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STOPPING COVID–19 FRAUD AND PRICE GOUGING

HEARING

BEFORE THE

SUBCOMMITTEE ON CONSUMER PROTECTION,
PRODUCT SAFETY, AND DATA SECURITY

OF THE

COMMITTEE ON COMMERCE,
SCIENCE, AND TRANSPORTATION
UNITED STATES SENATE

ONE HUNDRED SEVENTEENTH CONGRESS

SECOND SESSION

FEBRUARY 1, 2022

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SENATE COMMITTEE ON COMMERCE, SCIENCE, AND TRANSPORTATION

ONE HUNDRED SEVENTEENTH CONGRESS

SECOND SESSION

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STOPPING COVID–19 FRAUD AND PRICE GOUGING

TUESDAY, FEBRUARY 1, 2022

U.S. SENATE,
SUBCOMMITTEE ON CONSUMER PROTECTION, PRODUCT SAFETY, AND DATA SECURITY,
COMMITTEE ON COMMERCE, SCIENCE, AND TRANSPORTATION,
Washington, DC.

The Committee met, pursuant to notice, at 3:05 p.m., in room SR–253, Russell Senate Office Building, Hon. Richard Blumenthal, presiding.

Present: Senators Blumenthal [presiding], Cantwell, Klobuchar, Markey, Blackburn, Wicker, Thune, and Lee.

OPENING STATEMENT OF HON. RICHARD BLUMENTHAL, U.S. SENATOR FROM CONNECTICUT

Senator BLUMENTHAL. The Subcommittee on Consumer Protection of the Commerce Committee will come to order.

I want to welcome our witnesses and thank the Chair, Maria Cantwell, and Ranking Member Roger Wicker, who is with us, and especially my partner in this effort, Senator Blackburn, whose leadership has been very important throughout our subcommittee process today, no less than in our past meeting. She has played an important role, and I want to thank our witnesses for being here as well. Nothing could be more important right now than protecting consumers against the spreading scourge of price gouging and scamming on the Internet and elsewhere relating to COVID prevention and treatment products.

Connecticut alone has received more than 800 complaints, including one from a constituent of mine in Shelton, Connecticut, Julius Hull, whose son tried to get a test. He needed a test because he was potentially a danger to his older parents. He and his son went to a walk-in test facility, waited in line for 45 minutes before they were told no more tests. They went to another facility, waited for 50 minutes, no more tests, and they were told the only tests left were rapid tests available to purchase for $60. As Mr. Hull put it to me, "We are being told to wear masks, get vaccinated, keep social distances, and get tested if you have any symptoms. We have done this and get hit with a $60 bill. I do not know who put the price of these tests at $60 each, but I believe we are being taken advantage of." Yes, Mr. Hull, you are being taken advantage of, you are being exploited, and what is happening to you is unconscionable. And I would say the same thing to every one of those 800 people who have complained about similar practices.

Sixty dollars per test is ridiculous. Taking advantage of people by raising the cost of these lifesaving products is not only immoral. In most states, it is a crime. State attorneys general are stepping up, bringing cases where they can, but it is a national challenge, and I will be very blunt. There is a glaring lack of enforcement at the Federal level. The Federal Government, including the Federal Trade Commission and the Department of Justice, have few legal tools to hold price gougers accountable. That is a glaring gap in the law that needs to be corrected. I am deeply frustrated and disappointed that Federal enforcers have failed to do more, and a large part of the problem is almost certainly lack of sufficient authority.

And that is why I will be proposing a measure that will fill that gap. It will enable Federal enforcers to do more and protect consumers in Connecticut from these price gougers and scammers. We need to impose steep financial penalties and absolutely bring criminal charges. I have said this in a variety of other contexts. The one thing that these companies understand is prison time and criminal charges. Profiteering during a pandemic is reprehensible. It costs lives. It must end.

Last year, the Subcommittee held a hearing on scams and fraud exploiting the pandemic. We heard then that the pandemic has created a bonanza for swindlers and con artists. The theft continues. The FTC has received nearly 700,000 reports of fraud since the start of the pandemic, approaching $700 million lost. At each new phase of the pandemic, consumers have been inundated with more sophisticated scams. Online marketplaces are still rife with fake face masks. Sophisticated counterfeits are still infiltrating our supply chain, putting unsuspecting consumers and healthcare workers at risk. And social media platforms are still a mega mall for snake oil salesmen hawking fake cures and prevention measures.

It is not small change theft. People are going unvaccinated because of the commercial misinformation from these snake oil salesmen and then contracting COVID–19 and dying. So we have seen a new trend, an entirely new paradigm of fake or deceptive testing schemes during this recent surge. Bogus testing centers have promised quick results and left consumers waiting for days. In some cases, the results are not even real. Again, these scams cost lives.

The purpose of this hearing is to sound the alarm, raise the red flag, create awareness about the surge of scam, but it is also to ensure that those who steal from consumers and put them at risk are brought to justice. Our consumer protection laws are dead letter if they are unenforced, and the Federal Trade Commission has to do more, has to do better, has to be more vigorous and assertive. It has failed to create deterrence through hefty fines and strict court orders, and it must do more. In December 2020, Congress gave the FTC new legal tools to help bring stiff financial penalties against fraud. I want to recognize Chair Cantwell's substantial leadership on that law, which I was pleased to help lead. We urge the Commission to fight harder. We gave it more funding.

Last year, the Acting Director of the Bureau of Consumer Protection told us that it had "cases in the pipeline," and yet the FTC has brought two cases in the last 10 months since that hearing, three in total, under the new law. However, the FTC continues to

issue warning letters that are nothing more than a notice and not even a slap on the wrist. They do not rise to that level. Again, this fraud, this undermining of our pandemic response is happening because there are nearly no consequences. The burden is falling on consumers. These bogus testing centers, counterfeit face masks, and deceptive marketing schemes are crimes. I expect more enforcement and so does the American people. I expect the FTC to refer cases to the Department of Justice and collaborate with States for criminal prosecution. For these criminals, only prison time will act as a deterrent.

I look forward to hearing from the witnesses about what else can be done and should be done to protect consumers, and I look forward to collaborating with colleagues on both sides of the aisle to stop price gouging, hold online marketplace scammers accountable, and ensure that our laws are enforced. Thank you again to the Ranking Member, and I turn to her.

STATEMENT OF HON. MARSHA BLACKBURN,
U.S. SENATOR FROM TENNESSEE

Senator BLACKBURN. Thank you, Mr. Chairman, and I thank you for the work and I thank your staff for the work. I appreciate that our staffs are able to work together so well on not only this issue, but other issues that our subcommittee is addressing, and it is important to bring some oversight to scams that consumers have faced. It is absolutely essential that the Federal Government work with our State partners to crack down on bad actors who threaten the livelihood of some of the most vulnerable Americans.

Fraudsters have gotten quite creative with their schemes during the pandemic. I think we have all been a little bit amazed with some of what we have discovered that they are doing. Whether it is through taking advantage of elderly citizens or advertising and selling products with false medical claims, scammers have disrupted the lives of millions of Americans. And you mentioned the $700 million that is the cost that the FTC estimates has come to consumers. Seven hundred million dollars. It is unacceptable. Fortunately, our states have leaders, like my state of Tennessee, our attorney general, Herbert Slatery, that have taken a leading role in shutting down these scammers. In the first consumer action brought by any State Attorney General Office in response to COVID–19, Tennessee closed down a price gouging operation involving two brothers that deprived rural East Tennessee and Eastern Kentucky of hand sanitizer. Thankfully, AG Slatery was able to resolve the matter quickly, and the brothers agreed to donate the supplies to a nonprofit organization in Tennessee. State attorneys general know their consumers best, and that is why I believe they are so well suited to lead this fight and to be there on the front lines.

In 2020, another Tennessee company was making allegedly deceptive and misleading claims related to its cleaning products and services. The company claimed its products and services were FDA and EPA approved and could eliminate COVID–19 and protect against the virus on surfaces for up to 30 days. The company also presented the logos of major companies on their website, even though most of the companies confirmed they had never worked

with the company or approved the use of their logo. Following a letter from AG Slatery in May 2020, the company continued to imply that its products and services could protect against COVID-19. In November 2020, Attorney General Slatery announced a settlement with the company and prevented them from making any further deceptive or misleading claims that products or their services were effective against COVID–19.

Individual consumers were not the only victims of fraudsters the Federal Government has been defrauded in countless instances. The Paycheck Protection Program and the Economic Injury Disaster Loan Program have saved thousands of small businesses and kept hundreds of thousands of people on the payroll. However, scammers immediately took advantage of these programs when the SBA was forced to screen applicants and approve loans quickly. According to an ABC News report dating back to last August, SBA's Inspector General Mike Ware, estimated that 5 percent of transactions were fraudulent, a stunning rate that would suggest tens of billions of dollars have been lost.

I would like to point out one last thing before the witnesses give their opening remarks, and we do thank the witnesses for joining us today and for their patience with our tardiness in beginning the hearing. It is important to note that an unprecedented amount of counterfeit PPE continues to come through our Nation's ports. Not surprisingly, countless amounts of these fake masks and test kits come from China. Tomorrow, this committee is scheduled to vote on the nomination of Mary Boyle to be a Commissioner of the Consumer Product Safety Council, the CPSC.

Now, according to a *USA Today* report, in July 2021, Ms. Boyle was a leader in last year's decision to pull inspectors from the ports. Ms. Boyle, who agreed to pull port inspectors during private conversations in March 2020 told Commissioners, and I quote her, that "The Agency could chase problem products later through recalls." That is a very troubling statement, very troubling, because by that time, the counterfeit products are there. People have had tests that did not deliver accurate results. They have used PPE that is counterfeit and not effective. So I highly recommend to the White House that they pull the nomination of Ms. Boyle and that they put forward a candidate with a more proven background.

Thank you, Mr. Chairman. I look forward to the hearing.

Senator BLUMENTHAL. Thanks, Senator Blackburn. Senator Wicker, I do not know whether you have an opening statement.

Senator WICKER. I do have a brief opening statement, Mr. Chairman, and I do thank you.

Senator BLUMENTHAL. Please go ahead.

STATEMENT OF HON. ROGER WICKER, U.S. SENATOR FROM MISSISSIPPI

Senator WICKER. And thanks to both of you for your leadership on this issue and for convening this very important hearing on protecting the public from COVID–19 scams and price gouging.

As the COVID–19 virus continues to impact the United States, fraudsters and cyber criminals have continued exploiting the pandemic to take advantage of consumers. These bad actors have employed myriad scams to steal money from Americans, including e-

mail phishing schemes, government imposter scams, price gouging, identity theft, and more. Last month, the FTC calculated that these scams have cost Americans over $600 million, perhaps more. To protect consumers from such illicit activities, Congress can and should move to clarify the FTC's authority to empower the Agency to punish and enjoin fraudulent or improper behavior and quickly see that victims are compensated for their losses. Congress should also give the FTC clear authority to go after bad actors exploiting the supply chain crisis and surging inflation to gouge consumers.

I think there is a real opportunity to craft legislation to clarify the FTC's authority to protect consumers from price gouging and assist State attorneys general in combating this illegal practice. However, this effort should not distract from addressing the reckless policies that have caused the price of goods to spike and brought about the highest inflation numbers in 40 years. Finally, these COVID-related scams further underscore the need for uniform national privacy legislation to protect consumers from identity thieves and other misuse of their personal information. The subcommittee addressed this topic about 10 months ago, as the Chairman has already stated. Today's hearing presents an opportunity to learn more about the efforts of the FTC, State and local governments, and the private sector to protect consumers from COVID–19 scams.

So I thank the witnesses for their patience and for their testimonies, and I thank Senators Blumenthal and Blackburn for holding this important hearing. And I yield.

Senator BLUMENTHAL. I will turn to the Chair of the Commerce Committee, Senator Cantwell, if she has any opening remarks.

STATEMENT OF HON. MARIA CANTWELL,
U.S. SENATOR FROM WASHINGTON

The Chairwoman: Thank you, Chair Blumenthal, and thank you for holding this hearing, my colleague, the Ranking Member, Senator Wicker, and being here for this important hearing, and the witnesses today.

Since the onset of the pandemic, consumers across the country have been victimized by a range of scams related to COVID–19, including fake COVID–19 tests, cures, price gouging, phishing scams, and these are more than just an annoyance. They put the lives of individuals really at risk. So I am sad to see in the *Seattle Times* today a headline, "COVID Testing Company Faked Test Results, Lied to Patients," and that our attorney general in the State of Washington is filing suit. The lawsuit, which was filed yesterday, describes how an Illinois-based company with at least 13 COVID–19 testing sites operating in Washington, took advantage of Washington residents and consumers, some in other parts of the country as well, at a time when the Omicron infections were rising at a skyrocketing rate. Consumers complained that they did not get test results, that there were reports that companies stuffed tests into trash bags. Reports also surfaced that employees did not wear protective gear, or masks, or gloves, and one resident particularly worried because he provided a copy of his driver's license and insurance card with obviously important personal information. Another resident visited the site, was uneasy from the start when she en-

tered a makeshift storefront to find an empty office except for two folding chairs and was in—still waiting to hear about her test results.

So I hope that the witnesses will be able to answer important questions for the record today. The alleged fraud has serious consequences, and I want to make sure that consumers in Washington have confidence to go get these tests and at these sites, so I hope that the FTC will look into this matter. There are issues about whether the FTC will—make sure the FTC has the proper authority. The FTC reports that since 2020, there have been nearly 300,000 reported instances of fraud resulting in more than $669 million in total fraud losses. So I hope that the FTC—responding by sending warning letters, but obviously we want and have sought for much quicker action on that. The Commission needs to take stronger tools to find companies who peddle fake treatment and cures and who endanger the public. So I look forward, Mr. Chairman, to have comments from our witnesses on that.

We passed the Consumer Protection Act, and Senator Wicker and I were sponsors of that, yet the FTC only has brought three civil penalty cases with this authority. So we want a strong FTC pursuing these cases about misperceptions, fraudulent activity as it relates to consumers in the time of a COVID crisis. So thank you, Mr. Chairman.

Senator BLUMENTHAL. Thanks, Senator Cantwell, and thanks for your support in the work of our subcommittee, and most especially your work on the December 2020 law that strengthened the FTC in giving them additional tools on this topic. And I want to join in thanking the witnesses for their patience. We have ongoing votes as you know, and we are going to be moving in and out, but we were late starting because of those votes, and we appreciate your staying with us.

Let me introduce the witnesses. Mr. Samuel Levine is the Director of the Federal Trade Commission's Bureau of Consumer Protection. Mr. Levine previously served as attorney advisor for Commissioner Rohit Chopra and as a staff attorney in the FTC's Chicago office. Teresa Murray is the Director of the Consumer Watchdog Office at the United States Public Interest Research Group, which looks out for consumers' health, safety, and financial security. Previously, Ms. Murray worked on—worked as a journalist and columnist covering consumer issues and personal finance for 2 decades in Ohio. Ms. Mary Engle is the Executive Vice President of Policy at the Better Business Bureau National Programs. Prior to joining BBB, Ms. Engle directed the FTC's Division of Advertising Practices, enforcing truth in advertising principles for national advertising matters. And Mr. Todd Leatherman. Mr. Leatherman is the Program Counsel of the National Attorneys General Training and Research Institute for the National Association of Attorneys General—NAAG. Before joining NAAG, Mr. Leatherman worked for 23 years with the Kentucky Attorney General's Office, Office of Consumer Protection.

Mr. Levine, we will begin with your testimony. Thank you for being here.

STATEMENT OF SAMUEL A.A. LEVINE, DIRECTOR, BUREAU OF CONSUMER PROTECTION, FEDERAL TRADE COMMISSION

Mr. LEVINE. Thank you, Senator, and good afternoon. My name is Samuel Levine, and I am the Director of the FTC's Bureau of Consumer Protection. I am pleased to be speaking to you today about the FTC's comprehensive work to detect, deter, and halt COVID-related fraud. My written statement represents the views of the Commission, but this opening statement represents my views alone.

The global pandemic has caused unimaginable suffering for millions of Americans, but it has created rich opportunities for scammers. At the FTC, thanks to the new tools and resources Congress gave us to fight COVID fraud, we are pursuing a comprehensive strategy to combat this scourge. First, we are carefully monitoring fraudulent claims. We work tirelessly to review thousands of complaints submitted to our Sentinel data base, and we monitor social media and other platforms which have become fertile ground for fraud. In addition, we analyze the complaints we receive from the public to spot emerging trends and guide our enforcement strategy. Second, we are using new authorities granted by Congress to target the worst forms of COVID abuse. Thanks in part to the COVID–19 Consumer Protection Act, we have been able to take down hundreds of fraudulent claims through cease and desist demands, and we have brought lawsuits to permanently shut down the worst offenders.

But there is more work to do. We recognize that removing claims quickly from the marketplace does not help those who have already been victimized by these scams, and we will bring more cases to help ensure that consumers can be made whole. We are also making unprecedented investment to consumer education, and we are reaching out to communities across the country to spread the word about avoiding fraud. Unfortunately, the impacts of the pandemic on the marketplace have been so pervasive that case-by-case enforcement and education is simply not enough. That is why we are also taking steps to deter fraud market-wide, particularly by triggering civil penalty liability.

Over the last year, we initiated a rulemaking to combat government and impersonation fraud, we revived our penalty offense authority to crack down on false earnings and health claims, and we worked with the CFBP to deter landlords from violating the CDC's eviction ban. We also protected consumers looking to buy products made in America, formally outlawing the practice of slapping "Made in America" labels on imported goods. Finally, we issued a statement on criminal referrals, reaffirming that we would not hesitate to refer the most egregious frauds for criminal prosecution.

I am proud of the actions we are taking, but we do face significant headwinds. First, scammers now have a lethal weapon to aim at struggling Americans: social media. It is no longer the case that scammers need to cold call consumers or blast out fraudulent mailers to defraud the public. Now they can use powerful tools built on secret surveillance of American consumers to target their prey with precision. The result is that social media platforms have become hotbeds for fraud. Last week we released data showing that 1 in 4 people who reported losing money to fraud in 2021 said that the

con started on social media, and the number of consumers who reported losing money to these scams has gone up 19-fold—19-fold—since 2017. This surge is exactly why the Commission is pursuing a strategy to effectuate deterrence market-wide, but this battle remains uphill so long as digital platforms continue to wash their hands of responsibility for the fraud they are facilitating.

Our second major challenge stems from the Supreme Court's decision in AMG, which stripped the FTC of its most powerful authority, Section 13(b), to redress consumers and hold bad actors accountable. During the 5 years before the decision was issued, FTC law enforcement actions resulted in the return of more than $11 billion to injured consumers, but the AMG case means that many lawbreakers are now able to pocket their profits with impunity. We are grateful for everything Congress is doing to try to restore this vital tool, and we stand ready to assist in any way we can.

I thank you for the opportunity to speak with you today, and I look forward to taking your questions.

[The prepared statement of The Federal Trade Commission follows:]

PREPARED STATEMENT OF THE FEDERAL TRADE COMMISSION

I. INTRODUCTION

Chairman Blumenthal, Ranking Member Blackburn, and Members of the Subcommittee, I am Samuel Levine, Director of the Bureau of Consumer Protection at the Federal Trade Commission (Commission or FTC).[1] I am pleased to appear before you today.

During the course of this pandemic, we have encountered disturbing trends and surging complaints as Americans are being targeted by predators large and small, with schemes including get-rich-quick opportunities, bogus cures, false promises of economic assistance, and counterfeit personal protective equipment (PPE). The Commission is taking a comprehensive approach to identifying and addressing COVID-related consumer frauds impacting American consumers and businesses. First, the FTC is engaged in law enforcement to halt and deter COVID-related deceptive claims. Second, we continue to collect and analyze data in our Consumer Sentinel Network to identify consumer fraud trends. Third, the FTC has continued its outreach and consumer education and is proactively using social media, video streaming conferences, and other methods to reach historically underserved communities and people in economically and geographically diverse communities. The Commission appreciates funds provided in the American Rescue Plan, which we have used to bolster our efforts to address the effects of the COVID–19 pandemic on American consumers.

The Commission recognizes that challenges remain in protecting consumers from fraud and abuse. Returning money to defrauded consumers has been a fundamental part of the FTC's consumer protection mission. However, the Supreme Court in *AMG Capital Mgmt., LLC v. FTC,* 141 S. Ct. 1341 (Apr. 2021) held that the FTC does not have the ability to obtain monetary relief pursuant to Section 13(b) of the FTC Act. Amidst this devastating pandemic, restoring the FTC's ability to provide redress to wronged consumers is critical.

II. COMBATTING COVID–RELATED FRAUD

a. Detecting COVID–19 Scams

The FTC's Consumer Sentinel Network collects millions of reports from the public about fraud, identity theft, and other consumer problems, and makes them available to thousands of law enforcement users across the country. In the weeks following the first known cases of COVID–19 in the U.S., the FTC developed systems to track and alert the public to shifts in Sentinel reporting. On ftc.gov/exploredata, the FTC launched public dashboards showing aggregate Sentinel data on reports associated

[1] This written statement presents the views of the Federal Trade Commission. The oral statements and responses to questions reflect my own views and do not necessarily reflect the views of the Commission or any Commissioner.

with COVID–19 by age, type of fraud, and geographic location, with figures that are updated daily. Since January 2020 and as of January 28, 2022, the FTC has received more than 292,000 such fraud reports, reflecting $674 million in fraud losses.[2]

Ensuring that the experiences of all consumers are represented in Consumer Sentinel is critically important to the agency's work. To expand accessibility, the FTC launched a modernized reporting website, ReportFraud.ftc.gov, in October 2020. The updated site includes a COVID–19 banner, providing an easy way for consumers to report COVID-related issues. We are also grateful to more than 45 law enforcement partners, including 25 state Attorneys General, for contributing data to the Sentinel system. In 2021, the FTC increased the capacity of the Consumer Sentinel Network to learn about individual instances of fraud by adding the Social Security Administration as a data contributor. Sentinel received nearly 2.8 million reports of fraud in 2021, with consumers reporting a total dollar loss of $5.9 billion and an individual median dollar loss of $500.[3]

FTC staff monitors and analyzes Sentinel to identify every COVID-related fraud complaint to find potential law enforcement targets and witnesses, and to coordinate with federal, state, and local law enforcement partners. These reports have led to numerous law enforcement actions.

b. COVID–19 Law Enforcement Actions

Thanks in part to new authority granted by Congress, bad actors face severe consequences for committing COVID-related fraud. Deploying the Commission's new authority under the COVID–19 Consumer Protection Act of 2020[4] (CCPA) and its other legal authorities, the Commission seeks emergency injunctions, asset freezes, and civil penalties of up to $46,517 for each violation of the CCPA or other rules enforced by the agency as necessary to ensure that the public is protected.

Most recently, the FTC filed a lawsuit under the CCPA alleging that a Utah-based company claimed its nasal sprays provide four-hour protection against coronavirus and are "an effective solution to the pandemic."[5] A few months prior, we filed the first case under the CCPA against a chiropractor and his company who claimed their vitamin D and zinc supplements were scientifically proven to treat or prevent COVID–19, and that they were equally or more effective than vaccines.[6] We pursued and obtained a stipulated preliminary injunction against these defendants.[7] In addition, the agency is seeking civil penalties under the CCPA against an online marketer that allegedly not only failed to deliver PPE within promised timeframes, but also falsely claimed that consumers would receive N95 respirators certified by the FDA or NIOSH while actually providing inferior cloth facemasks.[8] In all three of these cases, which are still ongoing, we are using authority granted by Congress to pursue civil penalties and other relief. These actions are the latest in a long line of enforcement efforts that began early in the pandemic. Even before the enactment

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[2] The figures reflect reports in Sentinel that specifically mention words related to the pandemic, such as COVID, stimulus, N95, and related terms. To provide the most relevant results, some subcategories are excluded. For more information, visit *https://public.tableau.com/profile/federal.trade.commission#!/vizhome/COVID-19andStimulusReports/Map.*

[3] In 2020, Sentinel received nearly 2.3 million fraud reports and consumers reported a total dollar loss of $3.4 billion. *https://public.tableau.com/app/profile/federal.trade.commission/viz/ConsumerSentinel/Infographic*

[4] Pub. L. No. 116–260, 134 Stat. 1182, Division FF, Title XIV, § 1401.

[5] Complaint, *US v. Xlear, Inc.,* Case No. 2:21-cv-00640–RJS (D. Utah), available at *https://www.ftc.gov/system/files/documents/cases/filed_complaint_xlear_v_jones_v.1.pdf.*

[6] Complaint, *US v. Nepute,* Case No. 4:21-cv-00437 (E.D. Mo.), available at *https://www.ftc.gov/system/files/documents/cases/2023188eneputecomplaint_0.pdf.*

[7] Preliminary Injunction, *US v. Nepute,* Case No. 4:21-cv-00437 (E.D. Mo.), available at *https://www.ftc.gov/system/files/documents/cases/consent_order.pdf.*

[8] Complaint, *FTC v. Frank Romero dba Trend Deploy,* Case No. 5:21-cv-00343 (M.D. Fla.), available at *https://www.ftc.gov/system/files/documents/cases/complaint_-_trend_deploy.pdf.*

of the CCPA, the FTC used Section 5 to challenge deceptive health claims [9] and illegal practices relating to sales of PPE [10] and sanitizing products.[11]

The FTC also has challenged schemes that exploited consumers' and small businesses' financial distress. Most recently, the Commission ruled against a company that deceived consumers with mailers that featured a likeness of the Great Seal of the United States and a mock stimulus check and promised to get them Federal COVID–19 stimulus benefits.[12] Rather than assisting consumers to obtain stimulus benefits, the mailers sought to lure consumers to auto sales events. The Commission Order banned the company and its owner from participating in advertising, marketing, promoting, distributing, or selling or leasing motor vehicles for 20 years.[13] Early in the pandemic, the FTC alleged that a company falsely claimed to be an approved lender to induce struggling small businesses to submit applications for the Paycheck Protection Program, administered by the Small Business Administration (SBA). The FTC obtained a court order permanently barring the company from misrepresenting its ability to make or process SBA loans, as well as its affiliation with SBA.[14] In addition, to protect consumers attempting to replace or supplement income during the pandemic, the Commission—along with 19 federal, state, and local partners—led a nationwide crackdown against scams making false promises of income and financial independence.[15] As part of the crackdown, the Commission sued Moda Latina, which allegedly targeted Latina consumers with false earnings claims in Spanish language ads.[16] An order resolving that case bans the defendants from selling or marketing opportunities to work from home and imposes a judgment of over $7 million.[17] In *National Web Design,* a work-from-home scam, the Commission alleged that the defendants blasted out millions of illegal robocalls and adjusted call messaging to capitalize on consumers who were concerned about the health risks of working outside the home during the pandemic.[18] The order resolving the case

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[9] For example, the Commission sued a company that, even after receiving a warning from the FTC, allegedly deceptively advertised a $23,000 treatment plan as a scientifically proven way to treat COVID–19, and recently settled with one defendant for over $100,000. FTC Press Release, *FTC Sues California Marketer of $23,000 COVID–19 "Treatment" Plan* (July 31, 2020), *https://www.ftc.gov/news-events/press-releases/2020/07/ftc-sues-california-marketer-23000-covid-19-treatment-plan;* Stipulated Order for Permanent Injunction and Monetary Judgment as to Defendant Stephen Meis, *FTC v. Golden Sunrise Nutraceutical, Inc.,* Case No. 1:20-cv-00540–DAD–SKO (E.D. Cal.), available at *https://www.ftc.gov/system/files/documents/cases/052-gs_stipulated_order_for_permanent_injunction_and_monetary_judgment_as_to_defendant_stephen_meis.pdf.*

[10] *See, e.g.,* Complaint, *FTC v. SuperGoodDeals.com, Inc.,* Case No. 20-cv-3027 (E.D.N.Y.), available at *https://www.ftc.gov/system/files/documents/cases/202_3135_supergooddeals_-_complaint.pdf;* Complaint, *FTC v. Am. Screening, LLC,* Case No. 4:20-cv-1021 (E.D. Mo.), available at *https://www.ftc.gov/system/files/documents/cases/202_3158_american_screening_-_complaint.pdf;* Complaint, *FTC v. Zaappaaz LLC,* Case No. 4:20-cv-02717 (S.D. Tex.), available at *https://www.ftc.gov/system/files/documents/cases/202_3136_zaappaaz_-_complaint.pdf.*

[11] *See, e.g.,* Complaint, *FTC v. QYK Brands LLC,* Case No. 8:20-cv-01431–JLS–KES (C.D. Cal.), available at *https://www.ftc.gov/system/files/documents/cases/202_3147_qyk_brands_-_complaint.pdf;* Complaint, *FTC v. One or More Unknown Parties Deceiving Consumers Into Making Purchases Through: www.cleanyos.com et al.,* Case No. 5:20-cv-02494 (N.D. Ohio), available at *https://www.ftc.gov/system/files/documents/cases/complaint_w-a_filed.pdf.* The Commission obtained a Federal court order that, while litigation proceeds, prohibits the defendants from making deceptive claims, suspends their deceptive websites, and bars them from using their websites to collect money from consumers. Preliminary Injunction, *FTC v. One or More Unknown Parties Deceiving Consumers Into Making Purchases Through: www.cleanyos.com et al.,* Case No. 5:20-cv-02494 (N.D. Ohio), available at *https://www.ftc.gov/system/files/documents/cases/ftc_v_unknown_preliminary_injunction_with_att_a.pdf.*

[12] Opinion of the Commission, *In re Traffic Jam Events, LLC,* Docket No. 9395 (FTC), available at *https://www.ftc.gov/system/files/documents/cases/d09395_commission_opinion.pdf.*

[13] Final Order, *In re Traffic Jam Events, LLC,* Docket No. 9395 (FTC), available at *https://www.ftc.gov/system/files/documents/cases/d09395_commission_final_order.pdf.*

[14] Stipulated Final Order, *FTC v. Ponte Investments, LLC,* Case No. 1:20-cv-00177 (D.R.I.), available at *https://www.ftc.gov/system/files/documents/cases/x200042_ponte_inv_-_stipulated_final_order.pdf.*

[15] FTC Press Release, *As Scammers Leverage Pandemic Fears, FTC and Law Enforcement Partners Crack Down on Deceptive Income Schemes Nationwide* (Dec. 14, 2020), *https://www.ftc.gov/news-events/press-releases/2020/12/scammers-leverage-pandemic-fears-ftc-law-enforcement-partners.*

[16] Complaint, *FTC v. Moda Latina BZ Inc.,* Case No. 2:20-cv-10832–FMO–SK (C.D. Cal), available at *https://www.ftc.gov/system/files/documents/cases/001_complaint.pdf.*

[17] Order on Stipulation Re: Permanent Injunction and Monetary Judgment, *FTC v. Moda Latina BZ Inc.,* Case No. 2:20-cv-10832–FMO–SK (C.D. Cal. March 21, 2021), available at *https://www.ftc.gov/system/files/documents/cases/056_order_on_stipulation_re_permanent_inj_and_monetary_judgment.pdf*

[18] Complaint, *FTC v. National Web Design, LLC,* Case No. 2:20-cv-00846 (D. Utah), available at *https://www.ftc.gov/system/files/documents/cases/randon_morris_complaint.pdf.*

bans defendants from robocalling and selling or marketing work-from-home opportunities and imposes a judgment of more than $2 million.[19] In an ongoing lawsuit against Raging Bull, the FTC has alleged that the defendants fraudulently marketed investment-related services that they claimed would enable people to make consistent profits and beat the market, and claimed that the pandemic was a great time to learn their trading techniques to make profits.[20] Instead, the FTC has alleged, consumers—including retirees, older adults, and immigrants—lost more than $197 million to this scheme in only the last three years.

The Commission will remain vigilant in protecting the public from harms that stem directly and indirectly from the COVID–19 pandemic. The FTC is committed to tackling emerging threats, adjusting our strategies wherever necessary, and working in close coordination with our law enforcement partners at the local, state, and Federal level.

c. COVID–19 Consumer Education and Outreach

The Commission has continued to buttress its law enforcement actions with consumer and business education. Aided by the American Rescue Plan funds, the FTC has increased its outreach to ethnic and immigrant communities, which have been targeted by COVID–19 scams. The FTC has actively engaged with ethnic and community media journalists nationwide to learn about issues affecting these communities. Later this month, the agency will place multilingual anti-fraud messaging into targeted print and radio markets. This messaging will reach Asian-American, Black, Latino, and Tribal communities on topics that include scams related to COVID–19 and other topics. The FTC also has used new methods to reach people in economically and geographically diverse communities. For example, the FTC conducted national radio media tours with the National Association of Attorneys General (NAAG) focused on scams related to vaccine passports and certificates, travel, vaccine lotteries and giveaways, and other topics. Segments of the recorded interview were heard more than 7.6 million times over a seven-week period. Similarly, in November 2021, the FTC and NAAG partnered on a national radio tour that focused on consumer finances and resiliency—segments of which were heard more than 9 million times over five weeks. The FTC also mailed post cards to nearly a quarter of a million people in communities with low broadband access and delivered letters to community health professionals in 5,000 rural and urban clinics to help people avoid COVID-related fraud.

We have also hosted and participated in national and local events with partners to reach a variety of audiences, including older consumers, ethnic and community media, housing organizations, re-entry groups, library patrons, and the military community. For example, in June 2021, the FTC partnered with Connecticut's Department of Consumer Protection to brief the media and public about the FTC's newly-launched Community Advocate Center Program. This initiative provides a new way for organizations that provide free and low-cost legal services to report fraud and other illegal business practices directly to the FTC on behalf of their clients—a critical new resource in fighting COVID and other fraud. These kinds of initiatives and outreach events are the result of strong relationships built through regular collaboration and communication. FTC staff also participate on monthly consumer fraud task forces or roundtables in Hawaii, Indiana, Kansas, Minnesota, Missouri, South Dakota, and Wisconsin and hold additional quarterly calls with consumer protection staff in Hawaii and Utah to remain abreast of consumer fraud trends and developments in those states.

Finally, the Commission has been issuing timely alerts to warn consumers and the business community about a wide range of evolving COVID-related frauds since the beginning of the pandemic. To date, the FTC has issued more than 180 relevant consumer and business alerts on topics including free testing kits and testing scams, vaccine verification methods, economic impact payments, health claims, online shopping, privacy in a virtual environment, contact tracing, government imposter scams, and job scams. In addition to posting these materials on its public website, the FTC proactively sends its alerts, in English and Spanish, to more than 500,000 e-mail subscribers, which include consumers, businesses, partners, and the media. In turn, many of these subscribers share the information with their communities, greatly ex-

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[19] Order Granting Stipulated Motion for Permanent Injunction and Monetary Judgment, *FTC v. National Web Design, LLC,* Case No. 2:20-cv-00846 (D. Utah), available at *https://www.ftc.gov/system/files/documents/cases/38 - permanent injunction and monetary judgment.pdf.*

[20] Amended Complaint, *FTC v. RagingBull.com, LLC,* Case No. 1:20-cv-03538–GLR (D. Md.), available at *https://www.ftc.gov/system/files/documents/cases/ragingbull.com_-_amended_complaint_for_permanent_injunction_and_other_equitable_relief.pdf.*

panding the reach of the agency's message and resulting in media pick-up at the national, regional, and local levels.

III. MARKET–WIDE INITIATIVES TO PROTECT CONSUMERS

In addition to pursuing enforcement and consumer education, the Commission is deploying new tools and reviving old ones to try to address emerging trends that threaten consumers. The consumer fraud problems reported to the FTC every year help the agency not only identify specific law enforcement targets, but more broadly understand emerging trends in the marketplace, particularly problems causing substantial consumer financial losses.

The pandemic required many work, school, recreation, and social activities to transition from in-person to online. Reports in Sentinel show that scammers have been quick to take advantage of these changes, resulting in record reports of financial losses. These broad shifts include soaring number of reports about business imposters,[21] undelivered merchandise,[22] and substantial losses stemming from online shopping.[23] Cryptocurrency investment scam reports have also risen sharply during the pandemic,[24] and in fact, reports about income scams of all sorts increased sharply during the pandemic.[25] Work-from-home scams, fake check scams that start with an e-mail, or deceptive online trading offers proliferated during the pandemic.[26] Fraud reports about medical treatments more than doubled over the course of the pandemic, and the fraction of these that related to COVID also increased substantially in the last year.[27]

Scammers have reportedly increased their use of social media to target consumers.[28] More than one in four people who reported losing money to a scam in 2021 said that the scam started with a contact on social media. What's more, these reports have increased nineteen-fold since 2017.[29] The Commission has been examining these issues. In December 2020, the Commission ordered social media and video streaming companies to provide data on how they collect, use, and present personal information, their advertising and user engagement practices, whether they apply algorithms or data analytics to personal information, and how their practices affect children and teens.[30] This study may provide critical information on the business practices at issue.

a. Impersonator Fraud

For years, scammers have falsely claimed that they are calling from the IRS, the Social Security Administration, or other offices or businesses to steal data and money from hard-working Americans. Consumer financial losses to business imposter scams are substantial, topping $451 million in 2021 alone.[31] In fact, business imposter reports from consumers more than tripled between 2019 and 2021, and

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[21] The FTC received 106,727 business imposter reports in 2019, and 394,743 in 2021. FTC Consumer Sentinel Data (on file with the FTC).

[22] Emma Fletcher, *Pandemic Purchases Lead to Record Reports of Unreceived Goods,* FTC Consumer Protection Data Spotlight (Jul 1, 2020), available at *https://www.ftc.gov/news-events/blogs/data-spotlight/archive/202007.*

[23] Emma Fletcher, *Amazon tops list of impersonated businesses,* FTC Consumer Protection Data Spotlight (Oct. 20, 2021), available at *https://www.ftc.gov/news-events/blogs/data-spotlight/2021/10/amazon-tops-list-impersonated-businesses.*

[24] Emma Fletcher, *Cryptocurrency Buzz Drives Record Investment Scam Losses,* FTC Consumer Protection Data Spotlight (May 17, 2021), available at *https://www.ftc.gov/news-events/blogs/data-spotlight/2021/05/cryptocurrency-buzz-drives-record-investment-scam-losses.*

[25] FTC Consumer Sentinel Data (current through Jan. 28, 2022) (on file with the FTC) .

[26] Emma Fletcher, *Income Scams: Big Promises, Big Losses,* FTC Consumer Protection Data Spotlight (Dec. 10, 2020), available at *https://www.ftc.gov/news-events/blogs/data-spotlight/2020/12/income-scams-big-promises-big-losses.*

[27] FTC Consumer Sentinel Data (on file with the FTC) (based on reports about health care issues, such as medical treatments and cures, drug-OTC/prescription, and dietary supplements/herbal remedies).

[28] Emma Fletcher, *Social Media A Gold Mine for Scammers in 2021,* FTC Consumer Protection Data Spotlight (Jan. 25, 2022), available at *https://www.ftc.gov/news-events/blogs/data-spotlight/2022/01/social-media-gold-mine-scammers-2021.*

[29] *Id.*

[30] FTC Press Release, *FTC Issues Orders to Nine Social Media and Video Streaming Services Seeking Data About How They Collect, Use, and Present Information* (Dec. 14, 2020), available at *https://www.ftc.gov/news-events/press-releases/2020/12/ftc-issues-orders-nine-social-media-video-streaming-services.* Commissioner Phillips dissented, Dissenting Statement of Commissioner Noah Joshua Phillips Social Media Service Providers Privacy 6(b) (Dec. 14, 2020), available at *https://www.ftc.gov/system/files/documents/public_statements/1584154/dissenting_statement_of_commissioner_noah_joshua_phillips_regarding_social_media_and_video_streaming.pdf.*

[31] FTC Consumer Sentinel Data (on file with the FTC).

were largely driven by scammers pretending to be an online retailer, like Amazon.[32] Government imposter scams—a perennial top category of fraud—have similarly capitalized on the pandemic.[33] Impersonators use all methods of communication to trick their targets into trusting that they are the government or an established business and then trade on this trust to steal their identity or money.

The Commission is considering deploying its rulemaking authority to prohibit these impersonation frauds. In December, the agency launched an advanced notice of proposed rulemaking to combat government and business impersonation fraud.[34] If a rule is ultimately promulgated, it would enable the Commission to seek refunds for consumers under its Section 19 authority, in addition to civil penalties. The FTC will continue to use all of its tools, including any new tools granted by Congress, to protect consumers and ensure a fair marketplace.

b. False Educational and Earnings Claims

As noted above, scams promising income have proliferated during the pandemic.[35] The economic disruption caused by the pandemic led many consumers to pursue new opportunities to earn a living, including through multilevel marketers, "gig" employers, and vocational schools. Unfortunately, bad actors are preying on Americans' economic insecurity by making false claims about the income they can earn from jobs, and the training and opportunities they can receive from vocational schools. Consumers who are lured into these schemes can be driven deeply into debt and can be deprived of better opportunities.[36]

The Commission has long worked to protect consumers from deception in this area, but this is becoming more challenging. For example, this past November, the FTC returned nearly $60 million to more than 140,000 Amazon Flex drivers who allegedly had their tips deceptively withheld.[37] Achieving similar results in future cases could be hindered by the Supreme Court's decision in *AMG*.

The Commission has also launched an initiative to use its Penalty Offense Authority to deter unfair and deceptive practices on a market-wide basis and to protect consumers from scams that prey on economic precarity.[38] This past October, the Commission sent Notice of Penalty Offenses[39] to more than 1,100 businesses re-

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[32] FTC Consumer Sentinel Data (on file with the FTC). .

[33] *See* Trade Regulation Rule on Impersonation of Government and Businesses, 86 Fed. Reg. 72901, 72902 (Dec. 23, 2021) ("Since the pandemic began, COVID-specific scam reports have included 12,491 complaints of government impersonation and 8,794 complaints of business impersonation."), available at *https://www.federalregister.gov/documents/2021/12/23/2021-27731/trade-regulation-rule-on-impersonation-of-government-and-businesses.*

[34] FTC Press Release, *FTC Launches Rulemaking to Combat Sharp Spike in Impersonation Fraud* (Dec. 16, 2021), available at *https://www.ftc.gov/news-events/press-releases/2021/12/ftc-launches-rulemaking-combat-sharp-spike-impersonation-fraud.*

[35] Emma Fletcher, *Income Scams: Big Promises, Big Losses,* FTC Consumer Protection Data Spotlight (Dec. 10, 2020), available at *https://www.ftc.gov/news-events/blogs/data-spotlight/2020/12/income-scams-big-promises-big-losses.*

[36] *See, e.g., Quarterly Report on Household Debt and Credit;* Federal Reserve Bank of New York (Nov. 2021) (showing that student loan debt accounted for approximately 10 percent of total household debt in the third quarter of 2021), available at *https://www.newyorkfed.org/medialibrary/interactives/householdcredit/data/pdf/HHDC_2021Q3.pdf; see also COVID–19 Adds to Economic Hardship of Those Most Likely to Have Student Loans,* U.S. Census Bureau (Aug. 18, 2021) (stating that "student loans are among the largest contributors to household debt"), available at *https://www.census.gov/library/stories/2021/08/student-debt-weighed-heavily-on-millions-even-before-pandemic.html.*

[37] Decision and Order, *FTC v. Amazon.com, Inc.,* Docket No.C–4746 (requiring Amazon to return all of the money it allegedly withheld from drivers deceptively), available at *https://www.ftc.gov/system/files/documents/cases/1923123c4746amazonflexorder1.pdf. See also* Stipulated Order, *FTC v. University of Phoenix, Inc.,* Case No. 2:19-cv-05772 (D. AZ) (requiring the University of Phoenix and its parent company to pay $191 million to resolve allegations that they deceptively touted job opportunities), available at *https://www.ftc.gov/system/files/documents/cases/de_15_stipulated_order_for_permanent_injunction_and_monetary_judgment.pdf;* Stipulated Order, *FTC v. Career Education Corp.,* Case No. 1:19-cv-05739 (E.D. Ill) (providing $30 million in redress to consumers deceived by post-secondary and vocational schools' use of alleged deceptive lead generators), available at *https://www.ftc.gov/system/files/documents/cases/de_11_-_stipulated_order_for_permanent_injunction.pdf.*

[38] The Penalty Offense Authority empowers the Commission to seek civil penalties of up to $46,517 per violation from a company if it knowingly engages in acts or practices that the Commission has determined to be unfair or deceptive in a prior administrative order, other than a consent. 15 U.S.C. § 45(m)(1)(B). To trigger this authority, the FTC can send a company a Notice of Penalty Offenses outlining conduct that the Commission has determined is unlawful.

[39] The agency also sent Notices of Penalty Offenses to more than 700 advertisers and consumer product companies regarding fake reviews and other misleading endorsements. FTC Press Release, *FTC Puts Hundreds of Businesses on Notice about Fake Reviews and Other Mis-*

Continued

garding deceptive or misleading earnings claims and fake reviews and other misleading endorsements,[40] and to 70 for-profit colleges regarding deceptive or misleading job and earning prospects.[41] The goal of putting these industries on notice is to deter wrongful conduct by triggering the possibility of civil penalties.

c. Deceptive Health Claims

Fraud reports about medical treatments more than doubled during the course of the pandemic, and in the last year, those related to COVID increased persistently.[42] Market-wide deterrence is especially important with respect to deceptive health claims, which can lead consumers to turn to bogus cures and forgo legitimate treatments. To achieve this deterrence, the Commission is placing market actors on notice that they can face stiff civil penalties if they cheat consumers with false claims.

Starting in March 2020, the FTC launched a campaign to challenge companies' deceptive COVID–19 claims—directing the companies to cure violations and pursuing enforcement actions if problematic claims were not quickly removed. To date, the FTC has issued more than 425 cease and desist demands, many in conjunction with the Food and Drug Administration (FDA), to sellers and marketers that claimed that their products could treat or prevent COVID–19.[43] Twenty of those cease and desist demands were directed to multi-level marketing companies (MLMs) regarding deceptive earnings claims and COVID–19 prevention or treatment claims made by the MLM or its business opportunity participants.[44] The agency also issued cease and desist demands with the SBA regarding small business relief[45] and joint demand letters with the Federal Communications Commission (FCC) to Voice Over Internet Protocol service providers and others who may have been "assisting and facilitating" illegal telemarketing calls, including calls making fraudulent offers of COVID–19 home testing kits.[46] These cease and desist demands lay the groundwork for ensuring that bad actors can face civil penalties of $46,517 and other relief under the CCPA, the Commission's Penalty Offense Authority, and other laws.[47] These demands can be issued quickly, distributed broadly, and monitored closely.

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leading Endorsements (Oct. 13, 2021), available at *https://www.ftc.gov/news-events/press-releases/2021/10/ftc-puts-hundreds-businesses-notice-about-fake-reviews-other.*

[40] FTC Press Release, *FTC Puts Businesses on Notice that False Money-Making Claims Could Lead to Big Penalties* (Oct. 26, 2021), available at *https://www.ftc.gov/news-events/press-releases/2021/10/ftc-puts-businesses-notice-false-money-making-claims-could-lead.*

[41] FTC Press Release, *FTC Targets False Claims by For-Profit Colleges* Oct. 6, 2021), available at *https://www.ftc.gov/news-events/press-releases/2021/10/ftc-targets-false-claims-profit-colleges.*

[42] *See* note 27.

[43] Copies of all of the FTC's COVID–19 related cease and desist demands are available here: *https://www.ftc.gov/coronavirus/enforcement/warning-letters.*

[44] *See* Press Release, *FTC Sends Warning Letters to Multi-Level Marketers Regarding Health and Earnings Claims They or Their Participants are Making Related to Coronavirus* (Apr. 24, 2020), available at *https://www.ftc.gov/news-events/press-releases/2020/04/ftc-sends-warning-letters-multi-level-marketers-regarding-health;* Press Release, *FTC Sends Second Round of Warning Letters to Multi-Level Marketers Regarding Coronavirus Related Health and Earnings Claims* (June 5, 2020), available at *https://www.ftc.gov/news-events/press-releases/2020/06/second-round-warning-letters-to-mlms-regarding-coronavirus;* Press Release, *With Omicron Variant on the Rise, FTC Orders More Marketers to Stop Falsely Claiming Their Products Can Effectively Prevent or Treat COVID–19* (Jan. 19, 2022), available at *https://www.ftc.gov/news-events/press-releases/2022/01/omicron-variant-rise-ftc-orders-more-marketers-stop-falsely.*

[45] FTC Press Release, *FTC and SBA Warn Operator of SBA.com and Lead Generator Lendio to Stop Potentially Misleading Coronavirus Relief Loan Marketing* (May 18, 2020), available at *https://www.ftc.gov/news-events/press-releases/2020/05/ftc-sba-warn-operator-sbacom-lead-generator-lendio-stop;* Press Release, *FTC and SBA Warn Six Companies to Stop Potentially Misleading Marketing Aimed at Small Businesses Seeking Coronavirus Relief Loans* (June 24, 2020), available at *https://www.ftc.gov/news-events/press-releases/2020/06/ftc-sba-warn-six-companies-stop-potentially-misleading-marketing.*

[46] FTC Press Release, *FTC and FCC Send Joint Letters to VoIP Service Providers Warning against 'Routing and Transmitting' Illegal Coronavirus-related Robocalls* (Apr. 3, 2020), available at *https://www.ftc.gov/news-events/press-releases/2020/04/ftc-fcc-send-joint-letters-voip-service-providers-warning-against;* FTC Press Release, *FTC and FCC Send Joint Letters to Additional VoIP Providers Warning against 'Routing and Transmitting' Illegal Coronavirus-related Robocalls* (May 20, 2020), available at *https://www.ftc.gov/news-events/press-releases/2020/05/ftc-fcc-send-joint-letters-additional-voip-providers-warning.* The FTC also independently sent letters to nine VoIP service providers in March 2020 regarding illegal calls regarding COVID. FTC Press Release, *FTC Warns Nine VoIP Service Providers and Other Companies against 'Assisting and Facilitating' Illegal Coronavirus-related Telemarketing Calls* (March 27, 2020), available at *https://www.ftc.gov/news-events/press-releases/2020/03/ftc-warns-nine-voip-service-providers-other-companies-against.*

[47] In coordination with FDA, the FTC has issued cease and desist demands pursuant to the FTC's Penalty Offense Authority on other health fraud such as diabetes and infertility. *See, e.g.,* FTC Press Release, *FTC Sends Cease and Desist Demands to 10 Companies Suspected of Mak-*

In response to these cease and desist demands, the vast majority of recipients take down their claims. This allows the Commission to preserve its scarce law enforcement resources to pursue the most hardened scammers, and to seek every remedy available to halt their wrongdoing, ban them from further abuses, and make them pay.

IV. LEGAL CHALLENGES

Returning money to consumers harmed by scammers has been a cornerstone of the FTC's law enforcement actions. In Fiscal Year 2021, FTC law enforcement actions resulted in more than $403 million in redress to harmed consumers.[48] These payments help ensure that consumers can be compensated for their losses, and that wrongdoers cannot pocket their illegal gains. And these payments are especially critical during this pandemic. In *AMG Capital Mgmt., LLC v. FTC,* 141 S. Ct. 1341 (Apr. 2021), the Supreme Court held that the Commission cannot obtain monetary relief pursuant to Section 13(b) of the FTC Act. The Commission requests legislation to restore its ability to return money to consumers harmed by illegal conduct.

V. CONCLUSION

For nearly two years, the Commission has worked tirelessly to stop bad actors from exploiting the pandemic. But the Commission's work is far from over. COVID-related scams are likely to persist as the country continues to grapple with this pandemic. Combatting these scams remain a top priority for the Commission, and we will use every weapon in our arsenal to do so.

We look forward to continuing to work with the Subcommittee and Congress, and I am happy to answer your questions.

Senator BLUMENTHAL. Thanks very much, Mr. Levine.

We will now hear from, in succession, Ms. Murray, then Ms. Engle, and Todd Leatherman. I am going to be voting, but I have read your testimony, so I will be back to ask questions by the time you are done with your testimony. And in the meantime, Senator Blackburn will preside. Thank you.

Ms. Murray, you can go ahead.

STATEMENT OF TERESA MURRAY, CONSUMER WATCHDOG DIRECTOR, U.S. PUBLIC INTEREST RESEARCH GROUP

Ms. MURRAY. Good afternoon, Chairman Blumenthal, Ranking Member Blackburn, and members of the Subcommittee. I am Teresa Murray, Director of the Consumer Watchdog Program with U.S. Public Interest Public Research Group. We are an independent nonpartisan group that works for consumers and for the public interest. Thank you for the opportunity to talk about two big challenges consumers have faced during the pandemic: counterfeit products and price gouging.

Counterfeit or substandard products started infecting the marketplace in February 2020. We saw massive amounts of substandard and even dangerous hand sanitizer filling store shelves and retailers' websites. People were terrified and desperate and bought almost anything to protect themselves. Some hand sanitizer actually contain methanol or other toxic substances. Since July 2020, the FDA has recalled 273 brands of hand sanitizer because they were dangerous or ineffective, and a year ago, it issued an im-

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ing Diabetes Treatment Claims without the Required Scientific Evidence (Sept. 9, 2021), available at *https://www.ftc.gov/news-events/press-releases/2021/09/ftc-sends-cease-desist-demands-10-companies-suspected-making;* FTC Press Release, Federal Trade Commission, *FDA Warn Five Companies That May Be Illegally Selling Dietary Supplements Claiming to Treat Infertility* (May 26, 2021), available at *https://www.ftc.gov/news-events/press-releases/2021/05/federal-trade-commission-fda-warn-five-companies-may-be-illegally.*

[48] For more information visit *https://public.tableau.com/app/profile/federal.trade.commission/viz/Refunds_15797958402020/RefundsbyDate*

port alert on hand sanitizers from Mexico. And this is still a problem. The most recent recommended product recall was 2 weeks ago.

Many COVID-related products are counterfeit or do not do what they claim. We appreciate the work the FTC has done to try and keep us safe, but recently, we have seen a surge in counterfeit masks. During 2020 and 2021, Customs and Border Protection seized some 34 million counterfeit masks, half from China. We know some counterfeits slip through. The CDC found that 60 percent of KN95 masks sold in the U.S. during 2020 and 2021 did not meet safety standards. Counterfeit masks have been a particular problem the last couple of months as Omicron surged. The biggest issue with substandard masks is consumers and healthcare workers think they are protected, but they are not.

We are also seeing fake COVID test sites. The sites look real with people in hazmat suits. You may get charged for a test that is supposed to be free, or your information is used to steal your identity, and, oh, you do not get test results. The FTC is also seeing a surge in unauthorized home COVID tests fueled by the test shortage. Senators Blumenthal and Markey asked the FTC to investigate fraudulent tests and price gouging of home tests. This cannot happen quickly enough.

Price gouging also started early in the pandemic. In spring 2020, U.S. PIRG researched 90 types of face masks and hand sanitizers on Amazon. We found price increases of at least 50 percent on more than half the products compared with 3 months earlier. In January 2021, we researched 750 products, such as face masks and cough syrup, and for each, we looked at the price in December 2019 and in December 2020. And out of the 750 listings on Amazon, 409 saw price increases of more than 20 percent, and 136 at least doubled in price.

Recently, we have seen huge price spikes on home tests and N95 and KN95 masks. For example, 90 days ago, a 2-pack of On/Go home tests was selling for an average of $29.07 on Amazon, but at least one Amazon seller offered it for $39.99. Also, Saturday, I pulled up the top three listings on Amazon for N95 masks. One brand is Benehal. The 20-pack was selling for $16.78 2 months ago, and then health officials recommended higher-quality masks. So 17 days ago, this same box of Benehal masks was selling for as much as $69.98. How is this acceptable? In a 2020 letter to PIRG, Amazon vowed to do more to get rid of exorbitant prices. It is not working, and it is not just Amazon.

In conclusion, our recommendations are: Customs and Border Protection must do more to stop counterfeit products from entering the U.S. Regulators should proactively investigate what is for sale in stores and online, including products that falsely offer miracle cures. State attorneys general should aggressively investigate price gouging. Thirty-seven states have price gouging laws, but it is a patchwork of confusion and inconsistency. We need meaningful price gouging legislation in every state and at the Federal level. Congress should pass the bipartisan INFORM Act to help squash the sale of counterfeits. Businesses should not sell substandard products. Social media platforms should not—they should eliminate harmful content and advertising, including false promises of miracle cures. Congress should give the FDA more authority to crack

down on and punish mask counterfeiters. The bipartisan Protecting Patients From Counterfeit Medical Devices Act could help. We all need to do all need to do better. We all need to do more.

Thank you again for the opportunity to address this committee. I look forward to your questions.

[The prepared statement of Ms. Murray follows:]

PREPARED STATEMENT OF TERESA MURRAY, CONSUMER WATCHDOG DIRECTOR, U.S. PUBLIC INTEREST RESEARCH GROUP

Good afternoon Chairman Blumenthal, Ranking Member Blackburn and members of the Consumer Protection Subcommittee. I'm Teresa Murray and I'm the director of the Consumer Watchdog program with the U.S. Public Interest Research Group. U.S. PIRG is an independent, non-partisan group that works for consumers and the public interest. Thank you for the opportunity to talk today about challenges facing consumers as they continue trying to keep themselves safe from COVID.

I'd like to talk today about two of the biggest consumer issues during this pandemic: First, counterfeit products and other scams. Second, price-gouging of legitimate products.

Counterfeit or substandard products started infecting the marketplace in the earliest days, in February 2020. We saw massive amounts of substandard and even dangerous hand sanitizer filling store shelves and retailers' websites. People were terrified and desperate and they'd buy almost anything in hopes of protecting themselves and their families. Some of the items peddled as hand sanitizer actually contained methanol and other dangerous substances. Since July of 2020, the Food and Drug Administration has recalled 273 different brands of hand sanitizer because they were dangerous or ineffective and a year ago issued an import alert on all alcohol-based hand sanitizers from Mexico[1]; the most recent recommended recall was less than two weeks ago, on Jan. 20, 2022.[2] All sorts of other COVID-related products have surfaced that are counterfeits or knockoffs or simply don't do what they say. Most recently, we've seen a surge in counterfeit masks.

The FDA is working with other government offices to squash the surge in counterfeits. It has issued import alerts for fraudulent products.[3] It also has been working with customs officials to stop banned imports. During 2020 and 2021, agents with Customs and Border Protection seized some 34 million counterfeit masks, half of them from China, according to the New York Times.[4] Those are just the ones that got confiscated. Those are the ones we know about. We know that other counterfeit and substandard products do slip through and are purchased by unsuspecting consumers or provided to healthcare workers because they look genuine.[5] For example, last February, the Department of Homeland Security said it had confiscated 10 million counterfeit 3M N95 masks, some of which were reportedly being shipped to hospitals.[6]

Meanwhile, data from the Centers for Disease Control and Prevention shows that 60 percent of KN95 masks sold in the U.S. during 2020 and 2021 failed to meet safety standards.[7]

Counterfeit masks have been a particular problem the last couple of months, as omicron surged and people wanted better protection.

Of course the biggest issue with counterfeit masks is people have a false sense of security. These substandard masks aren't providing someone with the protection they think they're getting.

We're also seeing fake COVID test sites, according to the Federal Trade Commission.[8] The test sites look real with people in hazmat suits. But you get charged for a free test. Sometimes your information is used to steal your identity. And you of course don't get any test results.

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[1] *https://www.fda.gov/news-events/press-announcements/coronavirus-covid-19-update-fda-takes-action-place-all-alcohol-based-hand-sanitizers-mexico-import*

[2] *https://www.fda.gov/drugs/drug-safety-and-availability/fda-updates-hand-sanitizers-consumers-should-not-use#products*

[3] *https://www.accessdata.fda.gov/ cms ia/importalert 1165.html*

[4] *https://www.nytimes.com/2021/11/30/ health/covid-masks-counterfeit-fake.html*

[5] See appendix 4 for a photo of a counterfeit mask that looks legitimate.

[6] *https://abcnews.go.com/Politics/senators-aim-fraudsters-flooding-market-fake-masks/story?id=81778809*

[7] *https://www.cdc.gov/niosh/npptl/respirators/testing/NonNIOSHresults.html*

[8] *https://www.consumer.ftc.gov/blog/2022/01/dont-assume-every-covid-19-test-site-legit*

The FTC says we're also seeing a surge in unauthorized home test kits, fueled by the shortage of COVID test kits.[9] [10]

Sen. Richard Blumenthal and Sen. Ed Markey have asked the FTC to investigate fraudulent test kits and price gouging of home test kits. This can't happen quickly enough.[11]

On price gouging, like with counterfeit products, we saw this at the very beginning of the pandemic. In spring of 2020, U.S PIRG researched more than 90 types of face masks and hand sanitizers and used a price-tracking tool to compare current prices with the three-month average leading up to the pandemic. We found price increases of at least 50 percent on more than half of the products.

In January 2021, we did another report. We researched 750 products such as face masks, disinfecting wipes, oral thermometers and cough syrup. For each product, we looked at the price of the listing on Dec. 1, 2019—before the pandemic—and the price again on Dec. 1, 2020. Out of the 750 listings, 409 saw price increases of more than 20 percent, and 136 at least doubled in price.[12]

In the last couple of months, we've seen huge price spikes on home COVID tests and on N95 and KN95 masks. For example, 90 days ago, ON/GO home COVID rapid antigen tests were selling for an average of $29.07 on Amazon. But three months ago, at least one merchant was selling the two-pack test kit for 38 percent more—at a price of $39.99. As of last Saturday, Jan. 29, 2022, the price was down to $24.[13]

Also Saturday, I pulled up information for top 3 listings on Amazon for N95 masks. One is the Benehal NIOSH Approved N95 Mask particulate respirators, pack of 20 individually wrapped, which is one of the masks recommended by Project N95. The 20-pack was selling for as low as $16.78 two months ago. But then Federal health officials recommended higher quality masks than simple cloth masks. And 17 days ago, this same box of Benehal masks was selling for as much as $69.98.[14] How is this an acceptable business practice? For its part, Amazon vowed in an April 2020 letter to U.S. PIRG that it was committed to fair pricing and would work harder to rid the site of exorbitant prices.[15] It's not working. And it's certainly not just Amazon.

In December, New York Attorney General Letitia James issued a consumer alert regarding price gouging after consumers filed complaints about at-home tests being sold at double or triple their normal prices. Some that you could buy in November for maybe $20 were selling for as much as $70 per package at New York stores.[16] This is outrageous.

My 103-year-old grandmother just died of COVID a few weeks ago. It's personal for me, as I suspect it is for many of you. She did not contract COVID because of counterfeit masks or highly priced COVID tests. But it infuriates me to think the pain of this pandemic could be prolonged by even one day or one more person might get sick because of counterfeit masks or home COVID tests marked up three times their normal price.

Recommendations:

1. Customs and Border Patrol needs to do as much as possible to stop counterfeit and unauthorized products from entering this country. Regulators need to proactively investigate what's for sale at retailers and especially online, including products that falsely offer miracle cures.
2. Authorities including state attorneys general need to investigate reports of price gouging and prosecute any business that tries to take advantage of a public emergency or natural disaster by dramatically increasing its prices.

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[9] *https://www.cnbc.com/2022/01/06/fake-covid-testing-kits-are-everywhereheres-how-to-avoid-them.html*

[10] *https://www.consumer.ftc.gov/blog/2022/01/ how-avoid-buying-fake-covid-tests-online*

[11] U.S. PIRG has worked closely with the Federal Trade Commission on issues including scams, data privacy, Big Tech oversight and the right to repair. We support, among other improvements to help the FTC, increased funding for this chronically under-funded agency, reinstatement of its 13(b) authority to impose restitution orders and granting the FTC new authority to impose civil penalties for first-time violations of the FTC Act. We also urge the Senate to confirm President Biden's well-qualified nominee to the commission, Alvaro Bedoya, as soon as possible.

[12] *https://uspirg.org/sites/pirg/files/reports/1%20Year%20Later-%20Comparing%20Pre-Pandemic%20Prices%20to%20Today%27s%20on%20Amazon%20%281%29.pdf*

[13] Per Keepa. See screenshots in appendix 2.

[14] Per Keepa. See screenshots in appendix 3.

[15] See appendix 1, Amazon Response—U.S. PIRG

[16] *https://ag.ny.gov/press-release/2021/consumer-alert-attorney-general-james-asks-consumers-report-price-gouging-home*

3. The chronically under-funded FTC needs help, including increased funding, reinstatement of its 13(b) authority to impose restitution orders[17] and new authority to impose civil penalties for first-time violations of the FTC Act.[18]
4. In the United States, 37 states, three territories and Washington DC currently have price gouging laws. But it's a patchwork of confusion and inconsistency. Many take effect when the state declares an emergency. Some only apply to certain products such as gasoline or milk. While laws vary by state, increases of 20 percent or more may be considered price gouging. We need meaningful price gouging legislation in every state and we must also pass comprehensive Federal price gouging legislation that would apply during pandemics, natural disasters and other emergencies.
5. Congress needs to pass the INFORM act, which has bipartisan support.[19] It would help squash the sale of counterfeits by third-party sellers by requiring online marketplaces to acquire the seller's government ID, tax ID, bank account information, and contact information.
6. Businesses need to be more responsible and not sell products that could be substandard.
7. Social media platforms need to eliminate harmful content and advertising, including false promises of miracle cures.[20]
8. Congress needs to look at granting more authority to the FDA to crack down on and punish mask counterfeiters. The new bi-partisan Protecting Patients from Counterfeit Medical Devices Act[21] that was introduced six weeks ago could be a good first step. It's part of an effort to improve this country's pandemic response and improve the supply chain.

We all need to do better. We all need to do more. Regulators. Lawmakers. Law enforcement. Consumer advocates. As long as consumers are still getting ripped off, we can't stop trying to do more.

Thank you again for the opportunity to address this committee. I look forward to answering your questions.

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[17] *https://www.consumerfinancemonitor.com/2021/04/22/scotus-rules-ftc-act-section-13b-does-not-authorize-ftc-to-seek-restitution-or-disgorgement/ #:~:text=In%20a%20unanimous%20decision%2C%20the,AMG%20Capital%20Management%2C%20LLC%20v.*

[18] *https://castor.house.gov/news/documentsingle.aspx?DocumentID=403667*

[19] *https://www.congress.gov/ bill/117th-congress/senate-bill/936*

[20] *https://www.ftc.gov/news-events/blogs/business-blog/2021/11/ftc-analysis-shows-covid-fraud-thriving-social-media*

[21] *https://www.congress.gov/bill/117th-congress/senate-bill/3416?s=1&r=8*

Appendix 1

amazon

April 8, 2020

U.S. PIRG and U.S. PIRG Education Fund
CC: All Signatories
1543 Wazee Street
Suite 460
Denver, CO 80202

To All Signatories,

Thank you for your letter, received April 7, 2020, regarding the efforts of online retailers to combat price gouging related to COVID-19. There is no place for price gouging on Amazon, and we will not tolerate attempts to artificially raise prices on basic-need products during a global health crisis. It is unconscionable.

We are working around the clock to ensure our customers have access to the necessities that keep their households healthy and safe, while doing all we can to ensure no one takes advantage of our customers. Third-party sellers set their own prices for the products they sell in our stores. In the vast majority of cases, they offer our customers great products at low, competitive prices. Our long-standing Marketplace Fair Pricing Policy[1] strictly prohibits excessive prices on products and shipping. We proactively monitor our stores for unfair prices, and we aggressively enforce this policy in order to protect our customers. To date, Amazon has removed more than half a million offers from our stores for coronavirus-based price gouging, many before the offer was even available to customers. We have suspended more than 3,900 seller accounts in our U.S. store alone for violating our price gouging policies.

We have pursued strong partnerships with law enforcement at all levels to hold bad actors accountable for abuse in our stores. We proactively reached out to every state attorney general's office on March 6, 2020 to offer our assistance with any price gouging investigations and enforcement. We have spoken to several AG offices since then and have encouraged investigations and prosecution of bad actors for price gouging. As of today, we are actively collaborating with more than 20 AG offices (including California, Connecticut, Florida, New York, Missouri, Illinois, Michigan, and Tennessee) as they work to investigate and prosecute alleged price gougers. To advance price gouging investigations and resolutions, we have also created a special mechanism for state AG offices to quickly and easily escalate any consumer complaints they receive about third-party sellers. To stay a step ahead of bad actors, we are also proactively sharing information with all state AG offices about the sellers we have identified as potentially engaging in price gouging related to the COVID-19 crisis. We welcome the opportunity to partner with states in using this data to pursue any violations of specific state laws by these sellers.

[1] Full policy: https://sellercentral.amazon.com/gp/help/external/G5TUVJKZHUVMN77V?language=en_US&ref=efph_G5TUVJKZHUVMN77V_cont_521

601 New Jersey Ave NW
Washington, DC 20001

Appendix 1 continued

We are actively deploying a number of other solutions to aggressively fight price gouging in our stores and support these broader efforts.

Technology-driven detection systems complemented by 24/7 manual audits. In order to enforce our long-standing policy against price gouging, our dynamic, automated systems are continuously comparing the prices submitted by our selling partners with current and historic prices within and outside of the Amazon store in order to locate and remove unfairly priced items. In addition, we have deployed a dedicated team that is working 24 hours a day, seven days a week to search for, investigate, and remove offers for unfairly priced products in high demand because of coronavirus, such as protective masks and hand sanitizer. If any of these methods find a price that violates our policy, we remove the offer and, in cases of confirmed misconduct, take action against the sellers, including suspending or terminating seller accounts and referring bad actors to enforcement agencies for prosecution.

Proactively combatting price gouging. Our price gouging efforts are always active and we take action independent of any actions taken by government officials. We are guided in real-time by conditions that might affect our customers and our stores. In the case of COVID-19, we began taking action against bad actors before many states made emergency declarations. In addition to our engagement with state AGs, we are also partnering directly with federal prosecutors and city attorney offices across the country as they work to investigate and prosecute alleged price gougers.

Keeping our customers protected and informed. Amazon is and will remain a customer-obsessed company, and our commitment to outstanding customer service has never been stronger. Our strong existing customer service engagement processes and metrics equip us well to handle customer questions and complaints about products related to price gouging, and we are encouraging customers to bring any concerns to our attention.

We recognize that efforts to define and penalize price gouging start with federal and state legislators. Although we already proactively set our automated systems to remove unfairly priced offers from our store, we are and will continue collaborating with state and federal policymakers to help strengthen price gouging laws. We strongly support legislative efforts to ensure unreasonably excessive price increases are illegal during this and other national crises. For example, we have worked with state retail associations as they engage legislative leadership interested in price gouging legislation.

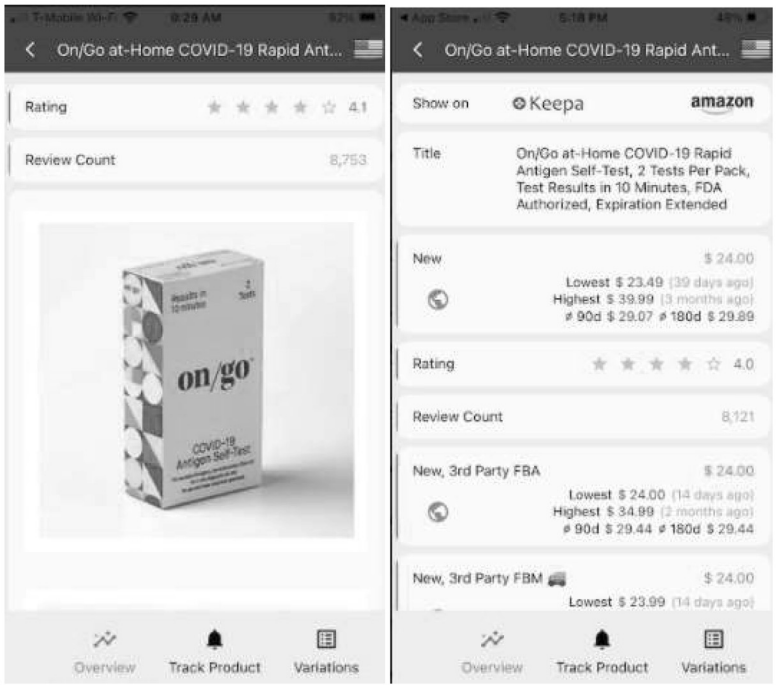
Thank you for your sharing your concerns with us. We look forward to our continued partnership with policymakers and law enforcement as we all rise to the challenges posed by the COVID-19 crisis.

Sincerely,

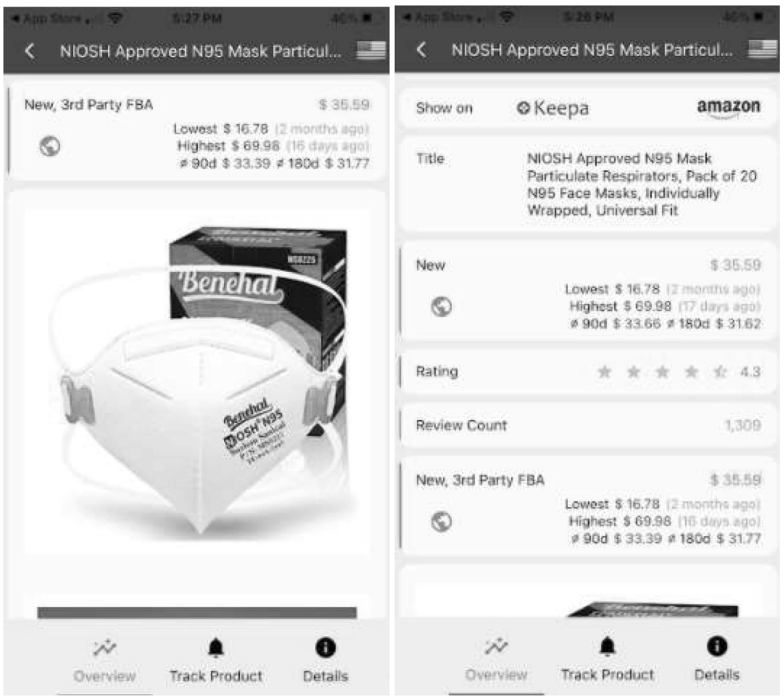


Brian Huseman
Vice President, Public Policy

Appendix 2, On/Go at-Home COVID-19 Antigen Self-Test



Appendix 3, Benehal N95 Masks



Appendix 4, example of a counterfeit mask confiscated by CBP in 2021.



This counterfeit mask infringes on the NIOSH trademark.

This is a photo of a mask that's similar to 171,460 masks seized in April 2021 by CBP in Houston. The caption is from U.S. Customs and Border Protection.
The shipment had the National Institute for Occupational Safety and Health logo on the boxes.
Consumers are told to look for the NIOSH stamp. If masks have this stamp, but are counterfeits, how can consumers or healthcare workers really tell?

Source:
https://www.cbp.gov/newsroom/local-media-release/cbp-seizes-counterfeit-n95-masks

Senator BLACKBURN [presiding]. Thank you, Ms. Murray.
Ms. Engle?
Ms. ENGLE. [Inaudible.] Sorry. You got it? Is it—OK? Thanks.

STATEMENT OF MARY K. ENGLE,
EXECUTIVE VICE PRESIDENT, POLICY,
BETTER BUSINESS BUREAU NATIONAL PROGRAMS

Ms. ENGLE. Ranking Member Blackburn, I am Mary Engle, Executive Vice President, Policy, at BBB National Programs, a nonprofit organization dedicated to increasing marketplace trust through independent industry self-regulation programs. I previously worked at the Federal Trade Commission for 30 years with the last 18 spent heading up the Division of Advertising Practices in the Bureau of Consumer Protection. Thank you for this opportunity to testify on how independent industry self-regulation has helped to combat COVID–19 fraud.

BBB National Programs was created in 2019 out of the reorganization of the Council of Better Business Bureaus into two separate entities: BBB National Programs and the International Association of Better Business Bureaus, which is the umbrella organization for the local BBBs. BBB National Programs operates more than a dozen national industry self-regulation and accountability programs in the areas of advertising, child-directed marketing, privacy, and dispute resolution. Today I will focus on the work of two of our programs, the Direct Selling Self-Regulatory Council, or DSSRC, and the National Advertising Division, or NAD, which both have addressed COVID–19 scams since the pandemic began.

Launched in 2019, the DSSRC monitors product and business opportunity claims made by direct-selling companies and their salesforce members, and facilitates the voluntary removal of misleading claims from the marketplace. The NAD has provided a voluntary self-regulatory forum for challenging misleading advertising since 1971. NAD promotes fair competition and builds public trust and advertising by reviewing misleading advertising claims based on competitor challenges and through its own monitoring. When a company does not participate or comply with a DSSRC or NAD recommendation, we refer the advertiser to the appropriate regulatory authority, usually the FTC.

When COVID–19 shut down the world, some advertisers begin touting untested cures, treatments, and preventives. The DSSRC and NAD promptly took action against those claims. In April 2020, the Direct Selling Association and DSSRC issued a joint press release cautioning direct selling companies and their salesforce members from making claims referencing COVID–19 in the context of product benefits and business opportunities. In addition, DSSRC reminded all direct selling companies to educate their salesforce members about best practices with respect to health-related claims.

Since the onset of the pandemic, DSSRC has commenced 139 inquiries involving claims pertaining to COVID. Those inquiries included 309 product performance claims and 32 claims discussing the pandemic as an earnings opportunity. In almost all the inquiries, the parties took prompt action to remove references to the coronavirus. In the seven cases where that did not happen, we referred the cases to the FTC or the appropriate State attorney gen-

eral. DSSRC currently has five cases pending involving COVID–19 claims. Our National Advertising Division has also brought cases challenging COVID claims. One of the benefits of NAD case decisions is their ability to educate other marketers as they can expand upon FTC guidance by showing specific examples of how advertising can imply, without stating expressly, that a product is effective against COVID–19.

A good example is the NAD case involving advertising claims for Your Superfoods U.S. Immunity Boosting Bundle of dietary supplements. In that matter, the advertiser said things like, "With all that is going on with the coronavirus, there is a piece we can control, and that is our own health and building our immune system because it depends on what we eat. It is super important to have a lot of micronutrients now, so Super Foods can help. We have this amazing Immunity Bundle." Following NAD's inquiry, the advertiser immediately agreed to remove the claims from the marketplace. A case concerning an elderberry supplement, advertised to support the immune system, provides another example. NAD reviewed the claim, "As restrictions are gradually lifting, it is more important than ever to keep your immune system strong. Our Elderberry Immune Support keeps you protected with a powerful immune boosting combo." NAD found that this claim conveyed the implied message that the product protects against COVID. The advertiser voluntarily removed the misleading advertising from YouTube and elsewhere. NAD's COVID decisions have reached other industries as well, from cleaning products, to ultraviolet lights, to intravenous hydration therapy, and continuously self-cleaning surfaces.

Thank you for the opportunity to explain how independent industry self-regulation has helped combat deceptive COVID claims. Although some companies will respond only to government enforcement, many other marketers respond voluntarily to remove misleading advertising when given concrete guidance on appropriate claims. Independent entity self-regulation thereby amplifies the impact of government actions to reduce harm to consumers. Thank you, and I look forward to your questions.

[The prepared statement of Ms. Engle follows:]

PREPARED STATEMENT OF MARY K. ENGLE, EXECUTIVE VICE PRESIDENT, POLICY, BBB NATIONAL PROGRAMS

Introduction

Chairman Blumenthal, Ranking Member Blackburn, and members of the Subcommittee, I am Mary Engle, Executive Vice President, Policy, at BBB National Programs, a non-profit organization where businesses go to enhance consumer trust and consumers are heard. I previously had the honor of working at the Federal Trade Commission for 30 years, with the last 18 spent directing the Division of Advertising Practices in the Bureau of Consumer Protection. Thank you for this opportunity to testify today on how independent industry self-regulation has helped to combat COVID–19 fraud.

After serving in government for three decades at the FTC, I was attracted to join BBB National Programs because of its status as a mission-driven non-profit organization that creates a fairer playing field for businesses and a better experience for consumers through the development and delivery of effective third-party accountability and dispute resolution programs. BBB National Programs was created in 2019 when the Council of Better Business Bureaus was re-organized into two separate entities, BBB National Programs and the International Association of Better Business Bureaus, or IABBB.

BBB National Programs operates more than a dozen national industry self-regulation programs, providing business guidance and fostering best practices in arenas such as advertising, child-directed marketing, dispute resolution, and privacy. IABBB is the umbrella organization for nearly 100 local Better Business Bureaus in the U.S. and Canada, and among other things, rates businesses and resolves consumer complaints about them. Although we share with IABBB a long history and common mission of increasing marketplace trust, we serve businesses and consumers differently and are no longer directly affiliated.

Before I explain how industry self-regulatory efforts have combatted COVID–19 fraud, I think it is important to distinguish between a company's own self-regulation and independent industry self-regulation, which is at the core of what we do at BBB National Programs. Self-regulation, as some are discussing it, is when companies monitor themselves without much guidance from regulators or the industry. By contrast, independent industry self-regulation, when done right, provides active collaboration between industry and regulators necessary for credible accountability. It is a system of three critical components: industry-wide accountability to agreed-upon guidelines, independent monitoring, and coordinating enforcement mechanisms.

Today I will focus on the work of two of our independent industry self-regulation programs, the Direct Selling Self-Regulatory Council, or DSSRC, and the National Advertising Division, or NAD, which have addressed COVID–19 scams since the pandemic began.

The Direct Selling Self-Regulatory Council was launched in 2019. Through extensive monitoring of product and business opportunity claims made by direct selling companies and their salesforce members, DSSRC's oversight facilitates the voluntary removal of misleading claims from the marketplace. Advertisers who disagree with a DSSRC decision can appeal to the DSSRC Appellate Board, consisting of three members drawn from the advertising and direct-selling industry. Although primarily funded by the Direct Selling Association (DSA), DSSRC operates as an independent "watchdog" and provides accountability for DSA members and nonmembers alike.

The National Advertising Division, also part of BBB National Programs, has a much longer history, having provided a voluntary, self-regulatory forum for challenging misleading advertising since 1971. The flagship of the U.S. advertising industry's system of self-regulation, NAD promotes fair competition and builds public trust in advertising by reviewing misleading advertising claims, based on competitor challenges and through its own monitoring program. Its decisions represent the single largest body of advertising decisions in the U.S. Although participating in NAD's review is voluntary, over 95 percent of companies participate and comply with NAD's recommendations. If an advertiser disagrees with NAD's recommendation to discontinue or change its advertising, the advertiser can appeal to BBB National Programs' National Advertising Review Board, or NARB. The National Advertising Review Board provides independent peer review for National Advertising Division cases, with appeals heard by five-person panels drawn from an 85-person panel pool, selected for their stature and experience, comprised of distinguished members representing national advertisers, advertising agencies, and public members (usually marketing academics). This layer of independent review further promotes credibility and voluntary compliance with the self-regulatory system.

When a company does not participate or comply with DSSRC, NAD, or NARB recommendations, we refer the advertiser to the appropriate regulatory authority, usually the Federal Trade Commission, but often other regulatory agencies as well, such as the Food and Drug Administration and state attorneys general. Recently, BBB National Programs also began reporting misleading advertising claims directly to platforms including Facebook and Instagram. Once received, the platforms will remove the claims that violate their terms of service.

BBB National Programs values the longtime support of Federal and state regulatory agencies, particularly the FTC, that support its self-regulatory efforts to promote fair competition and truthful and accurate advertising to benefit consumers and businesses. The FTC's website keeps a record of response to referrals from BBB National Programs, including DSSRC and NAD.[1] The FTC's responses demonstrate a strong track record of following up on such referrals and getting the advertising claims removed from the marketplace.

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[1] *https://www.ftc.gov/enforcement/cases-proceedings/closing-letters-and-other-public-statements/resolution-of-referrals-from-nad*

How Independent Industry Self-Regulation Has Addressed COVID–19 Fraud

When COVID–19 shut down the world and caused consumers to isolate fearing dire health consequences, unscrupulous advertisers began touting cures, treatments, and preventatives to the novel coronavirus. The FTC and FDA quickly issued letters warning companies to stop making false and misleading claims that a product could prevent, treat, or cure COVID–19. Similarly, as described below, the DSSRC and NAD promptly took action as well.

The response of DSSRC and NAD to the misleading advertising that flooded the marketplace demonstrates the value independent self-regulation can provide. Early in the pandemic, DSSRC released a statement to the direct selling industry, urging caution regarding misleading health-related product claims as well as misleading earnings claims, and both DSSRC and NAD opened multiple cases, resulting in the removal of advertising claims touting that products would prevent, treat, or cure COVID–19. In all cases, our self-regulatory programs uphold standards set forth in regulatory guidance issued by the FTC and FDA. Our case decisions, summaries of which are publicly available, have impact beyond the advertising at issue. The decisions educate companies on advertising law. To date the media has written more than 25 articles and blogs highlighting the industry self-regulatory guidance provided through DSSRC and NAD decisions on COVID–19 claims.

DSSRC Actions Against Misleading COVID–19 Claims

Although the COVID–19 pandemic has significantly impacted all sectors of the business community, direct selling companies face the added responsibility of ensuring that their independent salesforce members are not seeking to boost sales by making unauthorized health-related or business opportunity claims related to the pandemic. DSSRC has focused its monitoring efforts on identifying false and misleading claims about a product's ability to treat or prevent COVID–19, and claims related to how the pandemic has presented an opportunity for company salesforce members to earn significant income.

In an action commended by FTC Commissioner Noah Phillips,[2] in April 2020, the Direct Selling Association and DSSRC issued a joint press release cautioning direct selling companies and their independent salesforces from making claims referencing COVID–19 in the context of product claims and business opportunity claims. More specifically, the statement called attention to claims suggesting that products can:

- Cure, treat, or alleviate the symptoms of COVID–19
- Boost or improve immune function that can prevent COVID–19; or
- Eliminate or remove viruses.

In addition, because product claims made by salesforce members are attributable to direct selling companies themselves, DSSRC reminded all direct selling companies to educate their salesforce members about best practices with respect to health-related product claims.

Since the onset of the pandemic, DSSRC has commenced 139 inquiries that involved claims pertaining to COVID–19. In those inquiries, DSSRC has reviewed 309 product performance claims that referenced COVID–19 and 33 claims that discussed the pandemic as an earnings opportunity for direct selling company salesforce members.

Of those 139 inquiries, 127 have been administratively closed while seven resulted in referrals to the FTC and/or the appropriate state attorney general office for enforcement. DSSRC will administratively close an inquiry if a direct selling company takes immediate action to remove an identified problematic claim or social media post. DSSRC currently has five cases pending that involve COVID–19 claims. In almost all the inquiries in which DSSRC identified COVID–19 claims to direct selling companies, the parties took prompt and immediate action to remove references to the coronavirus.

Following warning letters issued by the FTC to several direct selling companies regarding claims that they or their salesforce members were making about their products' ability to treat or prevent COVID–19 or about the earnings that salesforce members can earn, DSSRC released a public statement applauding the actions taken by the FTC and reiterated its call to direct selling companies to fulfill their commitment to industry self-regulation. In its statement, DSSRC noted that the actions taken by the FTC were consistent with recent guidance issued by both DSSRC

[2] Noah Joshua Phillips, Commissioner, Federal Trade Comm'n, Keynote Address at the DSA Legal & Regulatory Summit (Oct. 15, 2020), in *https://www.ftc.gov/system/files/documents/public_statements/1581726/phillips_-_dsa_remarks_10-15-20.pdf*

and the DSA cautioning direct selling companies against expressly claiming or implying that their products can prevent, treat, alleviate, or cure COVID–19 and its symptoms.

With the FTC's heightened scrutiny of the direct selling channel, direct sellers can ill afford the reputational damage (and certain adverse regulatory enforcement action) that would result if a company (or its independent salespeople) seeks to capitalize on the current pandemic by making unsubstantiated health claims. Accordingly, through its case work and its direct engagement with the industry through educational initiatives such as the DSSRC Direct Selling Summit and DSA's Compliance Certification Program, DSSRC will continue to provide guidance to the direct selling industry with respect to earnings claims and representations pertaining to health and safety.

DSSRC will continue to monitor direct selling advertising messages to make sure they adhere to appropriate and ethical advertising standards throughout this pandemic and remains committed to helping ensure that inappropriate claims disseminated by direct selling companies and their salesforce members referencing COVID–19 are expeditiously removed from the marketplace.

National Advertising Division Actions Against Misleading COVID–19 Cases

BBB National Programs' National Advertising Division case decisions have often expanded on the guidance provided by the FTC and FDA letters by providing specific examples of advertising that conveys implied messages that a product prevents, treats, or cures COVID–19.

A good example is the NAD case involving advertising claims for Your Superfoods Immunity Boosting Bundle dietary supplements. In that matter, following an NAD inquiry, the advertiser immediately agreed to remove the following claim from the marketplace:[3]

> "[W]ith all that's going on, with the coronavirus . . . there is a piece that we can control and that is our own health and building our immune system because it depends on what we eat. . .. It's super important to have a lot of micronutrients now, so Superfoods can help. We have this amazing immunity bundle—Super Greens to up your green, Mellow Yellow which really reduces your stress because [stress] actually reduces your immunity, and then we also have immunity boosting mushrooms in our Magic Mushroom mix."

A case concerning an Elderberry supplement advertised to support the immune system provides another example.[4] NAD reviewed the claim: "[a]s restrictions are gradually lifting, it's more important than ever to keep your immune system strong. Our Elderberry Immune Support keeps you protected with vitamin C, zinc, elderberries, garlic and echinacea; a powerful immune-boosting combo."

NAD found that this claim conveyed the implied message that Vitamin Bounty Elderberry Immune Support IV Drips protect users against the novel coronavirus or COVID–19.

NAD initially referred the advertiser to the FTC for failing to respond to the inquiry but, after referral, the advertiser agreed to participate and voluntarily discontinued the claim, removing the misleading advertising from YouTube and elsewhere. NAD's decision also alerted the dietary supplement industry that touting immune support together with reminders of the ongoing pandemic misleads consumers that the product could help prevent disease. A prominent publication that covers the dietary supplement industry, *Nutritional Outlook,* alerted the industry to the decision with the headline, "Minor reference to pandemic constitutes implied COVID–19 claim according to recent NAD case," in an article that cautioned dietary supplement makers not to tie immune support to the pandemic. Other similar decisions looked at social media posts and other advertising tying dietary supplements that claim to support the immune system to the pandemic, generating guidance that spread across the dietary supplement industry.

NAD decisions further expanded on FTC and FDA guidance to other kinds of products that touted unsupported health benefits. In response to an NAD inquiry, an advertiser modified its claims that its air purifier was effective on the coronavirus:

> "Remove airborne coronavirus by 99.999%*".[5]

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[3] *Your Superfoods, Inc. (Your Superfoods Immunity Bundle),* Report #6371, *NAD/CARU Case Reports* (May 2020).

[4] *Vitamin Bounty/Matherson Organics, LLC (Vitamin Bounty Elderberry Immune Support),* Report #6397, *NAD/CARU Case Reports* (Sept. 2020).

[5] *NuWave LLC's OxyPure Air Purifier,* Report #6432, *NAD/CARU Case Reports* (Mar. 2021).

NAD recommended that the advertiser prominently disclose that it tested only porcine respiratory coronavirus, a surrogate for SARS-CoV–2.

NAD decisions have reached a broad and disparate range of industries from cleaning products[6] to ultra-violet lights,[7] intravenous hydration therapy,[8] and even continuously self-cleaning surfaces,[9] removing misleading claims. These industries have been alerted that unsupported claims that a product prevents, treats, or cures COVID–19 violate the law. The self-regulatory response to the pandemic is a powerful example of how independent industry self-regulation can prevent misleading advertising and reduce harm to consumers. Former FTC Chairwomen Edith Ramirez praised the NAD program in 2016 as an example of "how impactful self-regulation can be," further noting that it is "a valuable complement to the FTC's own enforcement efforts to eliminate fraud."[10]

Conclusion

Thank you for the opportunity to appear before you today to explain how independent industry self-regulation has helped combat deceptive COVID–19 advertising claims in the marketplace. When regulatory guidance establishes standards or best practices for advertising particular products or claims, independent industry self-regulation is effective at spreading that guidance, holding companies accountable to those standards, advising additional industries about the guidance, and applying the standards in a wide array of settings. A broad range of industries, including the dietary supplements, healthcare, and direct-selling industries look to DSSRC and NAD for guidance. Although some companies will respond only to government enforcement, many other marketers respond quickly and voluntarily to remove misleading advertising when given concrete guidance on appropriate claims. Independent industry self-regulation thereby amplifies the impact of government actions.

With our Direct Selling Self-Regulatory Council and National Advertising Division always on watch, BBB National Programs looks forward to working with this Subcommittee to address the problem of misleading COVID–19 marketing claims. Thank you again for this opportunity to testify, and I am happy to answer your questions.

Senator BLACKBURN. Thank you, Ms. Engle.

Mr. Leatherman, you are recognized.

STATEMENT OF TODD LEATHERMAN, PROGRAM COUNSEL FOR THE NATIONAL ATTORNEYS GENERAL TRAINING AND RESEARCH INSTITUTE, CENTER FOR CONSUMER PROTECTION, NATIONAL ASSOCIATION OF ATTORNEYS GENERAL

Mr. LEATHERMAN. Thank you, Ranking Member Blackburn, and thank you, Chairman Blumenthal and members of the Subcommittee. My name is Todd Leatherman, and I want to thank you for inviting me to participate in today's hearing.

I currently serve as Program Counsel at the National Association of Attorneys General, or NAAG, which is the nonpartisan national forum for America's 56 state and territory attorneys general. NAAG provides training and resources to support attorneys general in protecting the rule of law and the United States Constitution. Prior to joining NAAG, I spent 23 years in the Kentucky AG's Office of Consumer Protection, serving as consumer protection chief

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[6] *One Home Brands, Inc. d/b/a Blueland (Blueland Cleaning Products),* Report #6416, *NAD/CARU Case Reports* (Sept. 2020).

[7] *Ontel Products Corp. (Safe & Healthy*™ UV–C Disinfecting Light), Report #6426, *NAD/CARU Case Reports* (Dec. 2020).

[8] *IV Drips, Customized IV Hydration & Wellness (IV Hydration Therapy),* Report #6389, *NAD/CARU Case Reports* (Oct. 2020).

[9] *NanoTouch Material, LLC (NanoSeptic Surfaces),* Report #6390, *NAD/CARU Case Reports* (July 2020).

[10] Edith Ramirez, Chairwoman, Federal Trade Comm'n, Address at the CRN/ACI Fourth Annual Legal, Regulatory, and Compliance Forum on Dietary Supplements (June 2016), Press Release, *https://www.crnusa.org/newsroom/crn-nad-reflect-programs-ten-years-self-regulatory-excellence.*

for 20 of those years, focusing on a wide range of consumer protection issues, including price gouging and disaster scams. In my current role, I provide support and training for the consumer protection provisions of AG offices, who, along with Federal counterparts at the FTC, CFBP, DOJ, Secret Service, and others, are on the front lines fighting to protect U.S. consumers from deceptive business practices and scams. I have submitted written testimony and refer you to that for additional information that I am unable to address in my time today.

Attorneys general are the primary enforcers of consumer laws within their jurisdictions, and through a combination of enforcement advocacy and education, they help protect consumers from a wide variety of deceptive business practices and scams. From the outset of the pandemic, consumers have been pitched phony cures, treatments, and products supposed to prevent COVID. They have been targeted by bogus testing sites, bombarded with scam telemarketing, phishing and smishing scams cloaked as contract—contact tracing calls or testing companies, but which were, in fact, identity theft efforts. They have been sold counterfeit or knockoff N95 masks or other PPE that is not protective.

Like many of us, consumers have been spending more time online and are being targeted by online scammers through online marketplaces promising everything from PPE to puppies but having no intention of actually delivering the goods. Attorneys general on all sides of the political spectrum have taken on scams like these as well as practices by legitimate businesses that have harmed consumers, including recovering many millions of dollars wrongfully retained by entertainment event ticket sellers and vacation travel companies following pandemic-related cancellations. In addition, attorneys general have taken on price gouging, which is when a merchant charges increased prices for essential consumer goods and services during a declared state of emergency at such a high level that it takes unfair advantage of consumers. While merchants can pass on their own increased cost to consumers, they may not increase prices simply to make a profit following a spike in demand for an essential good or service, like bottled water or gasoline after a major weather disaster or hand sanitizers or masks during the pandemic. Thirty-nine States and several of the territories have price gouging statutes which are enforced by the AGs. Attorneys general are vigilant when it comes to price gouging and active in enforcing these laws.

On the consumer education front, the AGs have continued to provide vital consumer alerts to warn consumers about the latest scams, as well as to put unscrupulous businesses on notice that ignoring the law will result in enforcement action. NAAG has been coordinating with the FTC in providing timely public alerts and educational materials and alerting consumers regarding emergent scams and tips on how to avoid them.

Another consequence of the pandemic is that we are all spending increasing amounts of time online, and as you would expect, so are scammers. Impersonator scams are a huge problem. According to the FTC, one type of impersonator scam, the romance scam, is one of the fastest-growing scams in the U.S. and resulted in hundreds of millions of dollars in losses over the last two years. NAAG is

hosting a public webinar on Valentine's Day with members of the FBI, Commodity Futures Trading Commission, AARP, and the dating site company, the Match Group, to provide information about this financially and often emotionally devastating crime.

In closing, I would like to voice my appreciation once again to Chairman Blumenthal, Ranking Member Blackburn, and the entire subcommittee for holding today's hearing. Keeping consumers safe is a team effort, and I applaud your effort on educating the public, and urge you to continue using your platform to grow awareness among your constituents and consumers across the Nation on how to identify, avoid, and report scams and fraud. As you all have said, there is much work to do, and the attorneys general are ready to do the work and continue the work in protecting consumers.

I look forward to your questions today and working with the Subcommittee on keeping consumers safe in the future.

[The prepared statement of Mr. Leatherman follows:]

PREPARED STATEMENT OF TODD LEATHERMAN, PROGRAM COUNSEL, NAGTRI CENTER FOR CONSUMER PROTECTION, NATIONAL ASSOCIATION OF ATTORNEYS GENERAL

Chairman Blumenthal, Ranking Member Blackburn, and members of the Subcommittee, thank you for inviting me to participate in today's hearing. My name is Todd Leatherman. I currently serve as Program Counsel at the National Association of Attorneys General (NAAG). Founded in 1907, NAAG is the nonpartisan national forum for America's state and territory attorneys general. NAAG provides a community for attorneys general and their staff to collaboratively address issues important to their work, as well as training and resources to support attorneys general in protecting the rule of law and the United States Constitution.

Prior to joining the association, I spent 23 years in the Kentucky Attorney General's Office of Consumer Protection. I served as the office's executive director for 20 of those years focusing on a wide range of consumer protection issues. In my current role, I am one of two attorneys within the National Attorney General Training and Research Institute's Center for Consumer Protection, the Nation's only entity dedicated to providing support to attorney general staff who are committed to protecting the public against consumer fraud and abuse.

The Center supports the work of the NAAG Consumer Protection Committee, which currently has 19 members and is co-chaired by Illinois Attorney General Kwame Raoul and Tennessee Attorney General Herbert H. Slatery III.

In my role, I support 2022 NAAG President and Iowa Attorney General Tom Miller's Presidential Initiative, "Consumer Protection 2.0: Tech Threats and Tools". As part of the initiative, Attorney General Miller welcomes the opportunity to collaborate with the Federal government and Congress on our shared priorities. I encourage you to participate in the many events and meetings scheduled this year focused on the initiative and protecting consumers.

ROLE OF STATE ATTORNEYS GENERAL

Attorneys general are the primary enforcers of consumer laws within their state or territory. Their activities and enforcement actions are critically important for protecting consumers across the country. They deal with a full range of issues that consumers encounter in the marketplace and at home, including health, safety, and privacy. Because consumer protection is uniquely "people law," it is often the place where individuals have the closest contact with not only the attorney general's office, but with any governmental entity.

Attorneys general serve the public in a variety of ways in the sphere of consumer protection. These include:

- Education: Making consumers aware of their consumer rights and potential scams/frauds through speaking engagements, websites, press releases, public service announcements, mobile offices, social media, and other communications.
- Mediation: Serving as an independent mediator regarding disputes that consumers have with businesses.
- Enforcement: Investigation, settlement, and litigation of consumer protection matters.

COVID–19 Scams and Fraud

Whenever disaster strikes, unscrupulous individuals see an opportunity to profit off their fellow citizens' vulnerability. To individuals willing to profit off the misfortune of others, the COVID–19 pandemic has presented the opportunity of a lifetime. Phony cures, treatments, and products supposed to prevent infection; bogus testing sites, telemarketing, phishing and smishing scams cloaked as contact tracing calls, e-mails, or text messages; sales of counterfeit or knock-off N95 masks or other PPE; puppy scams—requiring consumers to send money for a new pet that never arrives. Schemes like these, as well as price gouging, have occurred during the pandemic and been the subject of enforcement actions by attorneys general. In addition, attorneys general have helped recover millions of dollars in wrongfully retained cancellation fees, obtained refunds for cancelled travel and entertainment events.

A few COVID-related cases to highlight:

- Missouri and Arkansas sued and won cases against James Bakker and his associated television production company regarding false claims about a "silver solution" product that was marketed as a cure or treatment for COVID.[1]
- Nebraska settled with a testing company regarding deceptive and misleading statements to consumers regarding the ability of their antibody tests to identify the presence of a current or prior COVID–19 infection.[2]
- Oregon's attorney general announced agreements with six companies and medical practitioners selling products and services advertising a so-called Covid-19 "cure," or an ability to boost immunity and protect people from the disease.[3]
- New York's attorney general sent cease and desist letters to multiple companies allegedly selling fake COVID–19 treatments.[4]
- Arizona's attorney general secured an agreement with Ticketmaster, returning over $71 million in refunds for consumers who purchased tickets to live events that were cancelled, postponed, or rescheduled due to the COVID–19 pandemic.[5]
- The Texas attorney general obtained a temporary restraining order against a Texas clinic for misrepresenting the character of its COVID–19 testing and failing to secure patients' sensitive personal information.[6]

Price Gouging

Thirty-nine states and several of the territories have price gouging statutes, most of which grant the jurisdiction's attorney general civil enforcement authority for any violations[7]. Some states, such as Florida, Louisiana, and Mississippi, also give the attorney general criminal enforcement authority in price gouging cases. States that may lack a specific price gouging statute, may still combat price gouging under their deceptive trade practices act, specifically as an unfair practice.

How price gouging is defined in specific statutes, varies by state. However, price gouging laws generally prohibit a merchant from increasing prices for essential consumer goods and services, during a declared state of emergency, to a level that takes unfair advantage of consumers. The laws generally recognize that if a merchant's costs increase, they may pass on those cost increases to consumers. However, when merchants' costs have not increased, they may not increase prices simply to make a windfall profit following a spike in demand for an essential good or service, whether it be a generator, motel room, bottled water, gasoline, hand sanitizer, or masks. This type of market behavior is illegal, unfair to consumers, and harms communities at their most vulnerable moments.

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[1] Arkansas: *https://arkansasag.gov/media-center/news-releases/rutledge-sues-jim-bakker-for-peddling-colloidal-silver-products-to-cure-covid-19/*; Missouri: *https://ago.mo.gov/home/news/2020/03/10/ag-schmitt-files-suit-against-jim-bakker-for-selling-fake-coronavirus-cure.*

[2] *https://ago.nebraska.gov/news/ag-peterson-reaches-settlement-omaha-companies-deceptive-and-misleading-statements-regarding.*

[3] *https://www.doj.state.or.us/media-home/news-media-releases/ag-rosenblum-settles-with-six-companies-and-medical-clinics-selling-unproven-covid-19-treatments/.*

[4] *https://ag.ny.gov/press-release/2020/attorney-general-james-orders-companies-stop-selling-fake-treatments-coronavirus.*

[5] *https://www.azag.gov/press-release/ag-brnovich-secures-71-million-ticket-refunds-arizona-events-impacted-covid-19.*

[6] *https://www.texasattorneygeneral.gov/news/releases/ag-paxton-files-lawsuit-against-clinica-hispana-fraudulent-covid-testing-and-failing-secure-personal*

[7] *https://www.ncsl.org/research/financial-services-and-commerce/price-gouging-state-statutes.aspx*

Attorneys general have used their price gouging authority following multiple disasters. For example:

- In 2017, the Texas attorney general took action against gasoline stations and motels who raised their prices exorbitantly in the aftermath of Hurricane Harvey.[8]
- The New York and New Jersey attorneys general obtained settlements from hotels, gas stations, and a hardware store for price increases following Hurricane Sandy.[9]
- The North Carolina attorney general obtained settlements from an out of state water damage restoration company for charging excessive prices following Hurricane Florence.[10]

Price gouging restrictions may also be implemented following an unexpected supply disruption, a recent example being the 2021 Colonial Pipeline ransomware attack that led to the shutdown of the pipeline supplying much of the gasoline to the East Coast. Following that event, a number of attorneys general, including the those from Kentucky,[11] North Carolina,[12] and Virginia,[13] filed price gouging actions against gasoline stations who raised their prices to unlawful levels.

PRICE GOUGING ENFORCEMENT DURING THE COVID PANDEMIC

As the committee is aware, consumers have reported gouging on a wide range of products from hand sanitizer to masks, even on eggs during the COVID–19 pandemic.

One such incident made the national press in the early days of the pandemic. A pair of brothers from Tennessee drove from store to store purchasing large quantities of hand sanitizer in Tennessee and Kentucky. The brothers then jacked up the prices and sold the bottles of hand sanitizer on Amazon for $8 to $70 each, many times higher than their purchase price. The Tennessee and Kentucky attorneys general quickly took action, obtaining a settlement in which the brothers gave up the supplies and made them available for emergency responders and others serving the public.

A few other cases to highlight:

- Colorado's attorney general announced a settlement with a business for making misleading claims about masks and respirators it sold and for charging unreasonably excessive prices for those products.[14]
- Oregon's attorney general settled with five Oregon companies for consumer protection violations related to the COVID–19 pandemic.[15]
- Pennsylvania's attorney general has taken action against numerous retailers who raised prices on sanitizer, wipes, masks, and bottled water;[16]
- The attorneys general of New York and Minnesota obtained settlements from egg wholesalers alleged to have price gouged and obtained more than 1 million eggs each for food pantries serving low-income communities in their states.

Attorneys general across the country have sent warning letters, activated price gouging hotlines, and launched mobile apps for consumers to report exorbitant prices.

The authority of attorneys general to pursue price gougers operating online was recently affirmed by the U.S. Sixth Circuit Court of Appeals when it upheld Ken-

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[8] *https://www.texasattorneygeneral.gov/news/releases/ag-paxton-files-more-lawsuits-against-businesses-accused-price-gouging-during-hurricane-harvey*

[9] *https://www.nj.com/mercer/2013/07/mercer_county_hotels_settle_with_state_over_alleged_price_gouging_during_sandy.html; https://ag.ny.gov/press-release/2013/ag-schneiderman-announces-40k-settlement-brooklyn-hotel-price-gouging-wake#:~≤text=Espa%C3%B1ol-,A.G.%20Schneiderman%20Announces%20%2440k%20Settlement%20With%20Brooklyn%20Hotel%20For,In%20Wake%20Of%20Hurricane%20Sandy&text=NEW%20YORK%20%2D%20As%20part%20of,Sandy%2C%20Attorney%20General%20Eric%20T.*

[10] *https://ncdoj.gov/attorney-general-josh-stein-reaches-100000-settlement-in-hurricane-florence-price-gouging-investigation/.*

[11] *https://www.kentuckytoday.com/state/price-gouging-settlement-with-fuel-retailer-reached/article_ca5ed3f0-3b45-50c0-b69a-3de3cd1522fe.html.*

[12] *https://ncdoj.gov/wp-content/uploads/2022/01/doc05140920220120142958.pdf.*

[13] *https://www.oag.state.va.us/media-center/news-releases/2158-september-23-2021-herring-holds-gas-station-accountable-for-price-gouging.*

[14] *https://coag.gov/press-releases/1-25-21/.*

[15] *https://www.doj.state.or.us/media-home/news-media-releases/attorney-general-announces-settlements-in-covid-19-consumer-protection-cases/.*

[16] *https://www.attorneygeneral.gov/avcs/.*

tucky's authority to investigate third party sellers offering products on Amazon. The court reversed a lower court ruling which had held that Kentucky's statute violated the dormant commerce clause of the U.S. Constitution by, in effect, regulating prices in other states. A bipartisan coalition of 39 states filed an amicus brief in support of Kentucky and the Sixth Circuit agreed with the states that the law was constitutional.

Attorneys general are vigilant when it comes to price gouging and active in enforcing these laws.

RESPONDING TO DISASTERS

During times of disaster, attorneys general have an important role to play in keeping their communities safe, whether it be from price gougers, scam artists selling bogus products, fake charities preying on the public's sympathy to con them out of donations, or fly-by-night storm chasers offering shoddy or expensive construction, repair, or other damage-related services. Just recently, when my home state of Kentucky suffered a devastating rash of tornados in early January, Attorney General Cameron and his office reached out to local officials and created a *contractor registration program,* requiring contractors offering emergency-related services to register with his office so they have identifying and contact information for all such businesses operating in the area. The contractors are then required to place a conspicuous placard on their vehicles so residents know who has been approved to perform work in the area and can avoid those who are not. The program is a creative initiative to help deter con men and unscrupulous businesses and, so far, has been a huge success.

On the consumer education front, attorneys general have continued to provide vital consumer alerts and public outreach to warn consumers about the latest scams, as well as to put unscrupulous businesses on notice that ignoring the law will result in enforcement action.

NAAG has been coordinating with Federal consumer agencies like the Federal Trade Commission (FTC) and Consumer Financial Protection Bureau (CFPB) in providing timely public alerts and educational materials, alerting consumers regarding emergent scams and tips on how to avoid them. Among those efforts are campaigns regarding free at-home test kits which we released last month, as well as efforts warning of fake COVID clinical trials and vaccine scams at earlier stages of the pandemic. We will soon be issuing tips to consider when visiting a testing site or obtaining an at-home test kit. This new campaign comes amid a number of anecdotal reports of bogus pop-up testing sites, delayed test results, and questions about at-home kits.

The materials related to these campaigns are available on our *COVID–19 resource page* on NAAG's consumer-facing website *www.consumerresources.org.* We encourage you and your staffs to make use of these materials along with other information on the site. Of particular interest may be the page which lists every attorney general's *consumer protection website and complaint intake portal,* which many of your colleagues and their staffs have told us has been very useful in referring consumers to their attorney general.

ONLINE DANGERS GROW DURING COVID PANDEMIC

Apart from scams directly related to COVID, all of us are spending increasing amounts of time online and so are scammers. This growing online presence has led to other problematic issues—including impersonator scams like romance scams, which according to the FTC is the fastest growing scam in the U.S. and one resulting in more than $300 million in consumer losses in 2020. As part of Attorney General Miller's NAAG Presidential Initiative, we are hosting a public webinar regarding romance scams on Valentine's Day, with members of the Federal Bureau of Investigations, Commodity Futures Trading Commission, AARP, and dating site company the Match Group, to provide information about this pernicious and financially and emotionally devastating crime.

CONCLUSION

In closing, I'd like to voice my appreciation once again to Chairman Blumenthal, Ranking Member Blackburn, and the entire Subcommittee for holding today's hearing. Keeping consumers safe is a team effort. I applaud your focus on educating the public and urge you to continue using your platform to grow awareness among your constituents and the consumers across the Nation on how to identify and report scams and fraud.

I look forward to your questions today and working with the Subcommittee on keeping consumers safe in the future.

Senator BLUMENTHAL [presiding]. Thank you, Mr. Leatherman.

I am going to begin the questioning with you, Mr. Levine. You mentioned in your remarks that the FTC has sent letters directing more than 425 companies to remove deceptive claims. In what proportion of those cases have the claims been removed?

Mr. LEVINE. Thank you, Senator. The overwhelming majority of recipients of those cease and desist demands take down their claims and often take them down within 48 hours.

Senator BLUMENTHAL. And then bring new ones.

Mr. LEVINE. Well, Senator, we monitor these closely. If we see them bringing new claims, we will not hesitate to take them to court.

Senator BLUMENTHAL. But you have brought only three cases under COVID-related—the COVID-related Consumer Protection Act.

Mr. LEVINE. I completely agree Senator that we need to bring more cases, and we will be bringing more cases. It is certainly important that we get these claims taken down quickly, but it is also critical that we not allow scammers to profit from preying on American consumers. And if that means taking them to court, that is exactly what we are going to do.

Senator BLUMENTHAL. You know, I have sat at this dais for years now, and I have heard the same thing said as you have said, I am sure in good faith, but we continue to have warning letters without real apparent effect. Are you obligated to bring warning letters before you bring lawsuits?

Mr. LEVINE. We are not obligated, Senator. Particularly early on in the pandemic, we wanted to make sure these claims got taken down quickly to prevent further harm to consumers. But I think we are now at the point where we do not only want to get these claims taken down. We want to make sure scammers out there know that they are going to pay a heavy price, not only pay back what they stole, but pay a penalty to the government as punishment, and that is why we are going to bring more cases.

Senator BLUMENTHAL. How many penalties have been paid as a result of the three cases that you brought?

Mr. LEVINE. I could get that exact figure, Senator. I know some of those cases remain in litigation.

Senator BLUMENTHAL. So, in effect, there have been few, if any, penalties actually paid.

Mr. LEVINE. I think in addition to the three cases under the CCPA, Senator, we brought about 15 other COVID-related cases under other authorities, and there may be penalty liability there as well.

Senator BLUMENTHAL. What changes have you made to deter these criminals from price gouging, and scamming, and deceptive and misleading practices that you have the authority to go to court on without warning letters, but evidently continue issuing warning letters?

Mr. LEVINE. I think the big change we are making is trying to make sure that there is civil penalty liability across the market. So those cease and desist demands and warning letters do give us the

basis to seek civil penalties against COVID scammers, but we are also sending notices of penalty offenses for other types of scams not covered by the CCPA to make sure that those scammers pay a penalty. Same with our Made in USA fraud rule. We want to make sure those scammers pay a penalty. There are a lot of people using this pandemic as a basis to prey on American consumers, and we want to make sure everyone pays a price and know they are going to pay a price if they persist in their wrongdoing.

Senator BLUMENTHAL. I appreciate your words, but what the con artists and scammers understand is action.

Mr. LEVINE. I agree.

Senator BLUMENTHAL. Actions speak louder than words. So far there has been no action. More important, there have been no penalties. There is no deterrence if there are no penalties, and there is no real deterrence unless there are penalties that have real bite. And so far, there has been a complete dearth of action. We have given you new authority, and I am at a loss to understand why the FTC has not taken stronger action. I understand that some of your testimony may be on your own or without the authority of the FTC, but let me ask you as someone with a lot of experience in this area, how do you go to work knowing that this Agency has apparently no clear strategy, articulated by the Agency itself, for changing its practice to bring more cases without warnings? Forget the warnings.

Mr. LEVINE. I think our strategy, Senator, is going to be to bring more cases. As I said, I think we are now at the stage in the pandemic where we are moving away from trying to get these claims taken down as quickly as possible. Obviously we want them taken down as quickly as possible, but we also need to make sure that these scammers are paying a heavy penalty for preying on people. And as I said, we are not just going to ask people to turn over what they stole. We are going to ask them to pay a civil penalty to the government and, when appropriate, we are going to make a criminal referral so that—because some of these people deserve jail time.

Senator BLUMENTHAL. Are they under an obligation to take down a deceptive misleading scam simply because you have issued a warning letter?

Mr. LEVINE. If they do not, we are going to take them to court, so yes.

Senator BLUMENTHAL. So why not just take them to court? They will take it down anyway.

Mr. LEVINE. Some of them we are going to take to court. Part of it is trying to get these claims taken down as quickly as possible, but I hear what you are saying, Senator. It is not only that these scammers pay a price. Consumers who lose money to these scams should be made whole, and to do that we need to bring lawsuits, and that is what we are going to do.

Senator BLUMENTHAL. To make them whole, you need to bring lawsuits.

Mr. LEVINE. Mm-hmm.

Senator BLUMENTHAL. But also, to prevent them in the future, you need to bring lawsuits with the remedy of penalties and injunc-

tive relief so if they violate a court order, the court itself will exact penalty.

Mr. LEVINE. We want to obtain permanent injunctions against these scammers that put them under court order for the rest of their lives. That is what most—that is what many of these scammers deserve, and that is what we are going to be seeking in court.

Senator BLUMENTHAL. Well, I am not from Missouri, but I am in the show me state of mind. The Ranking Member is recognized.

Senator BLACKBURN. Thank you, Mr. Chairman. Mr. Levine, I do appreciate that you mentioned that most of these things have started online. Mr. Leatherman, I want to come to you first because in Tennessee we have seen a preponderance of these online scams that have kicked up and the prevalence of that, and in my opinion, the States' attorneys general are in the best spot to deal with this. And as you well know, Tennessee has been very active and AG Slatery has been very active in pursuing these cases against fraudsters in this space. And what I would like to know from you, recognizing that the State is in a better position to go after this than the Federal Government, are there any barriers or hurdles that the State AGs are facing in this fight against these online scammers? And we know that we want our State AGs to be as well-equipped as possible, so any barriers or hurdles?

Mr. LEATHERMAN. I appreciate the question, Ranking Member Blackburn. And as you know, Attorney General Slatery, but also many other attorneys general, have been very active in pursuing not only price gouging cases, but also counterfeit PPE cases and also bogus cure cases. And you are correct that—and as has been mentioned by others, there is a lot of activity that is going on online. I would say that as a legal matter, the State AGs are replete with authority under the UDAP cases as well as price gouging cases in order to pursue these cases.

The barriers or the challenges are those related to the volume of the activity that is going on. Obviously, AG offices have limited resources, and so being able to address all these issues is a challenge. We are not here with head in hand asking for additional resources, but obviously, if the Federal Government is interested in providing——

Senator BLACKBURN. Let me—let me jump in there.

Mr. LEATHERMAN. Yep.

Senator BLACKBURN. So really, there are no legal barriers. The attorneys general have the needed authority, correct?

Mr. LEATHERMAN. That is correct.

Senator BLACKBURN. OK. And just—it is always a resourcing issue, so I appreciate that. Ms. Engle, let me come to you. I want to be sure I understood. 2019, pre-pandemic, is when the Direct Selling Association started their Self-Regulatory Council there at the BBB National Program, correct?

Ms. ENGLE. That is correct.

Senator BLACKBURN. OK.

Ms. ENGLE. It was created in 2019.

Senator BLACKBURN. I think that that is significant, and we know that you have used it to monitor the marketplace. So talk with me just a touch about the program's impact and what needs

to happen to ensure that these self-regulatory bodies can be successful?

Ms. ENGLE. Sure. So, you know, the impact of this program in the area of COVID has been the removal of over 400 misleading claims from the marketplace, from the direct selling marketplace specifically. And it is true that most of these claims appear on social media, and so we actively monitor social media in order to find those claims and contact the companies.

Senator BLACKBURN. How large is the staff that monitors this?

Ms. ENGLE. We have a handful of staff, but we have a—we have a contract with a—like a web crawler type of company——

Senator BLACKBURN. Sure. Absolutely.

Ms. ENGLE.—that does the monitoring, yes.

Senator BLACKBURN. OK. That is helpful. Ms. Murray, I want to come to you. CBP at the port in L.A. and Long Beach, intercepted 13,586 counterfeit products in 2021, and it was a 153-percent increase from 2020. So you touched on it in your remarks, but a more fulsome response on what we can do to fight these overseas entities that are flooding our ports and flooding our country with fake and counterfeit items. This is dangerous for our citizens, and we know most of this is, of course, coming from China.

Ms. MURRAY. Yes, thank you for the question. As I mentioned in my remarks, during 2020 and 2021, Customs and Border Protection actually seized 34 million counterfeit masks during that time. And, of course, the ports in Los Angeles and Houston and on the East Coast, I mean, all of them have seen this just monstrous increase in fake PPE. I think what we need to see is more resources as well as more cooperation. The things that scare me is we hear about the cases where the FBI was involved in this case and Border Patrol seized this many masks or this many fake COVID tests.

But what about the ones we do not hear about? What about the ones that are actually ending up on store shelves, or online, or in hospitals, because there were a number of cases last year where hospitals, including the Cleveland Clinic here in Ohio, as well as hospitals in Minnesota and New Jersey, all across the country, where hospitals actually had distributed what turned out to be counterfeit 3M N95 masks. And how do we stop that? I mean, that is just awful to think that we had our frontline workers running around for hours or days or weeks with fake masks, and so we absolutely need to have more resources to stop that.

Senator BLACKBURN. Thank you. Thank you, Mr. Chairman.

Senator BLUMENTHAL. I see that Senator Klobuchar has joined us remotely, and she is recognized.

STATEMENT OF HON. AMY KLOBUCHAR, U.S. SENATOR FROM MINNESOTA

Senator KLOBUCHAR. All right. Well, thank you very much, Chairman Blumenthal, and thank you also, Senator Blackburn, for holding this important hearing. I appreciate it. I was listening in, Ms. Murray, as you talked about the fake masks, and 3M is, of course, a Minnesota company, so it even hits harder home that someone was ripping off their masks and distributing them to our frontline workers. Also, last week, our attorney general, Minnesota Keith Ellison, filed a lawsuit in State court against two COVID

testing companies for falsifying test results, and I think going after these cases is really, really important.

One thing that I wanted to mention was just the work that we can do federally. I have proposed legislation with Senator Grassley that would change the way the merger fees are done so that we could get more money into the FTC as well as to the Department of Justice to help them with their annual budget. Mr. Levine, what would the effect be of tripling actually the FTC's budget, which is part of another bill that I have introduced, have on the Agency's ability to better protect consumers? And by the way, there are ways we can do this, as Senator Grassley and I pointed out from our merger fee bill, without putting it on the back of taxpayers. And I think there is also an argument that the cases, because there is so much rampant scams going on, actually bring in money for the government if done right, but not if they do not have the funding to start the cases to begin with. Mr. Levine, do you want to answer that?

Mr. LEVINE. Certainly, Senator, and thank you for the question. In short, the effect would be transformative. I mean, a striking fact about FTC funding, we actually have a smaller headcount today than we did in 1980 when the economy was far smaller. With more resources, we could bring more cases and return more money to more consumers. In the 5 years before the Supreme Court took away our strongest authority—Section 13(b)—we returned more than $11 billion to consumers, far more than we received in Federal funding. Investing in the FTC is a good investment.

Senator KLOBUCHAR. Exactly. You bring in money. And, Ms. Murray, you also highlighted the chronically underfunded Agency. How will more funding directly benefit customers from your perspective?

Ms. MURRAY. To the extent that the Federal agencies have more resources, they can improve their technology. They can improve their staffing. They can improve their training. All of those are needed to help consumers because consumers cannot do it alone.

Senator KLOBUCHAR. Right. Another thing, social media platforms, as you all know, are designed to amplify content, and, sadly, if not monitored, it actually makes it easier for scammers to spread content that is false. And, Mr. Levine, in your testimony, you note how since 2017, reports of scams starting on social media have increased 19-fold. Can you tell us about some of the most prevalent scams, and then maybe, Ms. Engle, could you also touch on this, what you think should happen? Mr. Levine.

Mr. LEVINE. Absolutely, Senator. The numbers are quite striking, not only a 17-fold increase in the volume of losses on social media, a 19-fold increase in the number of people reporting losses, 95,000 complaints last year, $770 million in losses reported last year, and we know that is the tip of the iceberg. We are seeing particular rise in investment scams, romance scams, online shopping, and other frauds. And simply put, Senator, online platforms are not doing enough to police this problem.

Senator KLOBUCHAR. Yep. Very good. Ms. Engle, would you like to add what the platforms should be doing to make sure these scams are not put forward in the first place?

Ms. ENGLE. Absolutely. I think in addition to being vigilant, I mean, one of the things that we would like them to do is to partner with us so that when we see misleading ads on their platforms and the advertiser does not comply with our decision, we could refer them to the platforms. Facebook actually has already agreed to do that, and so when we refer matters to them, that misleading ads violate the terms of service, they promptly take them down. And we would like to have that same partnership with the other platforms as well.

Senator KLOBUCHAR. Mm-hmm. All right. Well, very good. I think there are also some other proposals out there, I think, that would be very helpful on everything from algorithms, to assessing financial fees, taxes on this, to changes to immunity for misrepresentation. It is one thing if someone puts a false comment on. It is another when a platform actually amplifies the misinformation and is making money off of it. To me, that is the distinguishing factor if you are going to look at immunity issues, or you are going to look at taxation, or you are going to look at anything, to try to get a handle on this because there has got to be more disincentive—more incentives for good behavior than disincentives in place that we see right now. So thank you very much.

Senator BLUMENTHAL. Senator Markey.

STATEMENT OF HON. EDWARD MARKEY,
U.S. SENATOR FROM MASSACHUSETTS

Senator MARKEY. Thank you, Mr. Chairman, very much. Massachusetts is seeing encouraging decreases in COVID–19, but we know that reliable at-home test kits will continue to be an important tool to keep our communities healthy. And at-home testing kits are vital for identifying illnesses and stopping the spread of COVID–19. Unfortunately, we know that during periods of increased demand for tests, bad actors have engaged in predatory and profiteering behavior, including selling fraudulent test kits and charging exorbitant prices. Ms. Murray, can you briefly describe the types of fraudulent activity related to COVID testing that threaten consumers in this country?

Ms. MURRAY. Yes. Thank you, Senator, and I assume that by testing, you are talking about, like, the test sites as well as the test kits that people can buy in stores. And, you know, I mean, I have focused on consumer issues for 30 years. I was a consumer finance journalist in my past life, and just when you think you have heard it all—predatory lending, phone calls, the grandkids are in jail and they need iTunes gift cards for bail money—just when you think you have heard it all, then all of a sudden you get COVID coming along, and we have had so much of unauthorized test kits, counterfeit masks, fake test sites, and these miracle cures that do not work. So we——

Senator MARKEY. What should we do? What is the solution to this? We know it is out there. We know it is rampant. What is the plan we should put in place?

Ms. MURRAY. We need more resources, more enforcement. Frankly, I would like to see some—well, I—we need more supply, OK? And I would like to see more aggressive enforcement.

Senator MARKEY. I am sorry. We need more—we need more supply of what? We need more supply of what?

Ms. MURRAY. Of test kits and of the test sites. I mean——

Senator MARKEY. How do we make sure that those that are there are not fraudulent? We know the 60 percent of the masks coming in from China are fraudulent, so what can we do in order to, you know, police that?

Ms. MURRAY. Well, with the—with the test kits, there is a site that you can go on with the FDA to make sure that the test kits are valid. But really, I mean, are consumers going to be able to look—they are at the grocery store. They finally found some test kits for sale, and they are going to pull it up on their phone to see whether it is legitimate or not? I think the retailers have more responsibility to make sure that the products that they are getting in their stores are actually authorized. And with these test sites, what I was starting to say is I would like to see a little bit more of the mindset of see something, say something.

I mean, I wonder what some of these pop-up test sites that have opened up in shopping center plazas, if somebody just was able to call their local police department and say, hey, can you go out and check out what this thing is because, you know, people can just buy, like, orange cones and hazmat suits and go and pretend to be a test site. We have heard just horrible, horrible cases with these fake test sites, and people are getting their information stolen, in some cases, being asked to pay money for free—for what should be a free test. Everybody needs to——

Senator MARKEY. So, Mr. Levine, let me just say this to you, Mr. Levine. We have got a big problem out here. Senator Blumenthal and I have written for the—to the Federal Trade Commission asking for the toughest possible actions to be taken to deal with these scams, and I applaud the FTC for everything that they have done thus far. But we just want to make sure that we are working with you so that you have all of the authority which you need in order to—in order to police this area.

And I guess I would just move over to masks quickly because they are an effective tool for reducing transmission, but the Centers for Disease Control and Prevention recently updated its masking guidance to acknowledge that higher-quality masks provide better protection from COVID–19. Now more Americans are looking for increased protection that comes from N95, KF94s, and KN95s masks. Unfortunately, online marketplaces are rife with counterfeit and fraudulent masks, and those platforms continue to allow masks to be sold despite concerns that the information about these products is misleading and unverified. Last year, the Department of Justice established a COVID–19 Fraud Enforcement Task Force. Today, Senator Blumenthal and Senator Warren join with me in writing to the Department of Justice urging to take all steps necessary to protect consumers from the threat of fraudulent masks online in the marketplace.

Ms. Murray, do agree that this task force should prioritize efforts to protect consumers and promote public health by cracking down on fraudulent masks?

Ms. MURRAY. Absolutely, and one of the stunning things is some of these fake masks that have been tested by health officials. Their filtration level is 7 percent.

Senator MARKEY. So exactly. So we need some kind—what we need is this. We need a national ranking for masks so that people know that a cloth mask, on a scale of 10, is a 1 or a 2, that a surgical mask is only a 5 or a 6, and that you need those stronger masks to get up to an 8 or a 9 or 10. So actually, the Federal Government has to do a better job in putting together a comprehensive program. We actually—when people go and purchase their sunscreen, they know that it is—what the SPF is, 36, 18. People know what it is for their own skin. Right now it is incomprehensible to people in terms of the rating system for masks. And the Federal Government, following what NIOSH does for their masks, has another counterpart, the FDA, some agency, of which is ranking all of these masks, and that will help the consumer to know what to buy. In the same way when they buy a car—it is 5 stars, 4, 3, 2, and 1 for safety—we need some kind of system for masks because we might see this pandemic subsiding, but it is going to come back, and at that point, hopefully by then, we will have a ranking system.

So I thank you, Mr. Chairman. This is just such an important hearing. It gets right to what the Federal Government should be taking as action to give more protections to consumers in our country. Thank you.

Senator BLUMENTHAL. Thank you, Senator Markey, and thanks for mentioning the letter that we did today regarding fraudulent and fake masks and other scams. Very important that the Department of Justice takes responsibility here as well. Senator Thune.

STATEMENT OF HON. JOHN THUNE,
U.S. SENATOR FROM SOUTH DAKOTA

Senator THUNE. Thank you, Mr. Chairman. Mr. Levine, I recently introduced the bipartisan Robocall Trace Back Enhancement Act with Senator Markey to help bolster privately led efforts to trace back the origins of illegal robocalls. Can you speak to the FTC's efforts on engaging with industry initiatives, like the Robocall Trace Back Group, and whether this public/private partnership has been successful in identifying illegal robocaller actions?

Mr. LEVINE. Absolutely, Senator, and, first of all, thank you for your leadership on this issue and on the Trace Act as well. It has been a successful partnership, but let us not kid ourselves. There is a lot more work to be done. The FTC has brought 150 lawsuits. We are moving upstream targeting VoIP providers who are blasting billions of calls into Americans' homes and pockets, but a lot more needs to be done if we are going to take on this scourge.

Senator THUNE. Well, and I hope that you can continue to advise us, too, on things that we can do to give you more tools, but we do want to make sure that these partnerships that we have called for are hopefully functioning and working in an effective way. And I would follow up with Mr. Leatherman virtually, if you could elaborate on the coordination between industry and enforcement officials to make the traceback efforts effective, and then perhaps also address the question whether there are other tools Congress

should consider providing attorneys general to meet the challenge of tracking illegal robocallers?

[No response.]

Senator THUNE. Mr. Leatherman?

[No response.]

Senator BLUMENTHAL. I do not know whether we have Mr. Leatherman still——

Senator THUNE. OK.

Senator BLUMENTHAL. Oh, there he is.

Senator BLUMENTHAL. Mr. Leatherman?

Mr. LEATHERMAN. Sorry about that.

Senator BLUMENTHAL. Did you hear the question?

Mr. LEATHERMAN. I did not hear the question. My Internet just blinked out, so would you repeat it, please?

Senator THUNE. I do not know if you heard my first question of Mr. Levine, but I wanted to ask if you could elaborate on the coordination between industry and enforcement officials to make the trace back efforts effective. This comes back to the issue of robocalls. And as a followup, are there other tools Congress should consider providing State attorneys general to meet the challenge of tackling illegal robocallers?

Mr. LEATHERMAN. Thank you, Senator, for that question, and thank you for your leadership on the issue involving robocalls. As you are aware, I think, there has been a number of cases brought recently by State attorneys general using tools that have been made available through the Trace Back Act, and those efforts are ongoing. There have been a number of cases brought recently targeting illegal activity conducted on networks, and so the networks themselves have been subject to law enforcement actions.

So in the past, it was difficult to obviously sift through all of the scammers, and so the AGs have been very [inaudible] in targeting the network [inaudible] that [inaudible].

Senator BLUMENTHAL. Mr. Leatherman, I think we have lost you again. I think we have lost you.

Senator THUNE. Mr. Chairman, let me come back to Mr. Levine here, and this is a separate issue, but it has to do with a concern I have had for a long time about the big four meat packers' dominance and control over beef processing capacity and cattle supply in this country. Packers are enjoying excessive profits while cattle producers and family farm and ranch operations, like those in my home state of South Dakota, struggle to stay in business. At the same time, consumers are left paying record high prices for beef, and most of the time they are not even sure where it is coming from because the product of the USA labeling loophole, which is entirely another issue. But I remain very concerned with potential improper or anticompetitive activity in the beef sector, and I am encouraged that this Administration has prioritized oversight of this highly concentrated industry. And I am wondering what your views are with respect to the FTC using its Section 6(b) authority to investigate these meatpacking companies?

Mr. LEVINE. Well, Senator, I certainly share your interest in this issue. I would want to raise that with my colleagues in the Bureau of Competition who would have more knowledge on that particular issue. But I just want to jump off on something you said about the

"Product of USA" beef. You know, one of the things we did at the FTC last year is finalized a rule that prohibits mislabeling products made in USA when they are from overseas. But as you referenced, Senator, we know that when Americans are shopping for beef, it might say "Product of USA" on the label, but that cattle could have been born, raised, and slaughtered overseas. This is not only bad for consumers. This is bad for the ranchers in your state and across the country who are being cheated by misleading labels. We stand ready to work with the USDA on this issue to protect all consumers from misleading "Product of USA" of "Made in USA" labels.

Senator THUNE. Thank you, and I hope that you will take a look at the other issue that I mentioned on the FTC with respect to the concentration and dominance and control that a handful of meatpackers have. But I appreciate you addressing the issue of labeling because it is misleading to consumers in this country when a product that comes in from outside the U.S. attracts the USA label, and it does not represent an animal that was born, raised, and harvested here in the United States. And so this is an issue that has been around for a long time. We have addressed it in a couple of farm bills. It continually gets challenged at the World Trade Organization, and we have not been willing to defend the legislation that has passed previously here in the Congress that would provide mandatory country of origin labeling.

I am glad that you all are moving forward to try and close that loophole. I hope that you will use the powers that your Agency has and the authorities that it has to continue to try and tighten up so we can get to a point in this country where everything that we put in the center of our plate has the same requirements as the clothes we wear. Your tie, my tie will all say made in some other country. We have got labeling on everything except the stuff that we eat. It makes absolutely no sense. It is an issue that just flat has to be addressed. I have got a bill with Senator Tester to do that, but to the degree that you all have regulatory authority, I would encourage you to continue to exercise it in a way that allows American consumers to be able to differentiate when they go to the supermarket or the grocery store the products that are born, raised, and harvested here in the United States and those that are not. I think it is an important distinction to be made and something that consumers around this country desperately want to see. Thank you.

Thank you, Mr. Chairman.

Senator BLUMENTHAL. Thank you, Senator Thune, and I join completely in the views you just expressed, and if you want to follow up with letters or legislation, I would be very pleased to join you. This is an issue of consumer protection that is supremely important to our whole country, not just to your State and the ranchers and others there. I see we are joined by Senator Lee.

STATEMENT OF HON. MIKE LEE,
U.S. SENATOR FROM UTAH

Senator LEE. Thanks so much, Mr. Chairman. Mr. Levine, I would like to talk about 13(b). You wrote in your testimony that in the context of 13(b), "restoring the FTC's ability to provide redress to wronged consumers is critical." But, of course, in the AMG

case in which that ruling was issued, the Court specifically noted that its decision did not prohibit the FTC from using its authority under Section 5 and under Section 19 to obtain redress for wronged consumers. Is the Supreme Court wrong? Under other existing authorities, are you unable to provide any redress for wronged consumers?

Mr. LEVINE. It is possible, Senator, but it is very difficult, and I am happy to talk through why if that would be helpful.

Senator LEE. OK. Well, I mean, it is pretty significant. I mean, there was a significant ruling. The ruling was significant on its face. It also happened to be unanimous. And what the unanimous Court found in that case was that over a period of over 40 years, the FTC had been illegally obtaining money from companies, and we are not talking about something trivial. Some were. We are talking about billions of dollars.

Now, I certainly want to ensure, as I know you do, that consumers who have been harmed can be made whole again, but I think we cannot ignore what has happened. And I think it would be legislative malpractice on my part if I were to decide to jump on board with something that would grant the Commission the very same authority that the Commission used for 40 years, not only against bad actors, but also against lawful actors, against legal, non-predatory business practices that were providing legitimate goods and services. And so I think instead of just giving carte blanche authority, Congress should ensure that this authority is coupled with proper safeguards in order to block any future abuses of this immense power.

Now, let me make sure I understand. Are you against any guardrails around 13(b)-like authority for the FTC?

Mr. LEVINE. I think the best guardrail for our 13(b) authority is the fact that the FTC cannot order anybody to pay a nickel. We need a Federal judge to order any payment. We needed that under 13(b), and we need it under some of the legislation the Senate has considered.

Senator LEE. OK. So injunctive relief. You are saying that they need to be able to have an injunctive relief, but they have an injunctive relief. What other types of reforms would you be willing to support? What kinds of guardrails around the authority to do what the unanimous Supreme Court said they were unlawfully doing for 40 years in the AMG case?

Mr. LEVINE. The biggest reform we need is the ability to return money to consumers, Senator, who have been scammed. You are right. There are other ways to do it. It will take 5, 6 years—it could take years, and by the time we actually get money back, by the time we actually get a judgment and we are, you know, through the appeals process, the defendant does not have any money anymore. The best way to stop fraud and get money back to consumers is restoring the authority we had.

Senator LEE. Look, ensuring that consumers can be protected from scams and from unfair and deceptive business trap practices is extremely important, and we need to get this right when we do it. It is also important, not in spite of the fact that the aforementioned is important, but because it is important, it is also essential that we ensure that consumers continue to have access to goods

and services provided by legitimate businesses. These two goals do not have to be at odds with one another. In fact, due process allows for them to be pursued effectively and simultaneously. In fact, that is what due process is. It is why we have it. It is why it is built into the Constitution not just once, but twice.

I believe Congress can grant the expansion of 13(b) authority while also providing appropriate safeguards, safeguards of the sort outlined in my proposed legislation, S. 3410, which is called the Consumer Protection and Due Process Act. And it would protect consumers by, one, providing the FTC with the ability to pursue monetary, equitable remedies as against bad actors, and, two, providing businesses due process—due process protections from improper, unfounded, and frivolous claims, which leads to a concern that I have had.

You know, under the COVID–19 Consumer Protection Act—the CCPA—it is illegal to engage in deceptive marketing related to the treatment, the cure, the prevention, the mitigation, or the diagnosis of COVID–19. And over the past two years roughly since that has been in place, many hardworking Americans have stepped up to the plate and have worked diligently to identify, or create, or develop inexpensive therapies and treatments against COVID-19. Lamentably, it seems that the Federal Government is keen on promoting only some solutions while essentially blocking medical professionals from delivering other FDA-approved medications for the treatment of COVID, treatment options that are often far less expensive and far more available than the government-pushed approaches.

And I find it quite concerning that this combination of the FTC, the FDA, and other entities seem to be trying to block the off-label use of approved drugs when it comes to tackling the COVID–19 pandemic. In some cases, it is off-label use of previously approved medication. In other cases, it is anything that looks like it might help relieve the symptoms of COVID or otherwise address COVID. And so, look, it is not illegal for healthcare providers in their best judgment as medical professionals and with the health history and the best interests of their patients in mind to just prescribe off-label uses for approved drugs. Do you think this is a valid and important practice that is being hampered by the FTC and the FDA?

Mr. LEVINE. I think it depends on the circumstance, Senator. I can say that we certainly do not regulate the practice of medicine, and I think if you look at the cease and desist demands we have sent, the cases we have brought, you know, frankly, Senator, these are not close calls. These are hucksters. These are fraudsters who are selling people snake oil. So I think some of the concerns you raised, I am happy to——

Senator LEE. So you are saying that you go only after those who are selling snake oil or the modern-day equivalent? Mr. Chairman, I see my time has expired. I have got just one or two follow-up questions. I will be fast.

Senator BLUMENTHAL. Go ahead.

Senator LEE. Thank you, Mr. Chairman.

Mr. LEVINE. We go after a wide range of COVID–19-related fraud, Senator.

Senator LEE. You do.

Mr. LEVINE. And they are not close calls.

Senator LEE. In your testimony, you mentioned that the first case that you filed under the CCPA was against a chiropractor due to claims about the use of vitamin D and zinc supplements to treat or prevent COVID–19. And in the complaint filed by the Commission for that very case, you noted that you would seek to bar health claims unless "true and can be substantiated by competent and reliable scientific evidence." How do you determine what meets that evidentiary standard, and by what process does the Commission make these determinations? What process does it follow to protect the rights of those who do not think they are selling snake oil?

Mr. LEVINE. The short answer, Senator, is that we have to persuade a Federal judge. It has been the position of the FTC for decades that if you are going to make a health claim, there needs to be a reasonable basis for it or else it is deceptive, but we cannot just announce that.

Senator LEE. And what guidance do you provide them about what is deceptive?

Mr. LEVINE. We've provided extensive guidance both through our casework and through our business guidance on FTC.gov around the types of bases we look for for making medical claims. But, again, if we are going into Federal court alleging that a claim is unsubstantiated, we are only going to win if we can convince a Federal judge.

Senator LEE. Yes, and therein lies the tie to what I am describing about the need for due process. You have overwhelming power at your disposal. You have presumptions in the eyes of an entity that is staring down the barrel of your enforcement. It is not an even playing field when they walk into that court. The immense authority that you have got at your disposal within your discretion is itself looming, and it could, can, and does shut businesses down entirely. Now, I understand the difficult line-drawing problems inherent in the practice of government, but let us not pretend that this happens in a vacuum, and let us not pretend that this does not connect back to the need to protect due process and the need for there to be guardrails around 13(b) authority.

So in light of that, I hope and expect—in fact, I demand that you reconsider any opposition you might otherwise have to have to having guardrails around 13(b) authority. We can protect consumers and we must, but we have also got to provide American businesses, American consumers with due process protection.

Thank you, Mr. Chairman.

Senator BLUMENTHAL. Thanks, Senator Lee. I have just a few questions and then we will end. I have heard from a lot of consumers who have been victims of these scams and a lot of them on online marketplaces, as we have remarked throughout this hearing. Consumers who research sellers and attempt to authenticate these products, whether they are masks or supposed miracle cures, did their homework and still got scammed, so the question is on online retailers and marketplaces. Mr. Levine, in your testimony, you mentioned enforcement action against online marketers who claimed to provide, but failed to deliver, face masks and other products, and you remarked that the online marketplaces should be more cooperative. I am not quoting you directly. Amazon, Facebook,

eBay. Tell me whether they have been cooperative, and if not, why not?

Mr. LEVINE. I think, Senator, that they will refer us cases and we will let them know when we spot problems on their marketplaces, but I think here's the thing. If you are a consumer looking to buy an authentic mask, and we have brought lawsuits against sellers of—they claim it is an N95 mask and it is an absolute cloth mask. It is crazy to me that 2 years into this pandemic, consumers still cannot go on an e-commerce platform and have confidence that the mask they buy is authentic. Nobody, not e-commerce platforms and not the scammers, should be profiting from the sale of defective masks that are not only cheating consumers of money, but that are putting public health at risk. But unfortunately, that is exactly what is happening, and the platforms are not taking enough responsibility for the fraud they are facilitating.

Senator BLUMENTHAL. Are they doing anything?

Mr. LEVINE. I think they are doing things around the edges, but at the end of the day, their business model does not give them an incentive to sufficiently police this problem.

Senator BLUMENTHAL. They could scrutinize the sales of these products, correct?

Mr. LEVINE. Certainly, Senator, just like we do. We have people with the money Congress gave us monitoring these marketplaces all the time, and it raises the question why these marketplaces are not doing more on their own to protect their own customers and the American public from the kinds of frauds that you and others on this subcommittee have talked about.

Senator BLUMENTHAL. Tell me, why is the FTC not taking action against the online marketplaces if they are failing to perform their responsibilities? Is it lack of authority?

Mr. LEVINE. I think a big problem, Senator, is that these marketplaces have disclaimed responsibility for any of the conduct on their marketplaces, invoking Section 230 of the Communications Decency Act.

Senator BLUMENTHAL. Well, they disclaim responsibility, but can they not be held responsible?

Mr. LEVINE. It is certainly—you know, it is going to depend on the facts of course, Senator, but if you look at how some Federal courts have interpreted the CDA, it is, in fact, quite broad. And what it means is that these platforms do not have a strong incentive to actually police their marketplaces and we do not have strong tools.

Senator BLUMENTHAL. Let me put it to you this way. I understand there may be an issue under Section 230, but why has the FTC not come to us and said we need to hold these online marketplaces accountable because they are, in effect, complicit and we cannot reach them?

Mr. LEVINE. I am here telling you just that, Senator.

Senator BLUMENTHAL. That you are asking for authority——

Mr. LEVINE. We would——

Senator BLUMENTHAL.—on behalf of the FTC?

Mr. LEVINE. We would be—well, I am speaking for myself, but we would be very——

Senator BLUMENTHAL. Well, that is not—you know, Mr. Levine, I really respect your impressive accomplishments as an enforcer, your personal career, but without meaning any disrespect, we want you here speaking for the Agency. We did not invite you here as a private citizen. We did not invite you, as a matter of fact. We invited the FTC. I want you to tell me that you want authority on behalf of your Agency to effectively enforce the law.

Mr. LEVINE. I cannot commit the Commission to a position, but the Commission would be happy to work with you as we have——

Senator BLUMENTHAL. Well, I want you to work with me.

Mr. LEVINE. Happy to.

Senator BLUMENTHAL. I want you to do more than just work with us. Request the authority so we can have you here and say the FTC says it needs authority to go after these scammers and protect the public because the online marketers, in effect, are enabling and profiting from fraud. That is what is happening here.

Mr. LEVINE. I could not agree more, and like I said, we will certainly work with you on that, Senator.

Senator BLUMENTHAL. And I appreciate your agreement, believe me.

Mr. LEVINE. Yes.

Senator BLUMENTHAL. Do not misunderstand me. I appreciate your personal agreement, but we want the FTC to be on record as well.

Mr. LEVINE. Totally understood, Senator.

Senator BLUMENTHAL. Thank you. I would like to ask you, Mr. Levine, you mentioned in your testimony the work that the Commission is doing to reach out to Latina consumers in Spanish language ads, and you mentioned the *FTC v. Moda Latina BZ, Inc.* case. Have there been others like it, and what was that case about?

Mr. LEVINE. I could get you a list of all the cases, Senator. Moda Latina was an important case. It was COVID related. The company was peddling money-making opportunities deceptively and cheating people out of a lot of funds. We actually issued a report in the fall called "Serving Communities of Color," where we detailed our extensive enforcement work over the last 5 years to make sure that we are being—we are responding to consumer protection problems in every community, including for Latinos.

Senator BLUMENTHAL. And you mentioned also immigrant communities. Does that report cover immigrant communities?

Mr. LEVINE. It does, Senator.

Senator BLUMENTHAL. I want to just finish by asking a couple of questions. You noted in your testimony that the FTC requested data from social media and video streaming companies in December 2020 about personal information collection and use practices, stating, "This study may provide critical information on the business practices at issue." What is intended by the study and what kind of progress has been made on it?

Mr. LEVINE. A lot of progress has been made, Senator. As you can imagine, the document production has been quite voluminous. I think the key to the study, and it really relates to what we are talking about today. We know that scammers have a powerful new tool in social media to target consumers where it is going to hurt them the most. And what we want to do is we want to lift the hood,

understand how these algorithms operate so that we can do the best we—so that we can do the best job we can do to protect consumers and also report to Congress on our findings so that you can make a determination if legislation is needed.

Senator BLUMENTHAL. And finally, you mentioned in your testimony that the U.S. Customs and Border Patrol needed to better act to prevent counterfeit masks and other counterfeit products from coming into the country. What more should they be doing?

Mr. LEVINE. I think the specific discussion of CBP might be elsewhere. I will—what I will say, Senator, is that it could come into the country. The way it is actually getting into consumers' homes is through e-commerce marketplaces that, as I said, are not doing enough to police this problem. We can put all the people on at our ports that we can, they are never going to catch everything. The real question to me is why these for-profit marketplaces cannot do what the FTC is doing, making sure that fraudulent masks, defective masks are not being sold and that they are not profiting from it.

Senator BLUMENTHAL. That is a good way to end this hearing, even though it is a discouraging act—answer about online marketplaces. I think it should serve as a call to action, and I know that this committee will be further interested in taking action. So I want to really thank all of the witnesses for being here today. Your testimony has been very, very helpful and enlightening.

This hearing record is going to remain open for two weeks. Any Senators that want to submit questions for the record should do so by February 15. We ask that responses be returned as quickly as possible, in no case later than two weeks after you receive the questions.

And, again, my thanks for your testimony. My thanks to everybody who is online or virtual, and that will conclude this hearing. Thank you very much.

[Whereupon, at 4:42 p.m., the hearing was concluded.]

A P P E N D I X

RESPONSE TO WRITTEN QUESTIONS SUBMITTED BY HON. BEN RAY LUJÁN TO TERESA MURRAY

Unlicensed COVID–19 Testing Site. I am deeply concerned by reports of unlicensed COVID–19 test sites operating in New Mexico. These sites operated without any connection to New Mexico's medical providers or the Department of Health. These sites threaten public health both by issuing unreliable results and by undermining confidence in legitimate testing sites.

Question 1. What do we know about unlicensed and scam COVID–19 testing sites and the impact they are having on public health?

Answer. We know that unlicensed and scam COVID–19 testing sites started popping up in recent weeks [1] as opportunistic con artists tried to fill a void in the marketplace and seize on public fear of COVID and desperation to get tested, particularly before holiday gatherings. These fake testing sites popped up in New Mexico and other locations nationwide, including Chicago, Oregon, Los Angeles and Philadelphia, the latter which affected 4,000 people. The sites often would set up shop in vacant lots at busy intersections, and in the parking lots of shopping plazas. They'd put up a sign and some orange cones to mark off lanes and those "working" the sites were often dressed in hazmat suits or some other outfit to look legitimate.

In New Mexico, Attorney General Balderas put out a warning in January about fake test sites where thieves were stealing personal or medical information.[2]

Specifics on other incidents:

Jan 4, 2022—Philadelphia officials are warning residents to avoid pop-up tents offering COVID–19 testing in Center City that claim to be funded by the Federal government. The tents started operating around Center City in late December and city officials confirmed over the weekend that they had falsely claimed they were backed by the Federal Emergency Management Agency.

Lab Elite, a Chicago-based company offering PCR tests, said it runs testing sites in several cities and said it collected about 4,000 test samples in Philadelphia last month.[3]

Jan. 10—Illinois' governor directed the Illinois Attorney General's office to investigate fly by night testing sites.[4] BBB was involved in getting warnings out too.

Jan 13—The Oregon Department of Justice opened an investigation into a company accused of operating suspicious COVID–19 test sites.[5]

Mid-January—Los Angeles officials shut down a bunch of fake testing sites. Some residents reported they paid up to $200 and never received their results, and some sites even required people to give their Social Security number.[6]

Jan. 18—In Philadelphia, workers at a sidewalk COVID–19 testing tent falsely claimed to be working with FEMA, said James Garrow, communications director for the Philadelphia Department of Public Health. But FEMA told the department it wasn't funding any testing centers in the city at the time.

The problems and public health threats of these fake testing sites include:

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[1] *https://www.consumer.ftc.gov/blog/2022/01/dont-assume-every-covid-19-test-site-legit*

[2] *https://www.krqe.com/health/coronavirus-new-mexico/new-mexico-attorney-general-warns-residents-of-covid-19-test-scams/ https://www.cibolacitizen.com/news/attorney-general-balderas-urges-citizens-beware-covid-19-test-scams*

[3] *https://www.inquirer.com/news/covid-test-philadelphia-labelite-fema-20220103.html*

[4] *https://abc7chicago.com/covid-testing-scam-fake-sites-pop-up-test-covid-19-warning/11425543/*

[5] *https://www.opb.org/article/2022/01/13/oregon-attorney-general-warns-against-covid-19-test-scams/*

[6] *https://www.latimes.com/california/story/2022–01–27/californias-attorney-general-warns-of-fake-covid-testing-sites-heres-how-to-identify-one http://ph.lacounty.gov/hccp/covidscams/*

- Consumers would sometimes get charged for what was supposed to a free test.
- The con artists would steal people's personal information and use it to commit identity theft.
- Consumers would get fake test results, if any results at all. What happened with people who actually had COVID and would have tested positive at a legitimate testing site, but were told they tested negative? How many got infected needlessly?
- As news of these fake testing sites spreads, there's a risk of people becoming leery of getting tested anywhere. This clearly threatens public health.

The FTC says we're also seeing a surge in unauthorized home test kits, fueled by the shortage of COVID test kits.[7] [8]

Question 2. What measures do you recommend for public officials to restore confidence in genuine testing sites and supplies?

Answer. Officials should do more to inform consumers how they can verify whether a test site is legitimate. In Ohio, where I live, you can look up whether a location is legitimate with an easy-to-use website.[9] But it's not easy in every state to just call your local health department or state health department and give them an address and find out whether it's legit. I'd like to see a phone number that consumers could call, perhaps local health officials or the state AG or department of health that could tell them quickly whether a particular location is legitimate. It needs to be quick and easy. Some government officials in some cities agree it's not easy.

Officials should also quickly investigate reports of unauthorized tests or fake test sites and publicize it more when they shut something down. This will instill more confidence that the public is being protected.

And more legitimate sites need to be established. In Cleveland and many other cities, there were reports of two-hour waits before the holidays, if you could even get an appointment to sit in line in your car. (Some members of my family couldn't.)

The government should also do whatever it takes to make at-home tests widely available. The inexcusable shortage drives people to scam testing sites and leads to price-gouging for legitimate tests. As far as counterfeit supplies, we can try to educate consumers about warning signs of fake testing sites, at-home tests and other products, but that only goes so far. For example, if hospitals can't tell the difference between genuine N95 masks and counterfeits, how are my parents or your neighbors supposed to know?

I'm surprised there haven't been any fake *vaccination* sites yet. Maybe there have been. But God help us if that happens. Lots of people are already vaccine-hesitant.

In many cases, consumers can be their own first line of defense. But people rely on government and public health officials to protect them.

RESPONSE TO WRITTEN QUESTIONS SUBMITTED BY HON. BEN RAY LUJÁN TO TODD LEATHERMAN

Question 1. What challenges do States face when bringing cases against price gouging?

Answer. States face a number of challenges. State price gouging legal authority can vary in several respects and depending on the statute, there can be a number of complications to state efforts to combat pricing behavior that harms consumers.

First, not all states have price gouging laws. 39 states do have such laws, but states that don't, may still have authority under other consumer protection laws that prohibit "unfair" or "unconscionable" conduct. While those terms, may encompass the types of conduct that raises concern, they lack specificity that could be helpful in applying those laws to situations involving price gouging and there is little precedent in the use of such statutes or guidance from the courts on how they may apply to price gouging.

Second price gouging statutory definitions of what price increases are illegal can be quite broad, as with many consumer protection laws, as what may be deemed an "excessive" increase in one situation may not be inappropriate in others. This flexibility is needed, but can lead to litigation in situations where there is no precise standard.

Other issues that are commonly raised by defendants that can lead to protracted litigation:

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[7] *https://www.cnbc.com/2022/01/06/fake-covid-testing-kits-are-everywhereheres-how-to-avoid-them.html*

[8] *https://www.consumer.ftc.gov/blog/2022/01/how-avoid-buying-fake-covid-tests-online*

[9] *https://coronavirus.ohio.gov/dashboards/other-resources/testing-ch-centers*

- What is the effective date of the price gouging law—does it apply to price increases that occur prior to the declaration, such as when the market anticipates a disaster and increases prices prior to the declaration?
- What is the benchmark price for purposes of comparing the allegedly unlawful price?
- What is the duration of the emergency or applicability of the price gouging law?
- Does the statute apply to wholesalers as well as retailers?
- What are the allowable increased costs of the seller that may justify an increase in the price? Are "opportunity costs" allowable costs?
- What types of events trigger the statute; must they be local to the jurisdiction or do national events also trigger the statute. If so, what local effects must be present?
- Statutes may only apply to natural disasters as opposed to market disruptions such as occurred with the baby formula shortage.

Question 2. What steps can the Federal government take to help fight this practice?

Answer. First, whatever solution, if any, Congress should propose, Congress should not preempt the states, who should have the authority to enforce their state laws.

Second, the Federal government could articulate a clear standard and provide the Federal Trade Commission clear authority to address price gouging. Much of the price gouging activity that occurred during the pandemic occurred online and across state and international borders. The Federal government is in a much better position to address this type of activity than most state attorneys general, whose resources are severely limited. Having an additional "cop on the beat" is needed to address this activity. Also, providing the business community guidance on what activity is considered unlawful would be very helpful to both businesses and enforcers.

The issues identified in the prior section merit serious consideration and there is a growing body of case law interpreting state price gouging statutes that would inform the Congress on the issues confronting enforcers as well as the business community.

The issues are challenging but there will continue to be instances in which businesses seek to gain an economic advantage due to a disaster or supply disruption and businesses should not be allowed to obtain a windfall at consumers' expense.

