

Complaint

IN THE MATTER OF

CALIFORNIA NATUREL, INC.COMPLAINT, OPINION OF THE COMMISSION AND ORDER IN
REGARD TO ALLEGED VIOLATIONS OF SECTIONS 5 AND 12 OF THE
FEDERAL TRADE COMMISSION ACT

Docket No. 9370; File No. 152 3267
Complaint, April 11, 2016 – Order, December 5, 2016

This case addresses California Naturel, Inc.'s marketing of its sunscreen product. The complaint alleges that California Naturel falsely advertises its Sunscreen SPF 30 product as an "all natural" sunscreen when in fact it contains the synthetic ingredient dimethicone, in violation of Sections 5 and 12 of the Federal Trade Commission Act. Complaint Counsel filed a Motion for Summary Decision. The Commission granted the Motion and issued an Order to cease and desist.

Participants

For the *Commission*: Robert M. Frisby, Gregory Madden, and John Andrew Singer.

For the *Respondent*: John Bernard Duler, President, *pro se*.

COMPLAINT

The Federal Trade Commission, having reason to believe that California Naturel, Inc., a corporation, has violated the provisions of the Federal Trade Commission Act, and it appearing to the Commission that this proceeding is in the public interest, alleges:

1. Respondent California Naturel is a Delaware corporation with its principal office or place of business at 480 Gate 5 Road – Suite 114, Sausalito, California 94965.
2. Respondent has advertised, labeled, offered for sale, sold, and distributed products to consumers, including Sunscreen SPF 30. This sunscreen product is a "drug" within the meaning of Sections 12 and 15 of the Federal Trade Commission Act.

Complaint

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.

4. Respondent advertises Sunscreen SPF 30 on the Internet. This product retails for \$35.

5. Respondent has disseminated or has caused to be disseminated advertisements for Sunscreen SPF 30, including but not necessarily limited to the attached Exhibits A-B. These materials contain the following statements:

- a. California Naturel’s “Sunscreen SPF 30” webpage states:

This soft, luxurious and non-oily all natural sunscreen is formulated with Glacial Oceanic Minerals and Zinc Oxide to protect the skin from both UVA and UVB rays. It is enriched with antioxidants from botanical sources such as Shea Butter, Pomegranate Extract and Marigold Flower Extract to increase skin hydration and protection from environmental damage.

Exhibit A, Internet webpage www.californianaturel.com/sunscreen-spf-30 (August 2015).

- b. The text under the heading “Our Ingredients” on California Naturel’s “Ingredients” webpage states:

California Naturel uses only the purest, most luxurious and effective ingredients found in nature. All of our formulas are naturally scented and free of parabens and harsh synthetic chemicals. Our ingredients have been thoughtfully selected for their highly interactive properties, subtle scents, pleasurable textures and effectiveness on skin.”

Exhibit B, Internet webpage www.californianaturel.com/ingredients#filter=.f-ss (August 2015).

Complaint

Count I
False Claim

6. In connection with the advertising, labeling, promotion, offering for sale, or sale of Sunscreen SPF 30, Respondent has represented, directly or indirectly, expressly or by implication, that the product is an “all natural” sunscreen.

7. In fact, Sunscreen SPF 30 is not “all natural” because it contains or contained a synthetic ingredient Dimethicone. Therefore, the “all natural” representations set forth in Paragraph 6 are false or misleading.

Violations of Sections 5(a) and 12

8. The acts and practices of Respondent as alleged in this complaint constitute unfair or deceptive acts or practices, and the making of false advertisements, in or affecting commerce in violation of Sections 5(a) and 12 of the Federal Trade Commission Act.

NOTICE

You are notified that on December 12, 2016, at 10:00 a.m., at the Federal Trade Commission offices, 600 Pennsylvania Avenue, NW, Room 532-H, Washington, DC 20580, an Administrative Law Judge of the Federal Trade Commission will hold a hearing on the charges set forth in this Complaint. At that time and place, you will have the right under the Federal Trade Commission 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 this Complaint.

You are notified that you are afforded the opportunity to file with the Federal Trade Commission (“Commission”) an answer to this Complaint on or before the 14th day after service of the Complaint upon you. An answer in which the allegations of the Complaint are contested must contain a concise statement of the facts constituting each ground of defense; and specific admission, denial, or explanation of each fact alleged in the Complaint or, if you are without knowledge thereof, a statement to that effect.

Complaint

Allegations of the Complaint not thus answered will be deemed to have been admitted.

If you elect not to contest the allegations of fact set forth in the Complaint, the answer should consist of a statement that you admit all of the material facts to be true. Such an answer will constitute a waiver of hearings as to the facts alleged in the Complaint and, together with the Complaint, will provide a record basis on which the Commission may issue a final decision containing appropriate findings and conclusions and a final order disposing of the proceeding. In such answer, you may, however, reserve the right to submit proposed findings of fact and conclusions of law under FTC Rule § 3.46.

Failure to answer timely will be deemed to constitute a waiver of your right to appear and contest the allegations of the Complaint. It will also authorize the Commission, without further notice to you, to find the facts to be as alleged in the Complaint and to enter a final decision containing appropriate findings and conclusions and a final order disposing of the proceeding.

The Administrative Law Judge will hold an initial prehearing scheduling conference, to be held not later than 10 days after the answer is filed by the Respondent. Unless otherwise directed by the Administrative Law Judge, the scheduling conference and further proceedings will take place at the Federal Trade Commission, 600 Pennsylvania Avenue, NW, Room 532-H, Washington, DC 20580. Rule 3.21(a) requires a meeting of the parties' counsel as early as practicable before the prehearing scheduling conference, but in any event no later than 5 days after the answer is filed by the Respondent. Rule 3.31(b) obligates counsel for each party, within 5 days of receiving a Respondent's answer, to make certain initial disclosures without awaiting a formal discovery request.

The following is the form of the 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 concludes from record facts developed in any adjudicative proceedings in this matter that the proposed order provisions as to Respondent might be inadequate to fully protect the consuming public, the

Complaint

Commission may order such other relief as it finds necessary and appropriate.

ORDER**DEFINITIONS**

For purposes of this order, the following definitions shall apply:

- A. Unless otherwise specified, “respondent” shall mean California Naturel, a corporation, its successors and assigns, and its officers, agents, representatives, and employees.
- B. “Commerce” shall mean as defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. § 44.

I.

IT IS ORDERED that respondent, 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 product must not make any representation, expressly or by implication, including through the use of a product name, trademark, or trade name, about:

- A. whether such product is all natural or 100% natural;
- B. the extent to which such product contains any natural or synthetic ingredient or component;
- C. the ingredients or composition of such product; or
- D. the environmental or health benefits of such product,

unless the representation is non-misleading, including that, at the time such representation is made, the respondent possesses and relies upon competent and reliable evidence, which when appropriate based on the expertise of professionals in the relevant area must be competent and reliable scientific evidence, that is

Complaint

sufficient in quality and quantity based on standards generally accepted in the relevant fields when considered in light of the entire body of relevant and reliable evidence, to substantiate that the representation is true. For the purposes of this Provision:

1. “competent and reliable evidence” means tests, analyses, research, studies, or other evidence based on the expertise of professionals in the relevant area, that have been conducted and evaluated in an objective manner by qualified persons, using procedures generally accepted in the profession to yield accurate and reliable results; and
2. “competent and reliable *scientific* evidence” means tests, analyses, research, or studies that have been conducted and evaluated in an objective manner by qualified persons, using procedures generally accepted in the profession to yield accurate and reliable results.

II.

IT IS FURTHER ORDERED that respondent California Naturel, and its successors and assigns, shall, for five (5) years after the last date of dissemination of any representation covered by this order, maintain and upon request make available to the Federal Trade Commission for inspection and copying:

- A. All advertisements and promotional materials containing the representation;
- B. All materials that were relied upon in disseminating the representation; and
- C. All tests, reports, studies, surveys, demonstrations, or other evidence in its possession or control that contradict, qualify, or call into question the representation, or the basis relied upon for the representation, including complaints and other communications with consumers or with governmental or consumer protection organizations.

Complaint

III.

IT IS FURTHER ORDERED that respondent California Naturel, and its successors and assigns, shall deliver a copy of this order to all current and future principals, officers, directors, and managers, and to all current and future employees, agents, and representatives having responsibilities with respect to the subject matter of this order, and shall secure from each such person a signed and dated statement acknowledging receipt of the order. Respondent shall deliver this order to current personnel within thirty (30) days after the date of service of this order, and to future personnel within thirty (30) days after the person assumes such position or responsibilities. Respondent must maintain and upon request make available to the Federal Trade Commission for inspection and copying all acknowledgments of receipt of this order obtained pursuant to this Part.

IV.

IT IS FURTHER ORDERED that respondent California Naturel, and its successors and assigns, shall notify the Commission at least thirty (30) days prior to any change in the corporation that may affect compliance obligations arising under this order, including but not limited to a dissolution, assignment, sale, merger, or other action that would result in the emergence of a successor corporation; the creation or dissolution of a subsidiary, parent, or affiliate that engages in any acts or practices subject to this order; the proposed filing of a bankruptcy petition; or a change in the corporate name or address. *Provided, however,* that, with respect to any proposed change in the corporation about which respondent learns less than thirty (30) days prior to the date such action is to take place, respondent shall notify the Commission as soon as is practicable after obtaining such knowledge. Unless otherwise directed by a representative of the Commission in writing, all notices required by this Part shall be emailed to Debrief@ftc.gov or sent by overnight courier (not the U.S. Postal Service) to: Associate Director for Enforcement, Bureau of Consumer Protection, Federal Trade Commission, 600 Pennsylvania Avenue NW, Washington, DC 20580. The subject line must begin: In re California Naturel, Docket No. 9370.

Complaint

V.

IT IS FURTHER ORDERED that respondent California Naturel, and its successors and assigns, within sixty (60) days after the date of service of this order, shall file with the Commission a true and accurate report, in writing, setting forth in detail the manner and form of its own compliance with this order. Within ten (10) days of receipt of written notice from a representative of the Commission, it shall submit additional true and accurate written reports.

VI.

IT IS FURTHER ORDERED that the final and effective date of this Order is the 60th day after this Order is served. This Order will terminate 20 years from the date of its issuance (which is stated at the end of this Order, next to the Commission's seal), or 20 years from the most recent date that the United States or the Commission files a complaint (with or without an accompanying settlement) in federal court alleging any violation of this Order, whichever comes later; *provided, however*, that the filing of such a complaint will not affect the duration of:

- A. Any Provision in this Order that terminates in less than 20 years;
- B. This Order if such complaint is filed after the Order has terminated pursuant to this Provision. If such complaint is dismissed or a federal court rules that the Respondent did not violate any provision of the Order, and the dismissal or ruling is either not appealed or upheld on appeal, then the Order will terminate according to this Provision as though the complaint had never been filed, except that the Order will not terminate between the date such complaint is filed and the later of the deadline for appealing such dismissal or ruling and the date such dismissal or ruling is upheld on appeal.

THEREFORE, the Federal Trade Commission, this eleventh day of April, 2016, has issued this Complaint against Respondent.

By the Commission.

[illegible]

Complaint

Exhibit B

OUR STORY **PRODUCTS** **INGREDIENTS** **BLOG** **CONTACT**

Our Ingredients

California Naturel uses only the purest, most luxurious and effective ingredients found in nature. All our formulations are naturally scented and free of parabens, sulfates, and harsh synthetic chemicals. Our ingredients have been thoughtfully selected for their highly active properties, subtle scents, pleasurable textures and effectiveness in use.

FROM LEFT **TO RIGHT** **TOP TO BOTTOM**

- Citrus aurantium**
- Punica granatum (pomegranate) fruit extract**
- Butyrospermum parkii (shea) butter**
- Helianthus annuus (sunflower) seed oil**
- p-ANIS ALK**
- Chamomilla recutita (chamomile) flower extract**
- Scutellaria gum**
- Dimethicone**
- Cera microcrystalline**
- glucosylated sodium benzoate**
- Zinc Oxide**

Sign up for exclusive news and promo!

Email Address:

Our Story | Shop | Products | Ingredients | Contact

Shipping | Returns | Privacy Policy | Terms & Conditions

Facebook Twitter Pinterest Instagram

Macmillan, Ark-Miller
One Click
You and the company you own to receive full product benefits.
[View this content](#)

Opinion of the Commission

OPINION OF THE COMMISSION

By Chairwoman Edith Ramirez, for the Commission.

We have before us a motion by Complaint Counsel seeking summary decision against Respondent California Naturel, Inc., a seller and marketer of personal care products. California Naturel markets its sunscreen product as “all natural,” describing the product on its website as containing “only the purest, most luxurious and effective ingredients found in nature.” The company, however, admits that eight percent of its sunscreen formula is dimethicone, a synthetic ingredient. On these simple and undisputed facts, Complaint Counsel seeks a summary finding that California Naturel is falsely advertising its sunscreen. As discussed below, we grant summary decision and issue an order prohibiting California Naturel from misrepresenting the ingredients or composition of its products.

I. Background

On April 11, 2016, the Commission issued an administrative complaint alleging that California Naturel falsely advertises its Sunscreen SPF 30 product as an “all natural” sunscreen when in fact it contains the synthetic ingredient dimethicone, in violation of Sections 5 and 12 of the Federal Trade Commission Act.

On May 6, 2016, California Naturel’s president, John Bernard Duler, submitted an answer to the complaint on the company’s behalf as permitted by Rule 4.1(a)(2)(i) of the Commission’s Rules of Practice, 16 C.F.R. § 4.1(a)(2)(i).¹ In its answer, California Naturel does not dispute that the Commission has jurisdiction over it and over the conduct challenged in the complaint. It does deny that its “all natural” advertising is false or misleading. Among other things, California Naturel asserts in its

¹ California Naturel’s answer does not comply with all of the requirements of Rule 4.2, 16 C.F.R. § 4.2. However, in substance, it responds to the allegations in the complaint, and we therefore accept it as an answer. *Cf. Yakima Fruit & Cold Storage Co.*, 59 F.T.C. 693, 705 (1961) (holding that Commission has discretion to accept review of an initial decision when request for review was in the form of a letter addressed to the Chairman rather than in the form of a brief as required by the Commission’s Rules of Practice).

Opinion of the Commission

answer that, as a result of the FTC's investigation, it now includes a disclaimer on its website that the ingredient dimethicone in its sunscreen is synthetic.

Complaint Counsel filed their motion for summary decision on September 14, 2016. They contend that California Naturel has admitted that its Sunscreen SPF 30 contains eight percent dimethicone, a synthetic substance, and thus effectively admitted that its advertising claims are false. California Naturel disputes that its advertising is false or misleading. It argues that, as of early 2016, it has sufficiently disclosed the ingredients in Sunscreen SPF 30. In particular, it cites what it contends is a readily visible disclosure statement on its website specifying that eight percent of its "all natural" sunscreen formula is dimethicone, a synthetic ingredient.

We review Complaint Counsel's motion for summary decision pursuant to Rule of Practice 3.24, 16 C.F.R. § 3.24, which parallels Federal Rule of Civil Procedure 56 governing summary judgment in the federal courts. Consistent with Rule 56, a party moving for summary decision must show that "there is no genuine issue as to any material fact." *Id.* We may therefore rely on authority applying the federal summary judgment standard. *See, e.g., Fanning v. FTC*, 821 F.3d 164, 170 (1st Cir. 2016) (under FTC rules, summary decision is reviewed "under the same standard as summary judgment before a district court"), *petition for cert. docketed*, (Sept. 27, 2016) (No. 16-397).

As the moving party, Complaint Counsel bears the initial burden of identifying evidence that demonstrates the absence of any genuine issue of material fact. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). When a motion for summary decision is made and supported, the "party opposing the motion may not rest upon the mere allegations or denials of his or her pleading; the response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue of material fact for trial." 16 C.F.R. § 3.24(a)(3); *see also Celotex*, 477 U.S. at 323. We are required to resolve all factual ambiguities and draw all justifiable inferences in the light most favorable to California Naturel, the party opposing the motion.

Opinion of the Commission

Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247 (1986). We now turn to an analysis of Complaint Counsel's motion.

II. Analysis

Section 5 of the FTC Act prohibits “unfair or deceptive acts or practices in or affecting commerce.” 15 U.S.C. § 45(a). Section 12 proscribes the dissemination of any “false advertisement,” for food, drugs, devices, services, or cosmetics. *Id.* § 52(a). The deception standard is the same under both provisions. *POM Wonderful LLC*, 2013 WL 268926, at *18. n.5 (F.T.C. Jan. 16, 2013), *aff'd sub nom. POM Wonderful, LLC v. FTC*, 777 F.3d 478 (D.C. Cir. 2015); *see also Kraft, Inc. v. FTC*, 970 F.2d 311, 314 (7th Cir. 1992).

“An advertisement is deceptive if it contains a representation or omission of fact that is likely to mislead a consumer acting reasonably under the circumstances, and that representation or omission is material to a consumer's purchasing decision.” *POM Wonderful*, 2013 WL 268926, at *18; *FTC Policy Statement on Deception*, 103 F.T.C. 174, 175 (1984) (“*Deception Statement*”), appended to *Cliffdale Assocs., Inc.*, 103 F.T.C. 110 (1984). Determining whether California Naturel has violated the FTC Act thus consists of a three-part inquiry. We must evaluate whether, as a matter of law, California Naturel's advertising conveyed the claim alleged in the complaint, the claim was false or misleading, and the claim was material. *See POM Wonderful*, 2013 WL 268926, at *18; *FTC v. Pantron I Corp.*, 33 F.3d 1088, 1095 (9th Cir. 1994); *FTC v. Direct Mktg. Concepts, Inc.*, 569 F. Supp. 2d 285, 297 (D. Mass. 2008), *aff'd*, 624 F.3d 1 (1st Cir. 2010).

We first consider what claims California Naturel has conveyed in marketing its Sunscreen SPF 30. A claim may be either express or implied; express claims are those that directly state the representation at issue. *Kraft, Inc. v. FTC*, 114 F.T.C. 40, 120 (1991). “In determining what claims may reasonably be attributed to an advertisement, the Commission examines the entire advertisement and assesses the overall ‘net impression’ it conveys.” *POM Wonderful*, 2013 WL 268926, at *19 (citing *Deception Statement*, 103 F.T.C. at 178). Extrinsic evidence is unnecessary to establish the impression that consumers would

Opinion of the Commission

take away from an ad if the claim is reasonably clear from the face of the advertisement. *Id.*, at *20.

The net impression conveyed by California Naturel's representations regarding its Sunscreen SPF 30 is clear from a facial analysis. It is undisputed that California Naturel expressly advertises Sunscreen SPF 30 as "all natural." The sunscreen itself bears the description "All Natural." See Attachment A.² On its website, California Naturel states with respect to Sunscreen SPF 30:

This soft, luxurious and non-oily all natural sunscreen is formulated with Glacial Oceanic Minerals and Zinc Oxide to protect the skin from both UVA and UVB rays. It is enriched with antioxidants from botanical sources such as Shea Butter, Pomegranate Extract and Marigold Flower Extract to increase skin-hydration and protect it from environmental damage.

In addition, the website describes the sunscreen's ingredients as follows:

California Naturel uses only the purest, most luxurious and effective ingredients found in nature. All of our formulas are naturally scented and free of parabens, sulfates, and harsh synthetic chemicals.

See Declaration of Brittani Garland in support of Motion for Summary Decision (May 31, 2016) ("Garland Decl."), ¶ 3 and screenshots attached as Exhibits A and B to the Complaint.

² California Naturel has urged the Commission to examine its current website, and we have done so. Pursuant to 16 C.F.R. § 3.43(f), we take official notice of the content of California Naturel's website and attach relevant portions as Attachments A and B. See *Sunscreen SPF 30*, CALIFORNIA NATUREL, <http://www.californianaturel.com/sunscreen-spf-30> (last visited Oct. 21, 2016) (Attachment A); *Our Ingredients*, CALIFORNIA NATUREL, <http://www.california-naturel.com/ingredients#filter=.f-ss> (last visited Oct. 21, 2016) (Attachment B). The procedures set forth in 16 C.F.R. § 3.55 afford an opportunity to challenge the noticed facts and our inferences therefrom.

Opinion of the Commission

California Naturel does not, nor can it, dispute that it has consistently advertised its sunscreen as an “all natural” product and represented that it uses “only the purest, most luxurious and effective ingredients found in nature.” Instead, it opposes summary decision by pointing to a disclaimer it added to the bottom of the sunscreen webpage in “early 2016” after the FTC began its investigation. Opposition to Motion for Summary Decision (“Opp.”) at 1. The disclaimer states, “The FTC requires us to add the following: ‘Dimethicone, a synthetic ingredient, is 8% of the sunscreen formula, the remaining 92% are natural products.’” *Id.*; see also Answer at 3. California Naturel argues that the disclaimer and other portions of its website adequately disclose that the sunscreen contains the synthetic ingredient dimethicone. Put differently, California Naturel contends that its marketing claims are not false or misleading. We disagree.

As an initial matter, there is no question that prior to early 2016, California Naturel expressly marketed its sunscreen as an “all natural” product and that it did not include the disclaimer on which it now relies. Other than adding the referenced disclaimer, California Naturel has not changed the representations challenged in the complaint. As noted above, in addition to the express and prominent claim on the product that Sunscreen SPF 30 is “all natural,” California Naturel describes the sunscreen on its website as a “soft, luxurious and non-oily *all natural* sunscreen” and states that it “uses *only* the purest, most luxurious and effective ingredients found in nature.” Garland Decl. ¶ 3, and screenshots attached as Exhibits A and B to the Complaint (emphasis added). This plainly conveys to reasonable consumers that every ingredient in the product is natural. The recent addition by California Naturel of a disclaimer on its website does not excuse deception that has already occurred. See, e.g., *Libbey-Owens-Ford Glass Co. v. FTC*, 352 F.2d 415, 418 (6th Cir. 1965).

Nor are we persuaded by California Naturel’s argument that the disclaimer it added renders its marketing claims “transparent.” The sunscreen itself continues to state it is “all natural.”³ And

3 In addition to citing to its new disclaimer, California Naturel represents that it has produced stickers containing the same disclaimer language and placed them on the product packaging. Opp. at 2; Answer at 6. Because no such stickers are visible on the product images depicted in California Naturel’s website, and

Opinion of the Commission

California Naturel continues to prominently display the “all natural” language discussed above on its website. See Attachments A, B. Adding a disclaimer to the bottom of the webpage that is well removed from proximity to the “all natural” claims – and, in fact, not visible at all without scrolling down – does not change the net impression conveyed to consumers that the product is “all natural.” See *FTC v. Direct Mktg. Concepts, Inc.*, 624 F.3d 1, 12 (1st Cir. 2010) (inconspicuous disclaimer that infomercial was paid advertising and that statements were opinion was insufficient to correct “bold and straightforward” claims that supplements could cure or prevent disease); *FTC v. Cyberspace.Com LLC*, 453 F.3d 1196, 1201 (9th Cir. 2006) (finding fine print notices on the back of solicitations insufficient to overcome deceptive nature of front-side communications). Notably, the disclaimer is also well below the website’s “Add to Cart” button so that consumers are invited to purchase the product before they would even see the disclaimer. In guidance on online disclosures, we have urged that disclosures “be provided before the consumer makes the decision to buy, *e.g.*, before clicking on an ‘order now’ button or a link that says ‘add to shopping cart.’” FEDERAL TRADE COMMISSION, .COM DISCLOSURES: HOW TO MAKE EFFECTIVE DISCLOSURES IN DIGITAL ADVERTISING 14 (March 2013).⁴

In her partial dissent, Commissioner Ohlhausen questions the propriety of determining as a matter of summary decision the impact of California Naturel’s 2016 website disclaimer, arguing that such a determination is both unnecessary and improper.⁵

there is no other evidence of how the stickers appear on the sunscreen packaging, we do not consider the stickers as part of our analysis. We note, however, that in light of the prominent and express “all natural” claims on California Naturel’s website and the absence of any indication that consumers would see the stickers before making an online purchase, we are skeptical that a sticker would suffice to address our concerns about the net impression conveyed.

4 The FTC disclosure guidelines are available at <https://www.ftc.gov/sites/default/files/attachments/press-releases/ftc-staff-revises-online-advertising-disclosure-guidelines/130312dotcomdisclosures.pdf>.

5 Commissioner Ohlhausen agrees that the “all natural” claims made prior to the addition of the disclaimer were false and misleading. In her view, however, there is a fact question as to whether California Naturel has since clarified its

Opinion of the Commission

While it may not be necessary to rule on the effect of California Naturel's disclaimer on the net impression conveyed to consumers, it is entirely appropriate for the Commission to do so. As noted above, California Naturel cites its new disclaimer as its principal defense against Complaint Counsel's allegations of deception and motion for summary decision, and asks us to examine its updated website to evaluate the effect of the disclaimer on its advertising claims. We have taken official notice of California Naturel's website and determined that there are no disputed facts regarding the placement or font size of the disclaimer.⁶ Just as we engaged in a facial analysis to evaluate the net impression of California Naturel's advertising claims prior to the addition of the disclaimer, we can appropriately perform a facial analysis to determine the effect of the disclaimer. *See, e.g., Daniel Chapter One*, 2009 FTC LEXIS 259, at *24 (F.T.C. Dec. 24, 2009) (conducting facial analysis of a disclaimer's print size, positioning, and scope); *Kraft, Inc.*, 114 F.T.C. 40, 122-28 (1991) (finding disclosures ineffective to dispel the net impression otherwise presented in view of the disclosures' brevity, placement, and complexity).

Courts have similarly not hesitated to find disclaimers ineffective to dispel deceptive claims when the Commission has moved for summary judgment. *See, e.g., Cyberspace.Com*, 453 F.3d at 1201 (finding that "no reasonable factfinder could conclude that the solicitation was not likely to deceive consumers" despite the presence of fine-print disclosures on the back of the marketing material); *Direct Mktg. Concepts*, 624 F.3d at 24 n.9 (concluding from a facial examination that the disclaimer would not cure deceptive infomercials). In fact, declining to address the disclaimer's sufficiency could create the misimpression that the disclaimer cures the deception. As a matter of transparency and efficiency, the Commission should

"all natural" claims through its recently-added disclaimer and new stickers to accompany product packaging. As explained in her partial dissent, she believes that granting summary decision on that point is inappropriate and thus does not join the portion of the opinion holding that the disclaimer is insufficient to qualify California Naturel's "all natural" claims, based on the current record.

⁶ *See supra* note 2.

Opinion of the Commission

make clear that California Naturel's disclaimer does not cure its deceptive "all natural" claims. In our view, sidestepping the issue now only to argue later in a potential contempt action that the Commission's order has been violated would not serve the interests of either the public or California Naturel.

California Naturel also points to a list of ingredients that appears if one scrolls down on its Sunscreen SPF 30 webpage. This list, however, does nothing to dispel the net impression that the sunscreen is "all natural." It first identifies one ingredient, zinc oxide, as the active ingredient, and then lists 31 other ingredients using scientific terminology. Buried in the middle of the list is dimethicone. All of the ingredients are in the same font and font size, and nothing on the face of the list identifies dimethicone as a synthetic ingredient. California Naturel nonetheless asserts that the website is "transparent" because a consumer can click on the word "dimethicone," which takes the consumer to the general "ingredients" webpage. If the cursor is properly positioned, this webpage identifies dimethicone as a "silicone-based polymer." Case law, however, establishes that it is reasonable for a consumer to rely on express claims, and thus that they should not be required to search for and dig out information that contradicts what an advertisement expressly and prominently conveys. Indeed, we expect consumers to rely on express statements such as the "all natural" representation at issue here, and to interpret such statements as meaning what they say. *See FTC v. Skybiz.com, Inc.*, 2001 WL 1673645, at *9 (N.D. Okla. 2001) (reasonable to expect that consumers could rely on express claims); *FTC v. Five-Star Auto Club, Inc.*, 97 F. Supp. 2d 502, 528 (S.D.N.Y. 2000) ("Consumer reliance on express claims is [] presumptively reasonable.") (internal quotation omitted).

As purported evidence of the supposed transparency of its disclaimer and ingredient list, California Naturel points to an article referencing this case by an investigative reporter for the *Wall Street Journal*. California Naturel notes that the article quotes California Naturel's recently-added website disclaimer that "Dimethicone, a synthetic ingredient, is 8% of the sunscreen formula" and asserts that the reporter also saw the ingredient list. Opp. at 1; Answer at 3 (citing Serena Ng, *FTC Charges Five 'Natural' Products Firms Over Claims*, WALL ST. J., (Apr. 13,

Opinion of the Commission

2016), *available at* <http://www.wsj.com/articles/ftc-charges-five-natural-products-firms-over-claims-146050>). However, we look at claims from the viewpoint of the average consumer, and the fact that an investigative reporter researching a story about “all natural” claims located the disclaimer and saw dimethicone on the ingredient list does not alter our conclusion regarding the net impression of the website.⁷ See *Thompson Med. Co., Inc.*, 104 F.T.C. 648, 810 (1984) (focusing the deception inquiry on “average or ordinary members of the adult population”), *aff’d*, 791 F.2d 189 (D.C. Cir. 1986); *Kraft*, 114 F.T.C. at 122.

We therefore find that California Naturel’s advertising conveys that its sunscreen is “all natural,” meaning it contains only ingredients found in nature. See, e.g., *Williams v. Gerber Prods. Co.*, 552 F.3d 934, 939-40 (9th Cir. 2008) (stating, in denying motion to dismiss, that “‘fruit juice and other all natural ingredients’ could easily be interpreted by consumers as a claim that all the ingredients in the product were natural” and rejecting the argument that a list of ingredients on the same box would dispel this impression); *Bohac v. Gen. Mills, Inc.*, 2014 WL 1266848, at *6 (N.D. Cal. Mar. 26, 2014) (in rejecting motion to dismiss, concluding that “all natural” conveys “the affirmative and specific factual representation that the products are made *entirely* of natural ingredients”).

We consider next whether California Naturel’s “all natural” claims are false or misleading. The central question is whether the claim is likely to mislead; Complaint Counsel need not prove actual deception. See, e.g., *Jerk, LLC*, 2015 WL 1518891, at *10 (F.T.C. Mar. 13, 2015). Moreover, “[t]he deception need not be made with intent to deceive; it is enough that the representations or practices were likely to mislead consumers acting reasonably.” *FTC v. Verity Int’l, Ltd.*, 443 F.3d 48, 63 (2d Cir. 2006) (citation omitted). Accordingly, “[a]n advertiser’s good faith does not immunize it from responsibility for its misrepresentations” *Chrysler Corp. v. FTC*, 561 F.2d 357, 363 n.5 (D.C. Cir. 1977).

⁷ California Naturel’s unsupported claim that its customers “praise [its] disclosure and transparency,” Answer at 5, is inadmissible hearsay that lacks any indicia of reliability. See 16 C.F.R. § 3.43(b).

Opinion of the Commission

In its answer and in opposition to Complaint Counsel's motion, California Naturel admits that its sunscreen formula consists of eight percent dimethicone and that dimethicone is a synthetic material. These two admissions, Complaint Counsel argue, establish that California Naturel's "all natural" claims are false or misleading. We agree.

It is undisputed that California Naturel's sunscreen contains eight percent of a synthetic ingredient. California Naturel nonetheless asserts that its policy is to list all ingredients and thus to be "transparent." However, Complaint Counsel need not demonstrate an intent to deceive. *See, e.g., FTC v. Freecom Commc'ns, Inc.*, 401 F.3d 1192, 1202 (10th Cir. 2005) ("[I]ntent to deceive . . . is not an element of a [Section] 5 violation."). California Naturel also argues that there is no regulatory definition that specifies the percentage of natural ingredients required in order to describe a product as "natural." While true, this argument misses the mark.⁸ California Naturel does not merely claim that its product is "natural"; it expressly asserts that its sunscreen is "all natural" and that it "uses only the purest, most luxurious and effective ingredients found in nature." By California Naturel's own admission, that is not true.

Finally, we consider whether California Naturel's false and misleading claim is material. A "material" misrepresentation is one that is likely to affect a consumer's conduct with respect to the product or service. *Deception Statement*, 103 F.T.C. at 182. "[T]he Commission presumes that express claims are material." *Id.* As noted in the *Deception Statement*, the Commission "may assume that the willingness of a business to promote its products reflects a belief that consumers are interested in the advertising." *Id.* (internal quotations omitted). In turn, a respondent may rebut a presumption of materiality by providing evidence that the claim is not material. *Novartis Corp.*, 127 F.T.C. 580, 686 (1999).

⁸ The Commission's Green Guides do not provide guidance on the term "natural." However, our guidance is clear that "marketers must identify all express and implied claims that the advertisement reasonably conveys" and "ensure that all reasonable interpretations of their claims are truthful . . ." 77 Fed. Reg. 62125 (2012).

Opinion of the Commission

Here, California Naturel's "all natural" representation for Sunscreen SPF 30 is express and therefore presumptively material. California Naturel does not provide any evidence to rebut this presumption. Accordingly, we find that California Naturel's "all natural" claim is false and misleading, and likely to affect a consumer's purchasing decision in violation of Sections 5 and 12 of the FTC Act.

III. Remedy

Having found liability, we now turn to the issue of the remedy. The FTC Act authorizes the Commission to issue an order requiring a respondent to cease and desist the deceptive acts or practices. 15 U.S.C. § 45(b). Importantly, "[t]he Commission is not limited to prohibiting the illegal practice in the precise form in which it is found to have existed in the past." *FTC v. Colgate-Palmolive Co.*, 380 U.S. 374, 392, 395 (1965). The Commission may "frame its order broadly enough to prevent respondents from engaging in similarly illegal practices in [the] future." *Id.* at 395. We have the authority to issue orders "encompassing all products or all products in a broad category, based on violations involving only a single product or group of products." *ITT Continental Baking Co. v. FTC*, 532 F.2d 207, 223 (2d Cir. 1976); *see also Colgate-Palmolive*, 380 U.S. at 394-95.

We enter the accompanying Final Order to address California Naturel's unlawful conduct. The core substantive provision of the Final Order, Part I, prohibits California Naturel from making the kinds of misrepresentations alleged in the complaint. In particular, California Naturel is prohibited from misrepresenting (a) whether a product is all natural or 100% natural; (b) the extent to which a product contains any natural or synthetic ingredient; (c) the ingredients or composition of a product; and (d) the product's environmental or health benefits. To ensure that representations about ingredients are not misleading, California Naturel must have competent and reliable evidence supporting its claims about the content and ingredients of the product.

"Fencing-in provisions serve to 'close all roads to the prohibited goal, so that (the FTC's) order may not be by-passed with impunity.'" *Litton Indus., Inc. v. FTC*, 676 F.2d 364, 370

Opinion of the Commission

(9th Cir. 1982) (quoting *FTC v. Ruberoid Co.*, 343 U.S. 470, 473 (1952)). When determining whether an order is reasonably related to the unlawful practices so as to extend the order provisions beyond the specific products for which the challenged claims were made, the Commission considers “(1) the seriousness and deliberateness of the violation; (2) the ease with which the violative claim may be transferred to other products; and (3) whether the respondent has a history of prior violations.” *Stouffer Foods Corp.*, 118 F.T.C. 746, 811 (1994); *see also Telebrands Corp v. FTC.*, 457 F.3d 354, 358 (4th Cir. 2006); *Kraft*, 970 F.2d at 326. “The reasonable relationship analysis operates on a sliding scale – any one factor’s importance varies depending on the extent to which the others are found. . . . All three factors need not be present for a reasonable relationship to exist.” *Telebrands*, 457 F.3d at 358-59.

We first consider the seriousness and deliberateness of the violation. California Naturel’s express representations marketing its sunscreen as an “all natural” product despite containing eight percent dimethicone suggest deliberate action. *See Stouffer Foods*, 118 F.T.C. at 812. Even after the company learned of the FTC’s concerns and added language to its website in 2016 disclosing that dimethicone is a synthetic ingredient, California Naturel continued to claim that Sunscreen SPF 30 is “all natural.” *See ECM BioFilms*, 2015 WL 6384951, at *65 (“awareness of concern” and a “calculated choice” of revised marketing that conveyed “essentially the same” claims suggests deliberateness of conduct); *see also Stouffer Foods*, 118 F.T.C. at 813-14 (awareness of inappropriateness of claim and that wording was ‘a delicate matter’ suggests deliberateness of conduct that supports fencing-in). Next, we examine the ease with which California Naturel’s claims may be transferred from its Sunscreen SPF 30 to other products. There is no question that California Naturel could readily assert similar “all natural” claims to advertise other products it markets. *See FTC v. Colgate-Palmolive*, 380 U.S. 374, 394-95 (1965); *Sears, Roebuck & Co. v. FTC*, 676 F.2d 385, 392, 394-95 (9th Cir. 1982); *POM Wonderful*, 2013 WL 268926, at *64. Finally, although the limited record in this case does not show that California Naturel has a history of prior violations, the other two factors weigh in favor of restraining the company’s conduct in the future. We therefore conclude that the prohibited

Opinion of the Commission

misrepresentations described in Part I of the Final Order bear a reasonable relationship to California Naturel's violations of the FTC Act.

California Naturel argues that an order is unnecessary in light of the addition of the disclaimer on California Naturel's website and because California Naturel allegedly no longer sells Sunscreen SPF 30. For the reasons discussed above, we find California Naturel's disclaimer inadequate to render its "all natural" claim truthful and non-misleading. Moreover, California Naturel has not provided any evidence to support its assertion that it has stopped selling Sunscreen SPF 30. In any event, even if we accept that these sales have ceased, the Commission has authority to enter an order where "the challenged practices have been voluntarily abandoned or revised." *Am. Home Prods. Corp.*, 98 F.T.C. 136, 406 (1981); *Fedders Corp. v. FTC*, 529 F.2d 1398, 1403 (2d Cir. 1976) ("The fact that [the advertiser] may have discontinued the offending practice before the Commission issued the complaint . . . does not bar a cease-and-desist order, where the public interest otherwise requires it."), *aff'd*, 695 F.2d 681 (3d Cir. 1982); *Libbey-Owens-Ford Glass Co. v. FTC*, 352 F.2d 415, 418 (6th Cir. 1965). An order is appropriate when, as is the case here, a respondent could resume sales of the product in question in the future. See *United States v. Bldg. Inspector of Am., Inc.*, 894 F. Supp. 507, 521 (D. Mass. 1995) (finding injunction appropriate when company had ceased operation but "remains a going concern and could resume at any time").

Finally, Parts II-V of the Final Order impose certain record-keeping, notification, and reporting requirements, and properly serve to facilitate administration of the order. See *FTC v. Direct Mktg. Concepts, Inc.*, 648 F. Supp. 2d 202, 213 (D. Mass. 2009) ("Courts have also included monitoring provisions in final orders in FTC cases to ensure compliance with permanent injunctions."); *FTC v. Think Achievement Corp.*, 144 F. Supp. 2d 1013, 1018 (N.D. Ind. 2000) (ordering record retention, notification of changed employment or residence, access to premises, and monitoring); *FTC v. US Sales Corp.*, 785 F. Supp. 737, 753 (N.D. Ill. 1992) ("The order should also require Defendants to report their addresses and places of employment or business, and any subsequent changes in this information to the F.T.C."). Part VI

Opinion of the Commission

provides that the Final Order will terminate in twenty years. *See US Sales Corp.*, 785 F. Supp. at 754 (recognizing that “a sustained period of monitoring by the F.T.C.” may be needed “to ensure adequate compliance”).

IV. Conclusion

For the reasons explained above, we have concluded as a matter of law that California Naturel’s “all natural” claims are false and misleading and violate Sections 5 and 12 of the FTC Act. Accordingly, we issue the accompanying Final Order.

Attachment A

california
NATURAL

OUR STORYPRODUCTSINGREDIENTSBLOGCONTACT

Sunscreen SPF 30

The soft, luxurious and non oily all natural sunscreen is formulated with Organic Oregano, Minerals and Zinc Oxide to protect the skin from both UVA and UVB rays. It is enriched with antioxidants from botanical sources such as Shea Butter, Pomegranate Extract and Marigold Flower Extract to increase sun hydration, and protect it from environmental damage.

- Protects from UVA and UVB rays
- Increases skin hydration
- Enriched with antioxidants

Directions

Apply locally 15 minutes before sun exposure. Reapply immediately after swimming, sweating or towel drying, and at least every 2 hours.

What to Expect

- Texture: medium-weight cream
- Scent: subtle herbal scent
- Sensation on skin: non sticky, non oily, matte finish

Ingredients

Active Ingredients:

Zinc Oxide 20% (Sunscreen)

Inactive Ingredients:

Butyrospermum parkii (shea) butter, caprylic/capric triglycerides, carrageenan, Carthamus tinctorius (safflower) seed oil, cetylalcohol, cetinyl alcohol, cetinyl glucoside, cetyl palmitate, coco-caprylate, emulsione, glucose, glycerine esters, Helianthus annuus (sunflower) seed oil, lactic acid, lauripropylglycerol, lecithin, lysine, methylcellulose, polyglyceryl-3 polyoctadecyl ether, propylene glycol, Pullulan, Rosmarinus officinalis (rosemary) leaf extract, scutellaria root extract, Sea Salt extract (Glacial Oceanic Mineral Water), sorbitan oleate, stearoyl alcohol, Tagetes erecta flower extract, xanthan gum

The FTC requires us to add the following "Ominescence, a synthetic ingredient, is 8% of the sunscreen formula. The remaining 92% are natural products."

\$35 / 70 ml / 2.3 fl. oz.

Quantity

1

2

3

4

ADD TO CART

You might also like...

Lip Balm

\$7

Broad-spectrum protection UVA/UVB

Attachment B



Final Order

FINAL ORDER

The Commission has heard this matter upon the Motion for Summary Decision filed by Complaint Counsel, and upon the briefs and responses filed in support thereof and in opposition thereto. For the reasons stated in the accompanying Opinion of the Commission, the Commission has determined to grant the Motion for Summary Decision. Accordingly,

IT IS ORDERED that the following Order to cease and desist be, and it hereby is, entered:

ORDER**DEFINITIONS**

For purposes of this order, the following definitions shall apply:

- A. Unless otherwise specified, “respondent” shall mean California Naturel, Inc., a corporation, its successors and assigns, and its officers, agents, representatives, and employees.
- B. “Commerce” shall mean as defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. § 44.

I.

IT IS ORDERED that respondent, 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 product must not make any representation, expressly or by implication, including through the use of a product name, trademark, or trade name, about:

- A. whether such product is all natural or 100% natural;
- B. the extent to which such product contains any natural or synthetic ingredient or component;

Final Order

- C. the ingredients or composition of such product; or
- D. the environmental or health benefits of such product,

unless the representation is non-misleading, including that, at the time such representation is made, the respondent possesses and relies upon competent and reliable evidence, which when appropriate based on the expertise of professionals in the relevant area must be competent and reliable scientific evidence, that is sufficient in quality and quantity based on standards generally accepted in the relevant fields when considered in light of the entire body of relevant and reliable evidence, to substantiate that the representation is true. For the purposes of this Provision:

1. “competent and reliable evidence” means tests, analyses, research, studies, or other evidence based on the expertise of professionals in the relevant area, that have been conducted and evaluated in an objective manner by qualified persons, using procedures generally accepted in the profession to yield accurate and reliable results; and
2. “competent and reliable *scientific* evidence” means tests, analyses, research, or studies that have been conducted and evaluated in an objective manner by qualified persons, using procedures generally accepted in the profession to yield accurate and reliable results.

II.

IT IS FURTHER ORDERED that respondent California Naturel, Inc., and its successors and assigns, shall, for five (5) years after the last date of dissemination of any representation covered by this order, maintain and upon request make available to the Federal Trade Commission for inspection and copying:

- A. All advertisements and promotional materials containing the representation;

Final Order

- B. All materials that were relied upon in disseminating the representation; and
- C. All tests, reports, studies, surveys, demonstrations, or other evidence in its possession or control that contradict, qualify, or call into question the representation, or the basis relied upon for the representation, including complaints and other communications with consumers or with governmental or consumer protection organizations.

III.

IT IS FURTHER ORDERED that respondent California Naturel, Inc., and its successors and assigns, shall deliver a copy of this order to all current and future principals, officers, directors, and managers, and to all current and future employees, agents, and representatives having responsibilities with respect to the subject matter of this order, and shall secure from each such person a signed and dated statement acknowledging receipt of the order. Respondent shall deliver this order to current personnel within thirty (30) days after the date of service of this order, and to future personnel within thirty (30) days after the person assumes such position or responsibilities. Respondent must maintain and upon request make available to the Federal Trade Commission for inspection and copying all acknowledgments of receipt of this order obtained pursuant to this Part.

IV.

IT IS FURTHER ORDERED that respondent California Naturel, Inc., and its successors and assigns, shall notify the Commission at least thirty (30) days prior to any change in the corporation that may affect compliance obligations arising under this order, including but not limited to a dissolution, assignment, sale, merger, or other action that would result in the emergence of a successor corporation; the creation or dissolution of a subsidiary, parent, or affiliate that engages in any acts or practices subject to this order; the proposed filing of a bankruptcy petition; or a change in the corporate name or address. *Provided, however*, that, with respect to any proposed change in the corporation about

Final Order

which respondent learns less than thirty (30) days prior to the date such action is to take place, respondent shall notify the Commission as soon as is practicable after obtaining such knowledge. Unless otherwise directed by a representative of the Commission in writing, all notices required by this Part shall be emailed to Debrief@ftc.gov or sent by overnight courier (not the U.S. Postal Service) to: Associate Director for Enforcement, Bureau of Consumer Protection, Federal Trade Commission, 600 Pennsylvania Avenue NW, Washington, DC 20580. The subject line must begin: In re California Naturel, Docket No. 9370.

V.

IT IS FURTHER ORDERED that respondent California Naturel, Inc., and its successors and assigns, within sixty (60) days after the date of service of this order, shall file with the Commission a true and accurate report, in writing, setting forth in detail the manner and form of its own compliance with this order. Within ten (10) days of receipt of written notice from a representative of the Commission, it shall submit additional true and accurate written reports.

VI.

IT IS FURTHER ORDERED that the final and effective date of this Order is the 60th day after this Order is served. This Order will terminate on December 5, 2036, or 20 years from the most recent date that the United States or the Commission files a complaint (with or without an accompanying settlement) in federal court alleging any violation of this Order, whichever comes later; *provided, however*, that the filing of such a complaint will not affect the duration of:

- A. Any Provision in this Order that terminates in less than 20 years;
- B. This Order if such complaint is filed after the Order has terminated pursuant to this Provision. If such complaint is dismissed or a federal court rules that the Respondent did not violate any provision of the Order, and the dismissal or ruling is either not appealed or

Concurring and Dissenting Statement

upheld on appeal, then the Order will terminate according to this Provision as though the complaint had never been filed, except that the Order will not terminate between the date such complaint is filed and the later of the deadline for appealing such dismissal or ruling and the date such dismissal or ruling is upheld on appeal.

By the Commission.

**Statement of Commissioner Maureen K. Ohlhausen
Concurring in Part and Dissenting in Part**

This matter is before us on a motion for summary decision filed by complaint counsel and opposed by California Naturel. When deciding such a motion, we resolve all factual ambiguities and draw all justifiable inferences in the light most favorable to the party opposing the motion. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 157 (1970).

Prior to early 2016, California Naturel expressly marketed its sunscreen as an “all natural” product and stated that it “uses only the purest, most luxurious and effective ingredients found in nature.” The company does not dispute that it made these claims and admits that its sunscreen contained a substantial amount (eight percent) of a synthetic ingredient, dimethicone. Based on these undisputed facts, I agree with my colleagues that those unqualified “all natural” claims were false and misleading in violation of Sections 5 and 12 of the FTC Act at the time they were made. I also agree that the recent addition by California Naturel of a disclaimer on its website does not excuse deception that has already occurred. *See, e.g., Libbey-Owens-Ford Glass Co. v. FTC*, 352 F.2d 415, 418 (6th Cir. 1965). Thus, I would

Concurring and Dissenting Statement

grant summary judgment and impose a remedial order solely on this basis.¹

I do not support, however, the Commission's grant of summary decision regarding the effect of California Naturel's later-added disclaimer and new product stickers. First, that question is not properly before the Commission because it is immaterial to resolving the present motion. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986) ("Factual disputes that are irrelevant or unnecessary will not be counted" in resolving summary-judgment motions.); WRIGHT & MILLER, 10A FED. PRAC. & PROC. CIV. § 2725.1 (4th ed. 2016) ("[A] factual issue that is not necessary to the decision is not material within the meaning of Rule 56(a) and a motion for summary judgment may be granted without regard to whether it is in dispute."). Complaint counsel moved for summary decision on the ground that California Naturel violated Sections 5 and 12 of the FTC Act because "it expressly claimed that its Sunscreen SPF 30 was 'all natural'" and "admitted in a submission to the Commission on May 6, 2016, that its Sunscreen SPF 30 formula contains 8% Dimethicone, a synthetic ingredient." MSD, p. 1. We can—and do—grant summary decision on that basis. It is irrelevant to the pending motion whether California Naturel subsequently disclosed to consumers that the product contains eight percent of a synthetic ingredient.

Further, the question whether California Naturel's subsequent disclaimers and product stickers provided adequate disclosure would be a fact question that the Commission should not resolve on summary decision. Some courts have granted summary judgment in matters where disclaimers were in fine print and distant from the challenged claims. *See, e.g., FTC v. Cyberspace.com, LLC*, 453 F.3d 1196 (2006). But other courts have denied summary judgment where there is a genuinely disputed factual issue about whether disclaimers are prominent and easily visible. *See, e.g., FTC v. Dalbey*, No. 11-cv-1396, 2013 WL 934986 (D. Colo. Mar. 11, 2013). As noted above, the standard for summary decision requires us to resolve all factual

¹ I support the fencing-in relief based on the ease with which California Naturel's claims may be transferred from its Sunscreen SPF 30 to other products.

Concurring and Dissenting Statement

ambiguities and draw all justifiable inferences in the light most favorable to California Naturel, the party opposing the motion. Given this standard and the facts as presented, I believe the question of whether the later-added disclosure and new product stickers adequately qualified the “all natural” claim is a genuinely disputed material fact and thus not appropriate for summary decision in this matter.

For those reasons, I dissent on that portion of the Commission opinion.

Complaint

IN THE MATTER OF

GENERAL MOTORS LLCCONSENT ORDER, ETC. IN REGARD TO ALLEGED VIOLATIONS OF
SECTION 5 OF THE FEDERAL TRADE COMMISSION ACT*Docket No. C-4596; File No. 152 3101**Complaint, December 8, 2016 – Decision, December 8, 2016*

This consent order addresses General Motors, LLC's failure to disclose issues with used motor vehicles. The complaint alleges that the respondent has represented that the used motor vehicles it markets and advertises have been subject to rigorous inspection, including for safety issues, but has failed to disclose that these used motor vehicles are subject to open recalls for safety issues. The complaint further alleges that when the respondent allegedly advertised Certified Pre Owned ("CPO") vehicles that are subject to open recalls for safety issues, it provided no accompanying clear and conspicuous disclosure of this fact. The consent order requires the respondent to notify every consumer who purchased a CPO used motor vehicle from a GM dealership between July 1, 2013 and the date of entry of the Order, and whose vehicle has not had the open recall repaired, that (1) the consumer's vehicle has been recalled for safety issues that have not been repaired, and (2) how to get the vehicle repaired.

Participants

For the *Commission*: Courtney Estep, Peter Lamberton, Michael White, and Evan Zullow.

For the *Respondent*: Lindsey Barns, Lawrence Lines, Lorelei Misajlovich, and James Williams, in-house counsel.

COMPLAINT

The Federal Trade Commission, having reason to believe that General Motors Company ("Respondent" or "GM") has violated provisions of the Federal Trade Commission Act ("FTC Act"), and it appearing to the Commission that this proceeding is in the public interest, alleges:

1. Respondent is a Delaware limited liability company with its principal office or place of business at 300 Renaissance Center,