; *see also Waldman*, 835 F.3d at 328 ("Personal jurisdiction is 'a matter of individual liberty[.]'" (quoting *J. McIntyre Mach., Ltd. v. Nicastro*, 564 U.S. 873, 884 (2011))). Individuals have a liberty interest in "not being subject to the binding judgments of a forum with which [they have] established no meaningful 'contacts, ties, or relations.'" *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 472 (1985) (quoting *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 319 (1945)). Requiring a connection with the forum ensures that defendants have fair notice of where they may be haled into court, thereby allowing them "to structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit." *Id.* (quoting *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980)).

The liberty interests underpinning personal jurisdiction fall to the wayside if, as the District Court held, simply residing anywhere in the United States subjects Mr. Underwood to the jurisdiction of the Southern District of New York. As sister

circuits have correctly held,[5] even when a case arises under federal law and a federal statute authorizes nationwide service of process, due process still requires that the defendant have sufficient contacts with the state in which the court sits. *See Dakota Indus., Inc. v. Dakota Sportswear, Inc.*, 946 F.2d 1384, 1389 n.2 (8th Cir. 1991); *Bellaire Gen. Hosp. v. Blue Cross Blue Shield of Mich.*, 97 F.3d 822, 826 (5th Cir. 1996) (applying prior precedent despite "grave misgivings" and "emphasiz[ing] [the panel's] disagreement with it to the extent it concludes that the proper personal jurisdiction test in a national service of process case is whether minimum contacts exist between the individual and the national sovereign"); *Busch v. Buchman, Buchman & O'Brien, Law Firm*, 11 F.3d 1255, 1259 (5th Cir. 1994) (Garza, J., dissenting) ("Requiring that the individual defendant in a national service of process case only reside somewhere in the United States does not protect this [individual liberty] interest."); *Willingway Hosp., Inc. v. Blue Cross & Blue Shield of Ohio*, 870 F. Supp. 1102, 1106 (S.D. Ga. 1994) ("To allow Congress to dictate personal

[5] This Court has not yet decided whether "when a civil case arises under federal law and a federal statute authorizes nationwide service of process, the relevant contacts for determining personal jurisdiction are contacts with the United States as a whole" or contacts with the state where the district court sits. *Gucci Am. v. Bank of China*, 768 F.3d 122, 142 n.21 (2d Cir. 2014). *But see Okla. Firefighters Pension & Ret. Sys. v. Banco Santander (Mexico) S.A.*, 92 F.4th 450, 456 n.5 (2d Cir. 2024) (acknowledging *Gucci*, collecting "cases that suggest otherwise," and then declining to "reach this question").

jurisdiction through the enactment of nationwide service of process provisions, unquestioned by the judiciary is nonsensical.").

The record shows that Mr. Underwood is a stranger to New York. Mr. Underwood is not domiciled in New York, and does not personally have continuous or permanent contacts with New York. [Dkt.272 at 2-3.] Nor has Mr. Underwood purposefully availed himself of New York such that he could foresee being haled into court in connection with this litigation. [*Id.* at 2-5.] Indeed, the District Court correctly dismissed Mr. Underwood from the NYAG's claims in this case for this very reason. [*Id.*] But for the same reason, the District Court erred in exercising personal jurisdiction over Mr. Underwood as to the FTC's claims. *Waldman*, 835 F.3d at 344.

II. MR. UNDERWOOD INCORPORATES BY REFERENCE PORTIONS OF QUINCY'S BRIEF PURSUANT TO FED. R. APP. P. 28(i).

Pursuant to Fed. R. App. P. 28(i), Mr. Underwood incorporates the portions of Quincy's principal brief related to additional errors made by the District Court in deciding the FTC's claims against Defendants. Specifically, Mr. Underwood incorporates Quincy's arguments that: (i) the District Court erred in issuing a nationwide permanent injunction as a remedy to the FTC's claims under Sections 5 and 12 of the FTC Act in that it prohibited conduct *found to be legal* under those statutes; (ii) the District Court erred in issuing a nationwide permanent injunction that otherwise fails to comply with Fed. R. Civ. P. 65(d); (iii) the District Court erred

in denying both summary judgment and judgment as a matter of law as to the FTC's claims as the below is not a "proper case" for injunctive relief under Section 13(b) of the FTC Act; and (iv) the District Court erred in denying summary judgment in light of Plaintiffs' failure to present any consumer perception evidence and in light of Plaintiffs' failure to challenge Defendants' evidence of substantiation for its claims using the proper evidentiary standard.

Mr. Underwood also incorporates the portions of Quincy's principal brief related to errors made by the District Court in deciding the NYAG's claims against Quincy (properly dismissed as to Mr. Underwood for lack of personal jurisdiction) to the limited extent that, if the jury's factual findings are disturbed on appeal, then the District Court also erred in applying such factual findings in adjudicating Defendants' liability under the FTC Act.

CONCLUSION

For the reasons set forth herein, the District Court erred in finding personal jurisdiction over Mr. Underwood under Section 13(b) of the FTC Act. Mr. Underwood respectfully requests that this Court reverse and dismiss the FTC's claims against Mr. Underwood for lack of personal jurisdiction.

Dated: New York, New York
April 3, 2025

Respectfully submitted,

/s/ *Michael B. de Leeuw*
Michael B. de Leeuw
Tamar S. Wise
Amanda Giglio
COZEN O'CONNOR P.C.
Three World Trade Center
175 Greenwich Street, 55th Floor
New York, NY 10007
Tel: (212) 908-9400
Fax: (212) 509-9492

Robert S. Clark
COZEN O'CONNOR P.C.
1650 Market Street, Suite 2800
Philadelphia, PA 19103
Tel: (215) 665-2041

Attorneys for Defendant-Appellant-Cross-Appellee Mark Underwood

CERTIFICATE OF COMPLIANCE

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Dated: April 3, 2025

/s/ *Michael B. de Leeuw*
Michael B. de Leeuw