

Complaint

IN THE MATTER OF

NECTAR BRAND LLC
D/B/A
NECTAR SLEEP; DREAMCLOUD, LLC; AND DREAMCLOUD BRAND
LLC

CONSENT ORDER, ETC. IN REGARD TO ALLEGED VIOLATIONS OF SECTION 5 OF THE FEDERAL
TRADE COMMISSION ACT

Docket No. C-4656; File No. 182 3038
Complaint, August 28, 2018 – Decision, August 28, 2018

This consent order addresses Nectar Brand LLC’s marketing, sale, and distribution of mattresses with claims that the products are assembled in the United States. The complaint alleges that respondent represented that its products are “assembled in the USA,” when, in fact, the respondent’s mattresses are wholly imported. The consent order prohibits respondent from making any country-of-origin claim about a product or service unless the claim is true, not misleading, and respondent has a reasonable basis substantiating the representation.

Participants

For the *Commission*: *Julia Solomon Ensor*.

For the *Respondents*: *Tyler Newby and Idan Netser, Fenwick & West LLP*.

COMPLAINT

The Federal Trade Commission, having reason to believe that Nectar Brand LLC, a limited liability company, also doing business as Nectar Sleep; DreamCloud, LLC; and DreamCloud Brand LLC (“Respondent”), 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 Nectar Brand LLC, also doing business as Nectar Sleep; DreamCloud, LLC; and DreamCloud Brand LLC (“Respondent”) is a California limited liability company with its principal office or place of business at 2000 University Drive, Palo Alto, California 94303.

2. Respondent has advertised, labeled, offered for sale, sold, and distributed products to consumers, including but not limited to mattresses. Respondent advertises these products online, including, but not limited to, on its website, nectarsleep.com.

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.

Complaint

4. Respondent has disseminated or caused to be disseminated advertisements, packaging, and promotional materials for its products, including but not necessarily limited to the attached Exhibit A. This exhibit contains the following statement: “Designed and Assembled in the USA.”

5. In numerous instances, including, but not limited to, the promotional materials shown in Exhibit A, Respondent has represented, expressly or by implication, that its mattresses are assembled in the United States.

6. In fact, Respondent’s mattresses are wholly imported from China, and Respondent performs no assembly operations in the United States.

7. Therefore, Respondent’s express or implied representations that its mattresses are assembled in the United States are false.

COUNT I

(False or Unsubstantiated Representation – Assembled in USA)

8. In connection with the manufacturing, labeling, advertising, promotion, offering for sale, sale, or distribution of its products, Respondent has represented, directly or indirectly, expressly or by implication, that its products, including, but not limited to, mattresses, are assembled in the United States.

9. In fact, certain of Respondent’s products are wholly imported. Therefore, the representation set forth in Paragraph 8 is false or misleading, or was not substantiated at the time the representation was made.

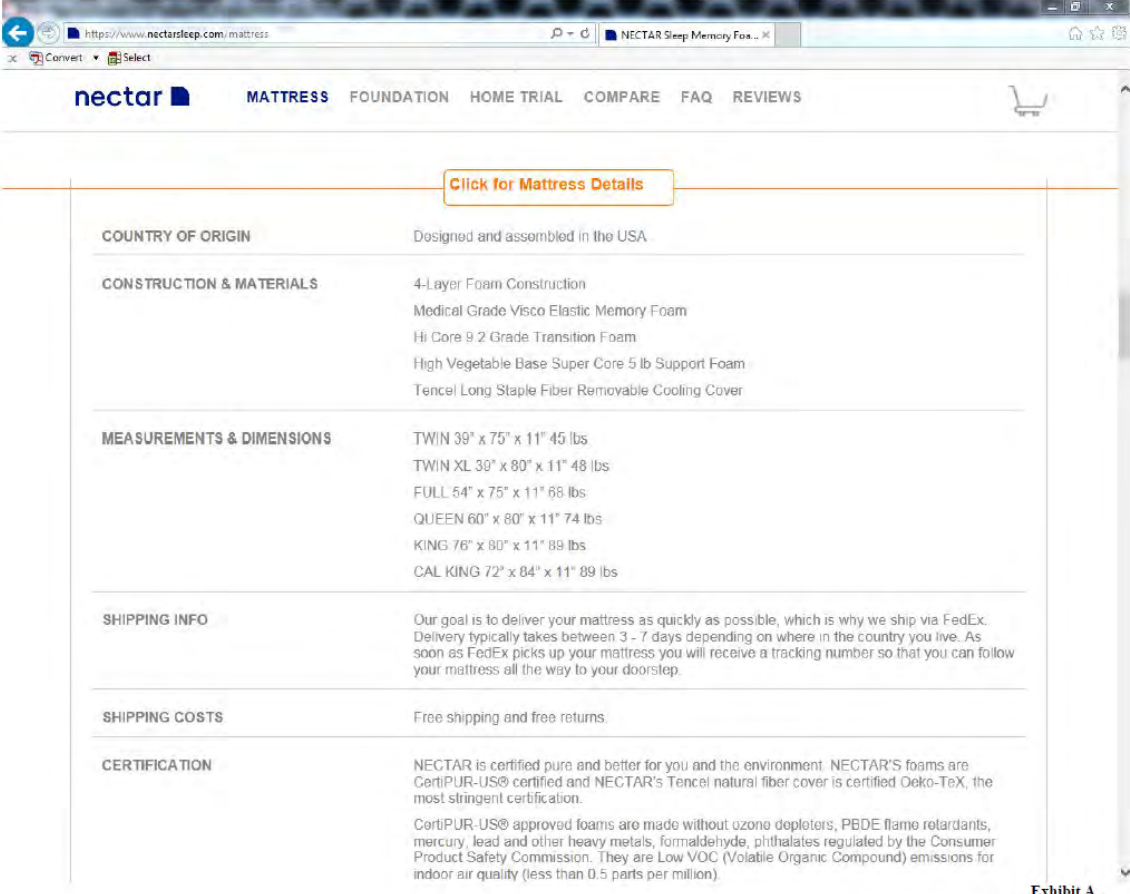
Violations of Section 5

10. 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.

THEREFORE, the Federal Trade Commission this twenty-eighth day of August, 2018, has issued this Complaint against Respondent.

By the Commission, Commissioner Chopra dissenting.

Decision and Order

Exhibit A


The screenshot shows a web browser window with the URL <https://www.nectarleep.com/mattress>. The page features a navigation bar with links: MATTRESS, FOUNDATION, HOME TRIAL, COMPARE, FAQ, and REVIEWS. A shopping cart icon is visible in the top right. Below the navigation bar, there is a section titled "Click for Mattress Details" in an orange box. The main content area is a table with the following sections:

COUNTRY OF ORIGIN	Designed and assembled in the USA.
CONSTRUCTION & MATERIALS	4-Layer Foam Construction Medical Grade Visco Elastic Memory Foam Hi Core 9.2 Grade Transition Foam High Vegetable Base Super Core 5 lb Support Foam Tencel Long Staple Fiber Removable Cooling Cover
MEASUREMENTS & DIMENSIONS	TWIN 39" x 75" x 11" 45 lbs TWIN XL 39" x 80" x 11" 48 lbs FULL 54" x 75" x 11" 68 lbs QUEEN 60" x 80" x 11" 74 lbs KING 76" x 80" x 11" 89 lbs CAL KING 72" x 84" x 11" 89 lbs
SHIPPING INFO	Our goal is to deliver your mattress as quickly as possible, which is why we ship via FedEx. Delivery typically takes between 3 - 7 days depending on where in the country you live. As soon as FedEx picks up your mattress you will receive a tracking number so that you can follow your mattress all the way to your doorstep.
SHIPPING COSTS	Free shipping and free returns.
CERTIFICATION	NECTAR is certified pure and better for you and the environment. NECTAR'S foams are CertiPUR-US® certified and NECTAR's Tencel natural fiber cover is certified Oeko-Tex, the most stringent certification. CertiPUR-US® approved foams are made without ozone depleters, PBDE flame retardants, mercury, lead and other heavy metals, formaldehyde, phthalates regulated by the Consumer Product Safety Commission. They are Low VOC (Volatile Organic Compound) emissions for indoor air quality (less than 0.5 parts per million).

Exhibit A**DECISION**

The Federal Trade Commission ("Commission") initiated an investigation of certain acts and practices of the Respondent named in the caption. The Commission's Bureau of Consumer Protection ("BCP") prepared and furnished to Respondent a draft Complaint. BCP proposed to present the draft Complaint to the Commission for its consideration. If issued by the Commission, the draft Complaint would charge the Respondent with violations of the Federal Trade Commission Act.

Decision and Order

Respondent and BCP thereafter executed an Agreement Containing Consent Order (“Consent Agreement”). The Consent Agreement includes: 1) statements by Respondent that it neither admits nor denies any of the allegations in the Complaint, except as specifically stated in this Decision and Order, and that only for purposes of this action, it admits the facts necessary to establish jurisdiction; and 2) waivers and other provisions as required by the Commission’s Rules.

The Commission considered the matter and determined that it had reason to believe that Respondent has violated the Federal Trade Commission Act, and that a Complaint should issue stating its charges in that respect. The Commission accepted the executed Consent Agreement and placed it on the public record for a period of 30 days for the receipt and consideration of public comments. The Commission duly considered any comments received from interested persons pursuant to Commission Rule 2.34, 16 C.F.R. § 2.34. Now, in further conformity with the procedure prescribed in Commission Rule 2.34, the Commission issues its Complaint, makes the following Findings, and issues the following Order:

Findings

1. The Respondent is Nectar Brand LLC, also doing business as Nectar Sleep; DreamCloud, LLC; and DreamCloud Brand LLC, a California limited liability company, with its principal office or place of business at 2000 University Dr., Palo Alto, CA 94303.
2. The Commission has jurisdiction over the subject matter of this proceeding and over Respondent, and the proceeding is in the public interest.

ORDER

Definitions

For purposes of this Order, the following definitions apply:

- A. “Clear(ly) and conspicuous(ly)” means that a required disclosure is difficult to miss (i.e., easily noticeable) and easily understandable by ordinary consumers, including in all of the following ways:
 1. In any communication that is solely visual or solely audible, the disclosure must be made through the same means through which the communication is presented. In any communication made through both visual and audible means, such as a television advertisement, the disclosure must be presented simultaneously in both the visual and audible portions of the communication even if the representation requiring the disclosure (“triggering representation”) is made through only one means.
 2. A visual disclosure, by its size, contrast, location, the length of time it appears, and other characteristics, must stand out from any accompanying

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text or other visual elements so that it is easily noticed, read, and understood.

3. An audible disclosure, including by telephone or streaming video, must be delivered in a volume, speed, and cadence sufficient for ordinary consumers to easily hear and understand it.
 4. In any communication using an interactive electronic medium, such as the Internet or software, the disclosure must be unavoidable.
 5. On a product label, the disclosure must be presented on the principal display panel.
 6. The disclosure must use diction and syntax understandable to ordinary consumers and must appear in each language in which the triggering representation appears.
 7. The disclosure must comply with these requirements in each medium through which it is received, including all electronic devices and face-to-face communications.
 8. The disclosure must not be contradicted or mitigated by, or inconsistent with, anything else in the communication.
 9. When the representation or sales practice targets a specific audience, such as children, the elderly, or the terminally ill, “ordinary consumers” includes reasonable members of that group.
- B. “Made in the United States” means any representation, express or implied, that a product or service, or a component thereof, is of U.S.-origin, including, but not limited to, a representation that such product or service is “made,” “manufactured,” “built,” or “produced” in the United States, or any other U.S.-origin claim.
- C. “Respondent” means Nectar Brand LLC, also doing business as Nectar Sleep; DreamCloud, LLC; and DreamCloud Brand, LLC, and its successors and assigns.

Provisions**I.****PROHIBITED MISREPRESENTATIONS REGARDING U.S. ORIGIN CLAIMS**

IT IS ORDERED that Respondent, and Respondent’s officers, agents, employees, and attorneys, and all other persons in active concert or participation with any of them, who receive actual notice of this Order, whether acting directly or indirectly, in connection with the manufacturing, labeling, advertising, promotion, offering for sale, sale, or distribution of any

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mattress, mattress foundation, or any other product or service, must not make any representation, expressly or by implication, that a product or service is Made in the United States unless:

- A. The final assembly or processing of the product occurs in the United States, all significant processing that goes into the product occurs in the United States, and all or virtually all ingredients or components of the product are made and sourced in the United States; or
- B. A Clear and Conspicuous qualification appears immediately adjacent to the representation that accurately conveys the extent to which the product contains foreign parts, ingredients or components, and/or processing; or
- C. For a claim that a product is assembled in the United States, the product is last substantially transformed in the United States, the product's principal assembly takes place in the United States, and United States assembly operations are substantial.

II.

SUBSTANTIATION

IT IS FURTHER ORDERED that Respondent, Respondent's officers, agents, servants, employees, and attorneys, and all other persons in active concert or participation with any of them, who receive actual notice of this Order, whether acting directly or indirectly, in connection with promoting or offering for sale any product or service, shall not make any representation, in any manner, expressly or by implication, regarding the country of origin of any product or service unless the representation is true, not misleading, and at the time it is made, Respondent possesses and relies upon a reasonable basis for the representation.

III.

COMPLIANCE REPORTS AND NOTICES

IT IS FURTHER ORDERED that Respondent make timely submissions to the Commission:

- A. One year after the issuance date of this Order, Respondent must submit a compliance report, sworn under penalty of perjury, in which Respondent must:
 - (a) identify the primary physical, postal, and email address and telephone number, as designated points of contact, which representatives of the Commission, may use to communicate with Respondent;
 - (b) identify all of that Respondent's businesses by all of their names, telephone numbers, and physical, postal, email, and Internet addresses;
 - (c) describe the activities of each business, including the goods and services offered, the means of advertising, marketing, and sales; and
 - (d) describe in detail whether and how Respondent is in compliance with each

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Provision of this Order, including a discussion of all of the changes Respondent made to comply with the Order.

- B. Respondent must submit a compliance notice, sworn under penalty of perjury, within 14 days of any change in the following: (a) any designated point of contact; or (b) the structure of any Respondent or any entity that Respondent has any ownership interest in or controls directly or indirectly that may affect compliance obligations arising under this Order, including: creation, merger, sale, or dissolution of the entity or any subsidiary, parent, or affiliate that engages in any acts or practices subject to this Order.
- C. Respondent must submit notice of the filing of any bankruptcy petition, insolvency proceeding, or similar proceeding by or against Respondent within 14 days of its filing.
- D. Any submission to the Commission required by this Order to be sworn under penalty of perjury must be true and accurate and comply with 28 U.S.C. § 1746, such as by concluding: “I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on: _____” and supplying the date, signatory’s full name, title (if applicable), and signature.
- E. Unless otherwise directed by a Commission representative in writing, all submissions to the Commission pursuant to this Order must 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 Nectar Brand LLC.

IV.**RECORDKEEPING**

IT IS FURTHER ORDERED that Respondent must create certain records for 20 years after the issuance date of the Order, and retain each such record for 5 years, unless otherwise specified below. Specifically, Respondent must create and retain the following records:

- A. Accounting records showing the revenues from all goods or services sold, the costs incurred in generating those revenues, and resulting net profit or loss;
- B. Personnel records showing, for each person providing services in relation to any aspect of the Order, whether as an employee or otherwise, that person’s: name; addresses; telephone numbers; job title or position; dates of service; and (if applicable) the reason for termination;

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- C. Copies or records of all consumer complaints and refund requests, whether received directly or indirectly, such as through a third party, and any response;
- D. All records necessary to demonstrate full compliance with each provision of this Order, including all submissions to the Commission;
- E. A copy of each unique advertisement or other marketing material making a representation subject to this Order;
- F. For 5 years from the date of the last dissemination of any representation covered by this Order:
 - 1. All materials that were relied upon in making the representation; and
 - 2. All evidence in Respondent's possession, custody, or control that contradicts, qualifies, or otherwise calls 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.

V.

COMPLIANCE MONITORING

IT IS FURTHER ORDERED that, for the purpose of monitoring Respondent's compliance with this Order:

- A. Within 10 days of receipt of a written request from a representative of the Commission, Respondent must: submit additional compliance reports or other requested information, which must be sworn under penalty of perjury, and produce records for inspection and copying.
- B. For matters concerning this Order, representatives of the Commission are authorized to communicate directly with Respondent. Respondent must permit representatives of the Commission to interview anyone affiliated with Respondent who has agreed to such an interview. The interviewee may have counsel present.
- C. The Commission may use all other lawful means, including posing through its representatives as consumers, suppliers, or other individuals or entities, to Respondent or any individual or entity affiliated with Respondent, without the necessity of identification or prior notice. Nothing in this Order limits the Commission's lawful use of compulsory process, pursuant to Sections 9 and 20 of the FTC Act, 15 U.S.C. §§ 49, 57b-1.

Concurring Statement

VI.**ORDER EFFECTIVE DATES**

IT IS FURTHER ORDERED that this Order is final and effective upon the date of its publication on the Commission’s website (ftc.gov) as a final order. This Order will terminate on August 28, 2038, 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; and
- B. This Order if such complaint is filed after the Order has terminated pursuant to this Provision.

Provided, further, that 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.

By the Commission, Commissioner Chopra dissenting.

**Concurring Statement of Commissioner Rebecca Kelly Slaughter,
In Which Chairman Joe Simons Joins**

When companies falsely claim that their products are made in the U.S.A., they take advantage of consumers who choose to spend their dollars supporting domestic products and the companies who expend resources in order to make the claim proudly and truthfully. Today, the Commission is announcing three enforcement actions¹ targeting companies and an individual

¹ To date, the Commission has initiated [25 enforcement actions](#) arising from misleading U.S.-origin claims, targeting entities that engage in intentional deception or refuse to come into prompt compliance. FTC staff also works extensively with companies to achieve compliance in this area, issuing more than [130 closing letters](#) addressing potential U.S.-origin claims. These letters highlight that where companies make errors or potentially deceptive claims to consumers, Commission staff works with them to quickly come into compliance. In addition to enforcement actions and compliance counseling, the Commission’s program to protect consumers from deceptive U.S.-origin claims involves significant business education efforts. In 1997, the Commission issued an [Enforcement Policy Statement on U.S. Origin Claims](#) that explains the types of U.S.-origin claims that can be made and the

Concurring Statement

who we allege falsely claimed their products were made in the U.S.A. in violation of Section 5 of the FTC Act. In *Patriot Puck*, respondent George Statler III and his companies marketed hockey pucks imported from China as “Made in America” and “The only American Made Hockey Puck!” The *Nectar Sleep* respondents included the statement “Designed and Assembled in the USA” in product descriptions for mattresses wholly imported from China. And in *Sandpiper/PiperGear*, respondents marketed imported backpacks and wallets on websites claiming “Featuring American Made Products” and shipped imported wallets with cards labeled “American Made.” The Commission’s complaints allege that these claims were plainly false and the respondents have all agreed to strong administrative consent orders.

Each of the administrative consent orders prohibits the respondents from making these types of claims in the future² and requires the respondents to engage in recordkeeping and reporting that will assist the FTC in monitoring compliance.³ Any violation of these orders can result in a civil penalty of over \$40,000 *per violation*.⁴ There is evidence that these potential penalties have served as powerful deterrents: to date the FTC has only had cause to initiate one contempt proceeding⁵ against the more than twenty prior respondents in cases involving U.S.-origin claims.

In this area, administrative consent orders securing permanent injunctive relief buttressed by the threat of significant civil penalties have been largely successful in keeping former violators on the straight and narrow and have no doubt served as a warning to others that false claims will be identified and pursued. Therefore, we are voting in support of the relief set forth in the final and proposed administrative orders announced today.

We write separately to highlight the possibility that the FTC can further maximize its enforcement reach, in all areas, through strategic use of additional remedies. For example, in the

substantiation needed to support them. Commission staff has also issued comprehensive [guidance](#), [press releases](#) and [blogs](#) in this area to promote compliance.

2 Specifically, the orders prohibit respondents from making deceptive unqualified U.S.-origin claims about their products and lay out the type of substantiation required to make truthful claims. The orders also govern the manner and type of qualification needed to make a lawful qualified claim regarding U.S.-origin. The orders further prohibit respondents from making any country-of-origin claim about a product or service unless the claim is true, not misleading, and respondents have a reasonable basis substantiating the representation.

3 Each of the orders requires the respondents to file a compliance report within one year after the order becomes final and to notify the Commission within 14 days of certain changes that would affect compliance with the order. Respondents are also required to maintain certain records, including records necessary to demonstrate compliance with the order. The orders also require respondents to submit additional compliance reports when requested by the Commission and to permit the Commission or its representatives to interview respondents’ personnel. The orders remain in effect for 20 years.

4 Outside of specific rules, the FTC does not have authority to seek civil penalties for violations of Section 5 of the FTC Act. The FTC does have authority to seek civil penalties for any violations of its administrative orders. See 15 U.S.C. § 45(l) and 16 C.F.R. § 1.98(d) (2018).

5See <https://www.ftc.gov/news-events/press-releases/2006/06/ftc-alleges-stanley-made-false-made-usa-claims-about-its-tools> (announcing settlement with Stanley Works that imposed a \$205,000 civil penalty for violating prior order regarding U.S.-origin claims).

Concurring Statement

U.S.-origin claim context, there may be cases in which consumers paid a clear premium for a product marketed as “Made in the U.S.A.” or made their purchasing decision in part based on perceived quality, safety, health or environmental benefits tied to a U.S.-origin claim.⁶ In such instances, additional remedies such as monetary relief or notice to consumers may be warranted. Requiring law violators to provide notice to consumers identifying the deceptive claim can help mitigate individual consumer injury—an informed consumer would have the option to seek a refund, or, at the very least, stop using the product.

The Commission has already begun a broad review of whether we are using every available remedy as effectively as possible to fairly and efficiently pursue vigorous enforcement of our consumer protection and competition laws. If we find that there are new or infrequently applied remedies that we should be seeking more often, the Commission will act accordingly—and, where appropriate, signal to the public how we intend to approach enforcement. In our view, a thoughtful review and forward-looking plan is a more effective and efficient use of Commission resources than re-opening and re-litigating the cases before us today.⁷

6 Of the three cases the FTC is announcing today, we note that consideration of additional remedies such as notice could have been of particular value in the *Nectar Sleep* matter, which involved U.S.-origin claims about mattresses. The fact that purchasers of Nectar Sleep mattresses can seek a refund for any reason for 365 days after their original purchase, <https://www.nectarsleep.com/p/returns/>, and that purchasers received mattresses with accurate country-of-origin labels, contributed to our decision to vote in favor of the final *Nectar Sleep* order.

7 It is worth noting that all of the cases announced today began well before the current complement of Commissioners were instated, and therefore before staff could reasonably have been expected to anticipate our particular priorities and views on enforcement. To renegotiate these settlements at this point, after litigation strategy was developed and executed, would require substantial investment of staff time and effort and diversion of resources from other important cases. A forward-looking set of remedy priorities will help staff develop litigation strategy in an efficient way.

Concurring and Dissenting Statement

STATEMENT OF COMMISSIONER ROHIT CHOPRA

Question Presented

Are no-money, no-fault settlements adequate to remedy serious violations of the FTC's "Made in USA" standard?

Summary

- Sellers gain a competitive advantage when they falsely market a product as Made in USA, especially when this claim is closely tied to the development of the product's brand.
- Third-party analysis suggests that Americans are often willing to pay significantly more for American-made goods compared to those made in China. Several of the matters under consideration by the Commission involve Made-in-USA fraud relating to products made in China.
- The Commission should modify its approach to resolving serious Made-in-USA fraud by seeking more tailored remedies that could include restitution, disgorgement, notice, and admissions of wrongdoing, based on the facts and circumstances of each matter.

Analysis and Discussion

The Power of Branding and Made in USA

While brand identity has historically been a major focus in markets for luxury goods, today it plays a key role in all segments of our economy. As advanced manufacturing and global supply chains challenge firms to find new ways to lower operating costs, consumer goods industries (including everything from apparel to packaged goods) have focused intensely on building and cultivating their brands as a way to drive up margins through price and volume enhancements.

Branding is distinct from marketing and advertising. A successful brand is one that creates a clear identity that goes beyond specific product attributes. A brand identity connects with a consumer's values, aspirations, and sense of self.

A Made-in-USA claim can serve as a key element of a product's brand that communicates quality, durability, authenticity, and safety, among other attributes. Not only can it be a signal about specific product attributes but it can also contribute to the development of a brand identity that connotes a set of values, such as fair labor practices, to consumers.

Made-in-USA branding can also be used to fraudulently conceal countries of origin that may cause concerns for consumers. For example, in recent years, regulators have

Concurring and Dissenting Statement

investigated serious health and safety problems with pet food¹ and drywall² imported from China, and the OECD estimates that China is the source of the vast majority of counterfeit goods imported to the US.³ Against this backdrop, slapping a “Made-in-USA” label on a good made abroad can be its own form of counterfeiting, replacing an unpopular attribute with one connoting quality, safety, and authenticity.

In many cases, Americans are actually willing to pay a premium for goods that are made in our country, especially compared to those made in China. A 2012 survey by the Boston Consulting Group shows that more than 80% of Americans express a willingness to pay more for made-in- USA products,⁴ which is consistent with other surveys.⁵

Importantly, however, price premium does not always accurately capture the harm caused by Made-in-USA fraud. Especially in markets for commodity goods where consumers may be particularly price-sensitive, firms may make false claims to distinguish their brand or conceal unpopular countries of origin.

Whatever its purpose, cheating distorts markets in fundamental ways. It rips off Americans who prefer buying domestic goods. It also punishes firms that may bear higher costs to produce goods here, yet must compete on price or branding with firms that cheat. Finally, widespread deception sows doubt⁶ about the veracity of Made-in-USA claims, which may reduce the claim’s value and discourage domestic manufacturing.

1 Food & Drug Admin., Melanine Pet Food Recall of 2007 (May 2007), <https://www.fda.gov/animalveterinary/safetyhealth/recallswithdrawals/ucm129575.htm>

2 Fed. Trade Comm’n, Tests for Defective Drywall (Dec. 2009), <https://www.consumer.ftc.gov/articles/O124-tests-defective-drywall>

3 *Global trade in fake goods worth nearly half a trillion dollars a year*, Org. for Econ. Co-Operation and Dev. (Apr. 18, 2016), <http://www.oecd.org/industry/global-trade-in-fake-goods-worth-nearly-half-a-trillion-doliars-a-year.htm>

4 *Made in America, Again: Understanding the value of ‘Made in the USA’*, The Boston Consulting Group (Nov. 2012) [Hereinafter *Made in America, Again*].

5 See, e.g. *Made in America: Most Americans love the idea of buying a US.-made product instead of an import. But sometimes it’s hard to tell what’s real and what’s not*, CONSUMER REPORTS (May 21, 2015), <https://www.consumerreports.org/cro/magazine/2015/05/made-in-america/index.htm> [hereinafter *Made in America*] (reporting on a national survey finding that 60%+ of Americans would pay a 10% premium for Made-in-USA goods); *Price of patriotism: How much extra are you willing to pay for a product that’s made in America?*, REUTERS (July 18, 2017), <http://fingfx.thomsonreuters.com/gfx/mgs/USA-BUYAMERICAN-POLL/01005017035/index.html> (reporting on a national survey finding that 60%+ of Americans would pay a premium of 5% or more). Of course, surveys reveal only Americans’ *stated* willingness to pay a premium, not their actual buying behavior. But assuming Americans will pay *no* premium runs contrary to the available evidence, and firms’ aggressive Made-in-USA branding shows they clearly see it as advantageous.

6 See *Made in America*, supra note 5 (reporting on a national survey finding that 23% of Americans lack trust in “Made in America” labels).

Concurring and Dissenting Statement

Backpacks, Hockey Pucks, and Mattresses

Today, the Commission is voting on three cases involving Made-in-USA fraud.⁷ The conduct of each of these companies was brazen and deceitful. In my view, each respondent firm harmed both consumers and honest competitors.

In the Sandpiper and Patriot Puck matters, the evidence suggests that the Made-in-USA claim was a critical component of the companies' brand identities. In the Nectar Sleep matter, the false Made-in-USA claim may have been asserted to convey health or safety benefits.

Sandpiper/PiperGear USA: Sandpiper/PiperGear USA ("Sandpiper") built its brand of military- themed backpacks and gear on patriotism. As detailed in the FTC's complaint, the company boasted in its promotional materials about its "US manufacturing," inserted "American Made" labels into products, and included the hashtag "#madeinusa" alongside social media posts.⁸ The company sold thousands of backpacks on American military bases overseas.

In reality, Sandpiper imported the vast majority⁹ of its products from China or Mexico, a fact the firm actively sought to hide through its aggressive Made-in-USA branding.

Patriot Puck: Hockey pucks typically are manufactured to meet certain weight, thickness, and diameter specifications. These are commodity goods. Purchasers largely see competing pucks that boast similar specifications, so brand positioning can be especially salient.

Patriot Puck positioned its brand as the all-American alternative to imported pucks. The company literally wrapped its pucks in the flag, embossing each one with an image of an American flag. To drive home the point, the firm claimed its pucks were "Proudly Made in the USA," "MADE IN AMERICA," "100% Made in the USA!," and "100% American Made!" The firm even claimed it made "The Only American Made Hockey Puck!"¹⁰

In reality, Patriot Puck imported all of its pucks from China.¹¹

That Patriot Puck priced its pucks similarly to other firms illustrates why sticker price premium alone is a poor proxy for the harm caused by Made-in-USA fraud, especially in markets for commodity goods. Hockey is closely associated with international competition, and Patriot Puck's claim to offer the "only" puck made in America was a clear effort to create a brand identity that would distinguish its pucks from the competition. Moreover, by pricing its pucks

7 Claiming falsely that a product is Made in USA violates Section 5 of the FTC Act. Although the FTC brought a Made-in-USA case as early as 1940, Congress amended the FTC Act in 1994 to state explicitly that Made-in-USA labeling must be consistent with FTC decisions and orders. See 15 U.S.C. § 45a.

8 Compl. at 116-7.

9 According to the Complaint, more than 95% of Sandpiper's products are imported as finished goods, while approximately 80% of PiperGear's products are either imported as finished goods or contain significant imported components. *Id.* at 17.

10 Compl. at 19.

11 The Commission has wisely named George Statler III, who operated the company, in its Complaint.

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similarly to its competitors, Patriot Puck led consumers to believe they were getting a great deal on American-made hockey pucks, when in fact they were overpaying for pucks made in China.¹²

Nectar Sleep: Nectar Sleep is a direct-to-consumer online mattress firm founded by Silicon Valley entrepreneurs. According to a CNBC profile of the company, Nectar competes with more than 200 firms to capture a slice of the \$15 billion mattress market.

Nectar mattresses are made in China, which may be a negative attribute for consumers who have health or safety concerns about Chinese-made mattresses.¹³ Perhaps for this reason, the company falsely represented to consumers that its mattresses were assembled in the US.

Nectar's conduct had clear consequences. Competitors who actually made mattresses domestically were undercut, and consumers looking for US-made mattresses - possibly for health or safety reasons - got ripped off. Further, Nectar may continue to profit from the lingering misperception that its mattresses are made in the US.

Addressing Made-in-USA Fraud Going Forward

Most FTC resolutions of Made-in-USA violations have resulted in voluntary compliance measures¹⁴ or cease-and-desist orders. Indeed, none of the three settlements approved today includes monetary relief, notice to consumers, or any admission of wrongdoing.

Going forward, in cases involving egregious and undisputed Made-in-USA fraud, I believe there should be a strong presumption against simple cease-and-desist orders. Instead, the Commission should consider remedies tailored to the individual circumstances- of the fraud, including redress and notice for consumers, disgorgement of ill-gotten gains, opt-in return programs, or admissions of wrongdoing.

Some general principles can inform our approach to tailoring remedies. For firms that built their core brand identity on a lie, full redress or the opportunity for opt-in refunds may be appropriate, given the centrality of the false claim and its widespread dissemination.¹⁵ When

12 Surveys show that Americans will pay a premium for US-made sporting goods relative to those made in China, meaning they effectively discount goods made in China. *Made in America, Again* at 1. And Americans may be particularly averse to buying patriotic-themed goods made in China. See, e.g., Matt Brooks, *US Olympic uniforms spark fury in Congress*, WASH. POST (July 13, 2012), <https://www.washingtonpost.com/blogs/2012-heaw-medal-london/post/us-olympic-uniforms-spark-fury-in-congress/2012/07/13/gJQABvJmhWblog.html?utmtenn=.3d96e39lfd>

13 Such concerns may be tied to recent recalls of Chinese-made mattresses and bedding, and may be partially reflected in the premium Americans are willing to pay for US-made furniture over furniture made in China. See *Made in America, Again* at 6. In fact, numerous consumer reviews specifically focus on comparing US-made mattresses.

14 Of course, when the violation is unintentional or technical in nature, less formal actions can be helpful, especially if the misstatement is quickly corrected. My comments are limited to matters where the violation was egregious.

15 Particularly for misbranded products, the FTC could likely show that a firm's Made-in-USA misrepresentations were widely disseminated, that they were of the kind usually relied on by reasonable persons, and that consumers purchased the product, thus making gross sales an appropriate starting point for calculating restitution. See *FTC v.*

Concurring and Dissenting Statement

refunds are difficult to administer or the firm lacks ability to pay, the Commission should at least seek notification to consumers or corrective advertising¹⁶ - especially in markets where country of origin bears on health or safety. Finally, if firms' misrepresentations are undisputed and clear, the Commission should strongly consider seeking admissions - a form of accountability that is explicitly contemplated by our rules of practice.¹⁷

Admissions may have particular value in cases involving Made-in-USA fraud. In these cases, clear and undisputed facts may give the agency a strong basis to demand an admission from a firm. And if that firm lacks funds or records for consumer redress or disgorgement, admissions can be a powerful tool to give consumers, competitors, and counterparties tools to remedy harm, even when we cannot.¹⁸ Moreover, because the Commission is generally limited to seeking equitable rather than punitive remedies for first-time offenses, seeking admissions is among the most effective ways we can deter lawbreaking and change the cost-benefit calculus of deception.

I hope that the Commission will reexamine its approach to tackling Made-in-USA fraud. I believe we should seek more tailored remedies that vindicate the important goals of the program and send the message that Made-in-USA fraud will not be tolerated.

Conclusion

Nectar Sleep, Sandpiper, and Patriot Puck clearly violated the law, allowing them to enrich themselves and harm their customers and competitors. Especially given widespread interest in buying American products, we should do more to protect the authenticity of Made-in-USA claims. I am concerned that no-money, no-fault settlements send an ambiguous message about our commitment to protecting consumers and domestic manufacturers from Made-in-USA fraud.

Going forward, I hope the Commission can better protect against harms to competition and consumers by seeking monetary relief, notice, admissions, and other tailored remedies. Every firm needs to understand that products labeled "Made in USA" should be made in the USA, and that fake branding will come with real consequences.

Kuykendall, 371 F.3d 745, 764 (10th Cir. 2004) (holding, in a contempt action, that after the Commission establishes a presumption of reliance, "the district court may use the Defendants' gross receipts as a starting point"). Importantly, if there was deception in the sale, defendants generally do not receive credit for the value of the product sold. *See* *FTC v. Figgie Int'l, Inc.*, 994 F.2d 595, 606-07 (9th Cir. 1993) ("The fraud in the selling, not the value of the thing sold, is what entitles consumers" to full redress.).

¹⁶ Corrective advertising can be important to preventing firms from continuing to profit from deception. As explained by then-Chairman Pitofsky after a corrective advertising order was upheld by the D.C. Circuit, "It is important for advertisers to know that it is not enough just to discontinue a deceptive ad, and that they can be held responsible for the lingering misimpressions created by deceptive advertising." *See* Press Release, Fed. Trade Comm'n, Appeals Court Upholds FTC Ruling; Doan's Must Include Corrective Message in Future Advertising and Labeling (Aug. 21, 2000), <https://www.ftc.gov/news-events/press-releases/2000/08/appeals-court-upholds-ftc-ruling-doans-must-include-corrective>.

¹⁷ *See* 16 C.F.R. § 2.32.

¹⁸ For example, a factual admission may have a preclusive effect in a Lanham Act claim by a competitor.

Analysis to Aid Public Comment

ANALYSIS OF CONSENT ORDER TO AID PUBLIC COMMENT

The Federal Trade Commission (“FTC” or “Commission”) has accepted, subject to final approval, an agreement containing a consent order from Nectar Brand LLC, also d/b/a Nectar Sleep; Dreamcloud, LLC; and Dreamcloud Brand LLC (“respondent”).

The proposed consent order has been placed on the public record for thirty (30) days for receipt of comments by interested persons. Comments received during this period will become part of the public record. After thirty (30) days, the Commission will again review the agreement and the comments received, and will decide whether it should withdraw from the agreement or make final the agreement’s proposed order.

This matter involves respondent’s marketing, sale, and distribution of mattresses with claims that the products are assembled in the United States.

According to the FTC’s complaint, respondent represented that its products are “assembled in the USA.” In fact, the respondent’s mattresses are wholly imported. Therefore, this representation was false or misleading. Based on the foregoing, the complaint alleges that respondent engaged in deceptive acts or practices in violation of Section 5(a) of the FTC Act.

The proposed consent order contains provisions designed to prevent respondent from engaging in similar acts and practices in the future. Consistent with the FTC’s Enforcement Policy Statement on U.S. Origin Claims, Part I prohibits respondent from making U.S.-origin claims for their products unless either: (1) the final assembly or processing of the product occurs in the United States, all significant processing that goes into the product occurs in the United States, and all or virtually all ingredients or components of the product are made and sourced in the United States; (2) a clear and conspicuous qualification appears immediately adjacent to the representation that accurately conveys the extent to which the product contains foreign parts, ingredients or components, and/or processing; or (3) for a claim that a product is assembled in the United States, the product is last substantially transformed in the United States, the product’s principal assembly takes place in the United States, and United States assembly operations are substantial.

Part II prohibits respondent from making any country-of-origin claim about a product or service unless the claim is true, not misleading, and respondent has a reasonable basis substantiating the representation.

Parts III through V are reporting and compliance provisions. Part III requires the filing of compliance reports within one year after the order becomes final and within 14 days of any change that would affect compliance with the order. Part IV requires respondent to maintain certain records, including records necessary to demonstrate compliance with the order. Part V requires respondent to submit additional compliance reports when requested by the Commission and to permit the Commission or its representatives to interview respondent’s personnel.

Finally, Part VI is a “sunset” provision, terminating the order after twenty (20) years, with certain exceptions.

Analysis to Aid Public Comment

The purpose of this analysis is to aid public comment on the proposed order. It is not intended to constitute an official interpretation of the proposed order or to modify its terms in any way.

Complaint

IN THE MATTER OF

BLU PRODUCTS, INC.**AND****SAMUEL OHEV-ZION**CONSENT ORDER, ETC. IN REGARD TO ALLEGED VIOLATIONS OF SECTION 5 OF THE FEDERAL
TRADE COMMISSION ACT*Docket No. C-4657; File No. 172 3025**Complaint, September 6, 2018 – Decision, September 6, 2018*

This consent order addresses BLU Products, Inc.’s representations regarding consumer privacy and data security. The complaint alleges that Respondents privacy policy represented that they limit the disclosure of users’ information to third-party service providers only to the extent necessary to perform their services or functions on behalf of BLU while, contrary to the privacy policy, personal information from BLU devices sold by Respondents was transmitted to ADUPS that was not needed to perform its services or functions on behalf of BLU. The complaint further alleges that Respondents did not implement appropriate physical, electronic and managerial security procedures. The consent order prohibits Respondents from misrepresenting: (1) the extent to which they collect, use, share, or disclose any personal information; (2) the extent to which consumers may exercise control over the collection, use, or disclosure of personal information; and (3) the extent to which the implement physical, electronic, and managerial security procedures to protect personal information.

Participants

For the *Commission*: *Jah-Juin “Jared” Ho* and *Ryan Mehm*.

For the *Respondents*: *Bernard Egozi, Egozi & Bennett, P.A.*

COMPLAINT

The Federal Trade Commission (“Commission”), having reason to believe that BLU Products, Inc., a corporation, and Samuel Ohev-Zion, individually and as an owner and President of BLU Products, Inc. (collectively “Respondents”), have 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 BLU Products, Inc. (“BLU”) is a Florida corporation with its principal office or place of business at 10814 NW 33rd St., Building 100, Doral, Florida 33172.

2. Respondent Samuel Ohev-Zion is a co-owner and the President and CEO of BLU. Individually or in concert with others, Mr. Ohev-Zion controlled or had authority to control, or participated in the acts and practices alleged in this complaint. His principal office or place of business is the same as that of BLU.

3. BLU sells mobile devices to consumers through a number of retailers such as Amazon, Walmart, and Best Buy. To date, Respondents claim to have sold over 50 million