

IN THE MATTER OF

NEW BALANCE ATHLETIC SHOES, INC.

*Docket 9268. Interlocutory Order, December 18, 1995*ORDER AMENDING COMPLAINT
AND LIFTING STAY OF PROCEEDINGS

I. INTRODUCTION

By order dated July 10, 1995, the Commission directed the parties to this litigation to show cause why the complaint and notice order should not be amended or dismissed. This order was issued in conjunction with the Commission's announcement that it had rejected a consent agreement in Hyde Athletic Industries, Inc., FTC File No. 922-3236, and would conduct public proceedings to consider whether its current "made in USA" enforcement standard is appropriate in an era of global competition. The ongoing litigation was stayed pending the outcome of this show cause proceeding.

II. BACKGROUND

The complaint issued against New Balance on September 20, 1994 alleges violations of Section 5 of the FTC Act through statements made in advertising and labeling about the origin of New Balance's athletic shoes. Paragraph five alleges that New Balance:

has represented, directly or by implication, that New Balance athletic shoes are made in the United States, *i.e.*, that all, or virtually all, of the component parts of the footwear are made in the United States, and that all, or virtually all, of the labor in assembling the footwear is performed in the United States.

Paragraph six alleges that this claim is false:

In truth and in fact, a substantial amount of respondent's athletic shoes is assembled in foreign countries of foreign component parts, and in many instances respondent's athletic shoes assembled in the United States consist largely of foreign component parts. Therefore, the representation set forth in paragraph five was, and is, false and misleading.

The Commission simultaneously accepted for public comment a complaint with an accompanying consent order raising similar allegations against Hyde Athletic Industries.

Over 150 public comments were filed in response to the Hyde consent agreement after it appeared in the Federal Register on September 23, 1994. Many of these comments took issue with the principle that an unqualified "made in USA" claim implies that all or virtually all of the parts of a product are made in the United States and all or virtually all of the labor used in producing a product is performed in the United States. The comments also raised other concerns, including questions about how such a standard would be calculated and implemented across various products and industries. Because these comments raised complex questions without readily apparent answers, the Commission publicly announced, on July 11, 1995, that it would invite various industry and trade associations, consumer groups and other government entities to participate in an exchange of views on these issues at a public workshop conference.

In light of the decision to review its enforcement standard, the Commission issued an Order to Stay Proceedings and Show Cause in the New Balance proceeding. The order directed the parties to brief the Commission on whether the public interest warrants amendment or dismissal of the complaint and notice order in this matter.¹ The Commission simultaneously rejected a proposed settlement incorporating the "all or virtually all" standard with Hyde Athletic Industries, and directed staff to renegotiate a modified consent order based on a revised complaint, consistent with the proposed amended complaint in New Balance.

III. THE PUBLIC INTEREST WARRANTS AMENDMENT OF THE COMPLAINT AND NOTICE ORDER

As explained in a Federal Register notice announcing the public workshop conference, the Commission will consider whether it should alter its legal standard regarding the use of unqualified "made

¹ New Balance asserts that "[i]t is not clear whether the Commission has the authority, *sua sponte*, to amend the complaint." Respondent's Brief in Response to Commission Order of July 11, 1995 at 28. The Commission has the authority to intervene *sua sponte* in an ongoing administrative adjudication to reconsider the public interest in proceeding, notwithstanding the absence of a specific Commission rule authorizing such action. See, e.g., *Hospital Board of Directors of Lee County*, 5 Trade Reg. Rep. (CCH) ¶ 23,860, at 23,619-20 (July 7, 1995); *Exxon Corp.*, 98 FTC 453, 461 (1981). Further, the Commission has the authority to act in a prosecutorial capacity in a pending adjudication to modify a complaint, see, e.g., *Cavanagh Communities Corp.*, 87 FTC 143, 144 (1976) (adding allegations), as well as to dismiss a complaint, see, e.g., *Frozen Food Forum, Inc.*, 84 FTC 1211, 1217 (1982).

in USA" claims for products comprised of domestic and foreign components and labor, and how domestic content should be measured under any future standard. *See* Request for Public Comment in Preparation for Public Workshop Regarding "Made in USA" Claims in Product Advertising and Labeling, 60 Fed. Reg. 53923, 53924 (October 18, 1995). Because the Commission is reviewing its enforcement standard, it concludes that public interest considerations and principles of fairness warrant dismissal of the charges against New Balance as they relate to advertising claims for athletic shoes manufactured in the United States of both foreign and domestic components. The remaining allegations of the complaint, however, remain unaffected by the upcoming policy review.² Moreover, the Commission has carefully considered respondent's arguments that the public interest does not warrant the additional expenditure of public or private resources on this litigation, and has concluded that resolution of these charges through administrative litigation is in the public interest.

Continuing to have reason to believe that New Balance has violated Section 5 of the FTC Act, the Commission has therefore determined not to dismiss the complaint, but to amend it. The attached amended complaint and notice order deletes those portions of the allegations in paragraphs five and six dealing with "made in the United States" claims as they relate to shoes of mixed domestic and foreign content. Paragraph five of the amended complaint alleges that New Balance, through its advertisements,³ "has represented, directly or by implication, that all New Balance athletic shoes are made in the United States," and paragraph six alleges that this claim is false because "[i]n truth and in fact, a substantial amount of New Balance athletic shoes is wholly made in foreign countries." The Commission has also determined to amend Part I of the notice order to prohibit claims that "footwear made wholly abroad is made in the United States," as well as to prohibit misrepresentations about the quantity of footwear that New Balance exports.

Any requests for additional trial preparation or discovery shall be directed to the ALJ, who shall authorize such additional trial preparation and discovery as is appropriate.

² These allegations are: (1) that New Balance represented that all of its athletic shoes are made in the United States when a substantial amount is made entirely abroad; and (2) that New Balance represented that it annually exports to Japan hundreds of thousands of pairs of athletic shoes that are made in the United States when fewer than 10,000 pairs of New Balance shoes are made in the United States and exported to Japan each year.

³ The amended complaint deletes all references to product labels.

Accordingly, *It is hereby ordered*, That the stay of these proceedings is hereby lifted, and the complaint and notice order are amended in accordance with the attached form of complaint.

Commissioner Starek dissenting.

COMPLAINT

The Federal Trade Commission, having reason to believe that New Balance Athletic Shoe, Inc., a corporation ("respondent"), has violated the provisions of the Federal Trade Commission Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, alleges:

PARAGRAPH 1. Respondent New Balance Athletic Shoe, Inc., is a Massachusetts corporation which manufactures and sells footwear. Its principal office or place of business is located at 38 Everett Street, Boston, Massachusetts.

PAR. 2. Respondent has manufactured, assembled, advertised, labeled, offered for sale, sold, and distributed athletic and other footwear to consumers.

PAR. 3. The acts and practices of respondent alleged in this complaint have been in or affecting commerce, as "commerce" is defined in Section 4 of the Federal Trade Commission Act.

PAR. 4. Respondent has disseminated or has caused to be disseminated advertisements, including print and television advertising, and other promotional materials for footwear including, but not necessarily limited to, the attached Exhibits 1-5.

The "Mr. President" print advertisement (Exhibit 1) states:

"Here's one American-made vehicle that has no problem competing in Japan."
"Not only that, they're made right here in the USA."

The "Competition" print advertisement (Exhibit 2) states:

"If we can make great athletic shoes in America, why can't our competition?"
"New Balance is the only company that makes a full line of athletic shoes here in America."

The "Los Angeles" print advertisement (Exhibit 3) states:

"This American-made transportation system..."

"Mayor Bradley, perhaps you should consider New Balance athletic shoes. Not only are they made here in the USA...."

The "Junk" print advertisement (Exhibit 4) states:

"Who says buying American has to mean buying junk?"
"New Balance athletic shoes are one American-made product that's worth buying."
"The Japanese buy hundreds of thousands of pairs a year."

The "Mr. President" television advertisement (Exhibit 5) states:

"Here's one American made vehicle that has no problem competing in Japan."
"MADE IN USA"

PAR. 5. Through the use of the statements contained in the advertisements referred to in paragraph four, including, but not necessarily limited to, the advertisements attached as Exhibits 1-5, respondent has represented, directly or by implication, that all New Balance athletic shoes are made in the United States.

PAR. 6. In truth and in fact, a substantial amount of New Balance athletic shoes is wholly made in foreign countries. Therefore, the representation set forth in paragraph five was, and is, false and misleading.

PAR. 7. Through the use of the statements contained in the advertisements referred to in paragraph four, including, but not necessarily limited to, the advertisement attached as Exhibit 4, respondent has represented, directly or by implication, that it annually exports to Japan hundreds of thousands of pairs of athletic shoes that are made in the United States.

PAR. 8. In truth and in fact, respondent does not annually export to Japan hundreds of thousands of pairs of athletic shoes that are made in the United States. Fewer than 10,000 pairs of respondent's athletic shoes are made in the United States and exported to Japan each year. Therefore, the representation set forth in paragraph seven was, and is, false and misleading.

PAR. 9. The acts and practices of respondent as alleged in this complaint constitute unfair or deceptive acts or practices in or affecting commerce in violation of Section 5(a) of the Federal Trade Commission Act.

NOTICE

Notice is hereby given to the respondent hereinbefore named that the _____ day of _____, A.D., 19____, at a.m. o'clock is hereby fixed as the time and the Federal Trade Commission Offices, 6th Street & Pennsylvania Avenue, N.W., Washington, D.C. 20580, as the place when and where a hearing will be had before an Administrative Law Judge of the Federal Trade Commission, on the charges set forth in this complaint, at which time and place you will have the right under said Act to appear and show cause why an order should not be entered requiring you to cease and desist from the violations of law charged in the complaint.

You are notified that the opportunity is afforded you to file with the Commission an answer to this complaint on or before the thirtieth (30th) day after service of it upon you. An answer in which the allegations of the complaint are contested shall contain a concise statement of the facts constituting each ground of defense; and specific admissions, denial, or explanation of each fact alleged in the complaint or, if you are without knowledge thereof, a statement to that effect. Allegations of the complaint not thus answered shall be deemed to have been admitted.

If you elect not to contest these allegations of fact set forth in the complaint, the answer shall consist of a statement that you admit all the material allegations to be true. Such an answer shall constitute a waiver of hearings as to the facts alleged in the complaint, and together with the complaint provide a record basis on which the Administrative Law Judge shall file an initial decision containing appropriate findings and conclusions and an appropriate order disposing of the proceeding. In such answer you may, however, reserve the right to submit proposed findings and conclusions and the right to appeal the initial decision to the Commission under Section 3.52 of the Commission's Rules of Practice for Adjudicative Proceedings.

Failure to answer within the time above provided shall be deemed to constitute a waiver of your right to appear and contest the allegations of the complaint and shall authorize the Administrative Law Judge, without further notice to you, to find the facts to be as alleged in the complaint and to enter an initial decision containing such findings, appropriate conclusions and order.

The following is the form of order which the Commission has reason to believe should issue if the facts are found to be as alleged in the complaint. If, however, the Commission should conclude from record facts developed in any adjudicative proceeding in this matter that the proposed order provisions as to New Balance Athletic Shoe, Inc., a corporation, might be inadequate to fully protect the consuming public, the Commission may order such relief as it finds necessary or appropriate.

ORDER

I.

It is ordered, That respondent, New Balance Athletic Shoe, Inc., a corporation, its successors and assigns, and its officers, agents, representatives, and employees, directly or through any corporation, subsidiary, division, or other device, in connection with the manufacturing, labeling, advertising, promotion, offering for sale, sale, or distribution of any footwear in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from misrepresenting, in any manner, directly or by implication.

1. That footwear made wholly abroad is made in the United States.
2. The quantity of footwear it exports.

II.

It is further ordered, That for five (5) years after the last date of dissemination of any representation covered by this order, respondent, or its successors and assigns, shall maintain and upon request make available to the Federal Trade Commission for inspection and copying:

- A. All materials that were relied upon in disseminating such representations; and
- B. All tests, reports, studies, surveys, demonstrations, or other evidence in its possession or control that contradict, qualify, or call

into question such representation, or the basis relied upon for such representation, including complaints from consumers.

III.

It is further ordered, That the respondent shall distribute a copy of this order to each of its operating divisions and to each of its officer, agents, representatives, or employees engaged in the preparation or placement of advertisements, promotional materials, product labels or other such sales materials covered by this order.

IV.

It is further ordered, That respondent shall notify the Commission at least thirty (30) days prior to any proposed change in the corporation such as a dissolution, assignment, or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries, or any other change in the corporation which may affect compliance obligations under this order.

V.

It is further ordered, That respondent shall, within sixty (60) days after service of this order upon it, and at such other times as the Commission may require, file with the Commission a report, in writing, setting forth in detail the manner and form in which it has complied with this order.

In witness whereof, the Federal Trade Commission has caused this complaint to be signed by its Secretary and its official seal to be hereto affixed at Washington, D.C. this _____ day of _____,

By the Commission.

Donald S. Clark
Secretary

Interlocutory Order

120 F.T.C.

EXHIBIT 1

Mr. President:
Here's one
American-made vehicle
that has no problem
competing in Japan.



Perhaps while jog-
ging in Tokyo's
Palace Gardens.

Mr. President, you
noticed that an awful lot of Japanese people (over
1,000,000 at last count) wear New Balance athletic shoes.

New Balance shoes come in a full range of widths.
Mr. President, This means they deliver a perfect fit —
no matter how wide or narrow your feet happen to be.
Mr. President, they're made right here in the U.S.A.

It just doesn't prove, Mr. President, that when you
find out what people really truly need, something
amazing happens. People buy it.

new balance **NB**
MADE IN THE U.S.A.

EXHIBIT 2

Exhibit 2



If we can make
great athletic shoes
in America,
why can't
our competition?

For more information, contact your nearest New Balance retail store or write to New Balance Athletic Shoes, Inc., 100 Morrissey Blvd., Boston, MA 02115. We'll be glad to help you find the right shoe for your feet.

new balance **NB**

Figure 1. The effect of the concentration of the *Agrobacterium* suspension on the transformation efficiency of *Agrobacterium* strains.

[illegible]

new balance **NB**
ESTABLISHED 1906

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EXHIBIT 4

Exhibit 4



New Balance athletic shoes are one American-made product that's worth buying.

The Japanese buy hundreds of thousands of pairs a year. The German consumer newsletter *Markt Intern* ranks New Balance as the top

Who says buying
American has to mean
buying junk?

American brand. And the Made in America Foundation included New Balance in its recent collection of the best American products.

The millions of Americans have been wearing New Balance shoes since 1906. Not just because it shows how they feel about their country, but because it shows how they feel about their feet.

new balance **NB**

Interlocutory Order

120 F.T.C.

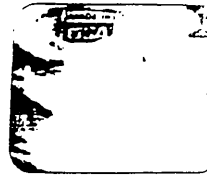
EXHIBIT 5



MUSIC/SFX



1st MALE ANNCR: Dear Mr. President:



Here's one American made vehicle that has no problem



COMPUTER IN CAR



MUSIC



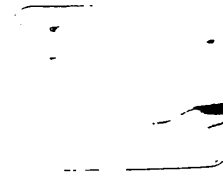
MUSIC/SFX IN & OUT



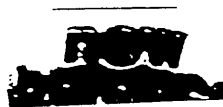
SFX TENNIS:



2nd MALE ANNCR: When you don't pay tennis stars



to wear your shoes



CONCURRING STATEMENT OF COMMISSIONER MARY L. AZCUENAGA

On September 20, 1994, when the Commission first issued its complaint against New Balance Athletic Shoes, Inc., I dissented. It is traditional (with rare exceptions) for a commissioner who dissents from the issuance of an administrative complaint to withhold an explanation of her views until a later stage of the proceeding. I reserved my views in accordance with that practice.

My views nevertheless were stated in my dissent in a case that settled at the same time. Hyde Athletic Industries, Inc., Matter No. 922-3236 (Sept. 20, 1994) (Commissioner Azcuenaga, dissenting). In Hyde, I questioned the standard for "Made in USA" claims that the Commission incorporated into the complaint, which was the same standard incorporated into the complaint in this case. I also was concerned that the Commission was enforcing a standard for "Made in USA" claims at the same time that it apparently was reconsidering that standard. I was "troubled by the majority's implicit uncertainty about the standard [for Made in USA claims] it has chosen to impose," *id.*, as reflected in the majority's request for public comment concerning the standard. Although I was willing to reexamine the enforcement standard, I was "unwilling to embark on that process while continuing to bring cases to enforce the existing standard." *Id.*

Today, the Commission issues a revised complaint and notice order to remove from this litigation the issue of what enforcement standard should be applied to "Made in USA" claims for products of mixed domestic and foreign origin. The Commission has undertaken formally to review its enforcement standard for such claims, and it will hold a public workshop to obtain information in connection with its review.¹ These actions are consistent with my earlier and continuing views that the Commission should not attempt to enforce a legal standard about which it has reservations and that the Commission should reexamine the standard for "Made in USA" claims. The deletion from this complaint of the allegations based on that standard having been made, I support the amended complaint.

¹ Because the Commission is reviewing its enforcement standard, it has concluded that "public interest considerations and principles of fairness" warrant dismissal of the portions of the complaint and notice order based on that standard.

DISSENTING STATEMENT OF COMMISSIONER MARY L. AZCUENAGA

Today, the Commission accepts for public comment a consent agreement settling charges that Hyde Athletic Shoes, Inc. made the false representation that its footwear is "Made in USA." I have reason to believe that this representation is false because some Hyde footwear is assembled in foreign countries of foreign components and because some Hyde footwear consists largely of foreign components even though it is assembled in the United States. Nevertheless, I am unwilling to vote to accept the consent agreement for public comment.

First, the complaint and order interpret the established standard for the claims at issue in a manner that apparently would prohibit certain "Made in USA" representations as false that consumers likely would view as true. Specifically, the complaint and order treat a "Made in USA" representation as containing the implied claim that:

all, or virtually all, of the component parts of the footwear are made in the United States, and that all, or virtually all, of the labor in assembling the footwear is performed in the United States.

Under the interpretation of the majority, this implied claim apparently would be false, for example, if 2% of a product's value is attributable to component parts, 25% of which are foreign, and 98% of its value is attributable to labor, all of which is American. Because I believe that consumers are likely to view such products as American, I am reluctant to support an interpretation of the standard that could prohibit advertisers of such products from using a "Made in USA" claim.

Also, I am troubled by the majority's implicit uncertainty about the standard it has chosen to impose, as reflected in the Analysis to Aid Public Comment. The proposed complaint alleges that Hyde has made a false "Made in USA" representation in its advertising. Yet, by soliciting information on how consumers perceive a "Made in USA" representation in its Analysis to Aid Public Comment, the Commission apparently asks what implied claim consumers take from a "Made in USA" representation. If the Commission has not yet determined what claim Hyde made, surely it is inappropriate to issue a complaint alleging as false a claim that is yet to be definitively identified. The better, indeed, the proper approach is for the Commission to determine before issuing a complaint that it has

reason to believe that a particular claim was made and that this claim is false.

A case can be made that the Commission should reexamine its standard regarding "Made in USA" representations. I would not object to such a reexamination, but I am unwilling to embark on that process while continuing to bring cases to enforce the existing standard.

DISSENTING STATEMENT OF COMMISSIONER ROSCOE B. STAREK, III

I oppose narrowing the complaint and notice order in this matter. As I have stated elsewhere, case-by-case litigation is the appropriate means to evaluate "Made in USA" claims.¹ With the amendment of this complaint, the Commission ratifies the change of course on which it embarked when it rejected the consent order in Hyde and issued its order to show cause in this proceeding.

The record was fully developed and the parties were ready for trial to begin when the Commission stayed the proceedings and issued its order to show cause why the complaint should not be dismissed or amended. The briefs subsequently filed by the parties indicate that significant evidence of consumer perceptions of "Made in USA" claims would have been tested in trial, and the Commission would have had the benefit of a full examination of the evidence in assessing whether New Balance's claims were deceptive. Instead, the Commission has opted to address claims about products containing both foreign and domestic components in a resource-intensive, unnecessarily broad review more typical of a rulemaking.

To remove all issues related to mixed foreign and domestic content, the Commission drops the central allegation of the complaint -- involving the application of unqualified "Made in USA" claims to products assembled in the United States from foreign and domestic components -- and revises the notice order to prohibit New Balance from misrepresenting that "footwear made wholly abroad is made in the United States." Without violating the order, New Balance could advertise as "Made in USA: imported athletic shoes that are assembled in a foreign country from foreign components parts, so long as the shoes also contained any small part of U.S. origin. Such

¹ See Request for Public Comment in Preparation for Public Workshop Regarding "Made in USA" Claims in Product Advertising and Labeling, 60 Fed. Reg. 53923, 53930 (October 18, 1995) (Dissenting Statement of Commissioner Roscoe B. Starek, III); Hyde Athletic Industries, Inc., File No. 922-3236 (Dissenting Statement of Commissioner Roscoe B. Starek, III).

an eviscerated order would have little value and would not justify the resources involved in continuing this litigation.

It also seems likely to be an inefficient use of scarce resources to address in a public workshop whether the Commission's enforcement standard for "Made in USA" claims is appropriate in an era of global competition. If information provided to consumers is deceptive, a market based on consumer choices cannot function properly, whether the market is global or national.

Guidance on the level of substantiation that the Commission will require for unqualified "Made in USA" claims -- including methods of calculating domestic content -- and on how much flexibility the Commission will use in enforcement may prove useful and could reduce the costs of complying with the standard. Further review of these issues, however, by no means justifies drastically narrowing the scope of this adjudication. The Commission frequently undertakes reviews to reduce uncertainties about its enforcement policies, and issues enforcement policy statements or guides, without dropping enforcement efforts against clear violations of law in the interim.

IN THE MATTER OF

GENERAL MOTORS CORPORATION

MODIFYING ORDER IN REGARD TO ALLEGED VIOLATION OF
SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT

Docket C-2966. Consent Order, May 18, 1979--Modifying Order, Dec. 21, 1995

This order reopens a 1979 consent order that settled allegations that General Motors ("GM") engaged in unfair and deceptive practices by selling cars with engines and other equipment manufactured by a different GM division without informing purchasers. This order modifies the consent order by allowing GM to display division brand nameplates on engines that are not manufactured by that GM division. In addition, the Commission deleted the provision from the modified order that have expired, concluding that elimination of the expired provisions is warranted. The Commission determined that changed conditions of fact justified reopening the proceeding and modifying the order.

ORDER REOPENING THE PROCEEDING AND
MODIFYING CEASE AND DESIST ORDER

On July 7, 1995, General Motors Corporation ("GM") filed a petition pursuant to Section 5(b)(2) of the Federal Trade Commission Act ("FTC Act"), as amended, 15 U.S.C. 45(b)(2), and Rule 2.51 of the Commission's Rules of Practice, 16 CFR 2.51, to reopen the proceeding and modify the cease and desist order entered against it on May 18, 1979, in Docket No. C-2966 (93 FTC 860).¹

The cease and desist order settled allegations that GM, a worldwide manufacturer of passenger vehicles: (1) represented that certain standard and optional equipment was manufactured by the particular division that assembled the passenger vehicle when that equipment was, in fact, manufactured by another division; (2) misrepresented the availability of various standard and optional equipment; and (3) substituted equipment other than that represented as being available, and delivered passenger vehicles that contained standard or optional equipment different from that ordered by retail purchasers.

¹ This order will sunset on May 18, 1999, provided that neither the Department of Justice nor the Commission files a complaint in federal court to enforce the order pursuant to Section 5(l) of the FTC Act prior to that date. See Final Rule Regarding the Duration of Existing Competition and Consumer Protection Orders, 60 Fed. Reg. 58514 (Nov. 28, 1995).