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**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH, CENTRAL DIVISION**

UNITED STATES OF AMERICA;

Plaintiff,

v.

XLEAR, INC., a corporation; NATHAN
JONES, individually and as an officer of
XLEAR, INC.;

Defendants.

**MOTION FOR LEAVE TO FILE
MEMORANDUM OF *AMICUS CURIAE*
ALLIANCE FOR NATURAL HEALTH
USA IN SUPPORT OF DEFENDANTS'
MOTION FOR JUDGMENT ON THE
PLEADINGS**

Case No. 2:21-cv-00640-RJS-DBP

Judge Robert J. Shelby
Magistrate Judge Dustin B. Pead

Pursuant to DUCivR 7-6(b) and (e), Alliance for Natural Health USA (“ANH”) respectfully asks this Court for permission to file their Memorandum of *Amicus Curiae* (the “Memorandum”) in support of Defendants’ Motion for Judgment on the Pleadings (“Defendants’ Motion”) (ECF No. 149), a copy of which is attached as Exhibit A to this motion.

ANH also respectfully requests that the Court extend the time allowed to file the Memorandum pursuant to DUCivR 7-6(e)(3). As set forth below, allowing ANH to file the attached Memorandum will result in no prejudice to Plaintiff. At the same time, the Memorandum will provide the Court with important scientific context concerning xylitol-based

nasal irrigation and reduction in the risk and duration of COVID-19 infection, and equally important legal context to determine the plain and intended meaning of Sections 5 and 12 of the Federal Trade Commission Act following the United States Supreme Court’s decision in *Loper Bright Enterprises v. Raimondo*, 603 U.S. ____, 144 S.Ct. 2244 (2024).

A proposed order granting permission to file the Memorandum is attached as Exhibit B.

I. THE INTEREST OF ANH IN THE LITIGATION

ANH is a national advocacy organization representing health-conscious individuals who seek access to information and products necessary to maximize health and wellness. Based in Alexandria, Virginia, ANH represents the interests of consumers of healthcare products nationwide, and works nationally to promote sustainable and regenerative approaches to healthcare while defending freedom of choice through lasting policy change and public education.

The consumers whose interests are represented by ANH have a well-recognized right to receive information, protected equally with the right of the speaker to convey it under the First Amendment, including in the context of commercial speech. *See, e.g., Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 738, 756 (1978) (“Freedom of speech presupposes a willing speaker. But where a speaker exists ... the protection afforded is to the communication, to its source and to its recipients both”). As explained in detail in the Memorandum, ANH has long recognized the science recognizing the value of nasal irrigation, including the use of saline spray and others with xylitol and/or grapefruit seed extract (“GSE”), in reducing the risk of respiratory infections. Following the emergency of the SARS-CoV-2 virus, building on decades of research on saline nasal rinses with and without other additives

including xylitol and GSE, ANH rapidly became aware of research that showed how such rinses could aid COVID-19 disease risk reduction. Consumers, including those whose interests are represented by ANH, have a right to receive this health-saving and life-saving information. The chilling effect of the FTC policy at issue in the case undermines this right.

II. THE MEMORANDUM'S USEFULNESS TO THE DISPOSITION OF THIS LITIGATION

This Memorandum will assist the Court in ruling on Defendants' Motion in two ways, neither of which are fully presented and argued in Defendants' Motion. First, the Memorandum articulates in detail the scientific evidence supporting the effectiveness of nasal rinses and nasal cleaners in reducing the risk of and mitigating COVID-19 infections. Based on this available evidence and its chronology, bearing in mind the sheer amount of ongoing research on novel strategies to combat the COVID-19 pandemic, as well as impediments to scientific publication given the suspension of the normal peer review process during the pandemic period, it appears communications made by Xlear were in line with the totality of available scientific information.

Second, the Memorandum seeks to assist the Court in its task of determining the plain and intended meaning of Sections 5 and 12 of the FTC Act. This task of statutory interpretation is at issue in Defendants' Motion, and ANH respectfully submits that such interpretation should be guided by the United States Supreme Court's decision in *Loper Bright Enterprises v. Raimondo*, 603 U.S. ____, 144 S.Ct. 2244, and well-established canons of statutory construction. Properly applied and construed in line with the First Amendment, the plain and intended meaning of Sections 5 and 12 demonstrate that Plaintiff may not burden speakers and speech predicated without proof of falsity of the speech in question. Plaintiff's sole reliance on the

presumptive absence of two supported randomized clinical trials at the time of the speech at issue runs afoul of this plain meaning.

III. THE PARTIES' CONSENT

Counsel for Defendants Xlear, Inc. and Nathan Jones consent to the filing of the Memorandum. Counsel for Plaintiff United States of America has advised ANH that they do not consent to the filing of the Memorandum, and will oppose its filing on grounds of timeliness. As set forth below, however, the filing of the Memorandum will result in no prejudice to Plaintiff.

IV. THE COURT SHOULD EXTEND THE TIME ALLOWED TO FILE THE MEMORANDUM

Under DUCivR 7-6(e)(3), “[u]pon a showing of good cause and no unfair prejudice to any party,” the Court may modify the time allowed to file a motion for leave to file an *amicus curiae* memorandum. Here, ANH does not dispute that the time allotted for the filing of this Motion under DUCivR 7-6 has expired. However, given the lack of prejudice to Plaintiff and the important scientific and legal information at issue in the Memorandum, the Court should modify the time allowed for ANH to file this Motion for the following reasons.

First, ANH’s Motion comes before any substantive pleading from Plaintiff in response to Defendants’ Motion for Judgment on the Pleadings. Consequently, it is without prejudice to Plaintiff. Further, in discussions between ANH and Plaintiff concerning the Motion and Memorandum, Plaintiff’s counsel indicated it could seek to extend the time for response to address *amici curiae* submissions. Counsel for Defendants have informed ANH that Defendants would not object to such an extension, which again obviates any prejudice to Plaintiff. Finally, the content of the Memorandum comes from an entity, ANH, that has particular scientific acumen germane to the argument that Plaintiff proceeds without a basis in fact to conclude the

speech at issue is false, as well as explanations of the canons of statutory construction germane to evaluation of the enabling statute in the advent of *Loper Bright*.

V. CONCLUSION

Given the foregoing, ANH requests permission to file the attached Memorandum within **two days** of the Court's order granting such permission.

DATED this 8th day of November, 2024

HOLLAND & HART LLP

/s/ Michael E. Harmond _____

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