

IN THE MATTER OF

NEW BALANCE ATHLETIC SHOES, INC.

*Docket 9268. Interlocutory Order, July 10, 1995*ORDER TO STAY PROCEEDINGS
AND SHOW CAUSE

In view of both the Commission's determination to conduct public proceedings respecting its "Made in USA" enforcement standard and the Commission's action of today's date in Hyde Athletic Industries, Inc., File No. 922-3236, the Commission is considering whether the public interest warrants amendment or dismissal of the complaint and notice of contemplated relief in this matter.

Accordingly, *It is hereby ordered*, That all proceedings in this matter, other than those contemplated herein, are hereby stayed pending further order of the Commission.

It is further ordered, That the parties shall show cause why the complaint and notice of contemplated relief in this matter should not be amended in accordance with the attached form of complaint, or dismissed. The parties shall, on or before August 9, 1995, serve and file a responsive brief to this order. Complaint counsel shall, within fifteen (15) days of service of respondent's brief, file a response to respondent's submission. Respondent shall, within fifteen (15) days of service of complaint counsel's responsive brief, file a reply brief. Respondent may, at any time on or before August 9, 1995, file a motion to withdraw this matter from adjudication for purposes of discussing resolution of this matter, in which event the Secretary shall issue an order withdrawing this matter from adjudication and the application of Commission Rule of Practice 4.7, 16 CFR 4.7, shall thereby be suspended.

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 product labeling, 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., 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 all of its footwear 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 officers, 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 _____, _____.

Interlocutory Order

120 F.T.C.

EXHIBIT 1

B159441

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, that they're made right here in the USA.

It may go to prove, Mr. President, that when you
find a product people really truly need, something
amazing happens. People buy it.

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

EXHIBIT 2

B159447



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

New Balance Athletic Shoes, Inc. is a company that makes a full line of athletic shoes in America. We are proud to be an American company. We are proud to be a company that makes shoes in America. We are proud to be a company that makes shoes in America. We are proud to be a company that makes shoes in America.

new balance **NB**

Interlocutory Order

120 F.T.C.

EXHIBIT 3

B159447

Mayor Bradley:
This American-made
transportation system
could reduce smog,
eliminate traffic, and save
you \$122,000,000.



...to spend all that money on a new commuter train. Mayor Bradley
...and the city of Boston. ...
...the city of Boston. ...
...the city of Boston. ...
...the city of Boston. ...
...the city of Boston. ...

new balance **AB**
...
...

EXHIBIT 4

B159447



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 fact is, 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



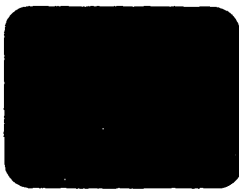
Competing in Japan



MUSIC(SFX)



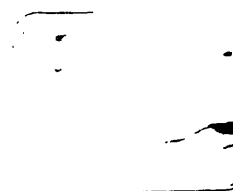
MUSIC(SFX IN & OUT)



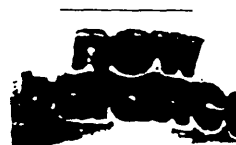
SFX TENNIS)



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



to wear your shoes



DISSENTING STATEMENT OF COMMISSIONER ROSCOE B. STAREK, III

I have voted against this motion for the reasons set forth in my statement explaining my vote in *Hyde Athletic Industries, Inc.*, File No. 922-3236.

DISSENTING STATEMENT OF COMMISSIONER ROSCOE B. STAREK, III

I oppose rejecting the consent order in this matter. The public comments on the consent agreement confirm that "Made in USA" claims are highly material to consumers. No commenter has come forward with evidence of consumer understanding that contradicts or even calls into question the evidence relied upon by the Commission when it accepted the consent agreement for comment. Nor did any of the commenters suggest that the claims made by the proposed respondent were not deceptive.

I continue to believe that case-by-case litigation is the appropriate forum for evaluating "Made in USA" claims. If consumer understanding of "Made in USA" claims varies from industry to industry or supports some other standard, the most promising way to develop that evidence is by copy testing the particular ads at issue in individual cases, not by conducting workshops.

Many commenters argue, in effect, that the existing standard for unqualified "Made in USA" claims is outdated, too high, and too difficult to meet in a global economy in which nearly all products contain a significant amount of imported parts or materials. They contend that firms that employ American labor should be able to benefit from the strong consumer appeal of an unqualified "Made in USA" claim, so long as their products contain at least 50% U.S. labor and materials.

Encouraging the creation and retention of jobs in the United States is a laudable goal and one I fully support. But whether relaxing the standard for unqualified "Made in USA" claims would have that effect is unclear and, more important, falls far outside the public interest inquiry normally made by the Commission as a law enforcement agency. According to the evidence we have now, weakening the existing standard would allow the deception of a significant number of reasonable consumers and would not reduce the

costs of compliance.¹ The "all or virtually all" standard used in the proposed complaint and consent order is supported by the results of the 1991 copy test placed on the public record today and is consistent with the Commission's previous decisions and order.² It appropriately recognizes that a very small percentage of imported components in a product assembled in the United States will not preclude an unqualified "Made in USA" claim. It is also consistent with the Commission's general approach of not reading qualifications into an unqualified claim. Nothing in the proposed consent order would prohibit adequately qualified claims that products manufactured in the United States with higher levels of foreign components are "Made in USA." The safe harbors set forth in the proposed order illustrate some of the ways in which a "Made in USA" claim may be qualified to avoid deceiving consumers.

Accordingly, I cannot support authorizing the staff to conduct a "comprehensive review . . . of domestic content claims" to the extent that it would be a broad inquiry into why adopting a weaker standard for unqualified "Made in USA" claims is good public policy.

The commenters also seek guidance from the Commission on the level of substantiation that the Commission will require for "Made in USA" claims, including methods of calculating domestic content, and how much flexibility the Commission will use in enforcing a "virtually all" standard. I agree that such guidance would be useful and could reduce the costs of complying with the standard. Further review of these issues, however, does not warrant rejecting the consent agreement. 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.

¹ Many commenters pointed to the difficulties associated with calculating domestic content. These difficulties, however, exist regardless of whether the standard is 50% or some other amount. Indeed, setting the standard at 50% is likely to increase industry's compliance costs, because it will be far more difficult to ascertain whether a product has at least 50% domestic content than whether it is "all or virtually all" domestic.

² See, e.g., *Windsor Pen Corp.*, 64 FTC 454 (1964); *Joseph H. Meyer Bros.*, 47 FTC 49 (1950). Similarly, the Commission's rules implementing statutory labeling requirements for textile products and wool products restrict unqualified "Made in USA" labels to those items "completely made in the United States of material that were made in the United States." Rules and Regulations Under the Textile Fiber Products Identification Act, 16 CFR 303.33 (1995); Rules and Regulations Under the Wool Products Labeling Act of 1939, 16 CFR 300.25a (1995).

This case presents us with a clear violation of Section 5 of the FTC Act disseminated in widespread national ad campaign. It does not turn upon whether a particular method of calculating domestic content is reasonable.

Set Aside Order

120 F.T.C.

IN THE MATTER OF

HARLEY-DAVIDSON MOTOR CO.

SET ASIDE ORDER IN REGARD TO ALLEGED VIOLATION OF
SEC. 3 OF THE CLAYTON ACT AND THE
FEDERAL TRADE COMMISSION ACT*Docket 5698. Consent Order, June 29, 1954--Set Aside Order, July 11, 1995*

The Federal Trade Commission has set aside a 1954 consent order with Harley-Davidson Motor Co., (50 FTC 1047), pursuant to the Commission's Sunset Policy, under which the Commission presumes, in the context of petitions to reopen and modify orders, that the public interest requires terminating competition orders that have been in effect for more than 20 years.

ORDER REOPENING PROCEEDING
AND SETTING ASIDE ORDER

On February 8, 1995, Harley-Davidson Motor Company ("Harley-Davidson"), the respondent subject to the order issued by the Commission on June 29, 1954, in Docket No. 5698, in the matter of *Harley-Davidson Co.*, 50 FTC 1047 (1954) ("order"), filed a Petition to Reopen Proceedings and Set Aside Cease and Desist Order ("Petition"). Among other things, Harley-Davidson requests that the Commission set aside the order in this matter pursuant to Section 2.51 of the Commission's Rules of Practice, 16 CFR 2.51, and the Statement of Policy With Respect to Duration of Competition Orders and Statement of Intention to Solicit Public Comment With Respect to Duration of Consumer Protection Orders, issued on July 22, 1994, and published at 59 Fed. Reg. 45,286-92 (Sept. 1, 1994) ("Sunset Policy Statement"). In the Petition, Harley-Davidson affirmatively states that it has not engaged in any conduct violating the terms of the order. The Petition was placed on the public record, and close to 200 comments were received.¹

The Commission in its July 22, 1994, Sunset Policy Statement said, in relevant part, that "effective immediately, the Commission will presume, in the context of petitions to reopen and modify existing orders, that the public interest requires setting aside orders

¹ To accommodate numerous requests to provide additional time to prepare and submit written comments concerning Harley-Davidson's Petition, the Commission extended the initial public comment period in this matter by thirty days.