

Complaint

IN THE MATTER OF

**SUNDAY RILEY MODERN SKINCARE, LLC,
AND
SUNDAY RILEY**CONSENT ORDER, ETC. IN REGARD TO ALLEGED VIOLATIONS OF SECTION 5 OF THE FEDERAL
TRADE COMMISSION ACT*Docket No. C-4729; File No. 192 3008**Complaint, November 6, 2020 – Decision, November 6, 2020*

This consent order addresses Sunday Riley Modern Skincare, LLC's marketing of their Sunday Riley brand cosmetic products. The complaint alleges that the respondents violated Section 5(a) of the Federal Trade Commission Act by misrepresenting that certain reviews of Sunday Riley brand products on the Sephora website reflected the independent experiences or opinions of impartial ordinary users of the products, when they were written by Ms. Riley and her employees. The complaint further alleges that the respondents deceptively failed to disclose that certain online consumer reviews were written by Ms. Riley or her employees. The consent order prohibits the respondents, in connection with the sale of any product, from misrepresenting the status of any endorser or person providing a review of the product, including misrepresenting that the endorser or reviewer is an independent or ordinary user of the product.

Participants

For the *Commission*: *Michael Ostheimer*.

For the *Respondents*: *Behnam Dayanim, Charles A. Patrizia, and Noah N. Simmons, Paul Hastings*.

COMPLAINT

The Federal Trade Commission, having reason to believe that Sunday Riley Modern Skincare, LLC, a limited liability company, and Sunday Riley, individually and as an officer of Sunday Riley Modern Skincare, LLC (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 Sunday Riley Modern Skincare, LLC ("Sunday Riley Skincare") is a Texas limited liability company with its principal office or place of business at 4444 Westheimer Road, Suite G305, Houston, Texas 77027-4455.

2. Respondent Sunday Riley is the Chief Executive Officer of Sunday Riley Skincare. Individually or in concert with others, she controlled or had the authority to control or participated in the acts and practices of Sunday Riley Skincare, including the acts and practices alleged in this complaint. Her principal office or place of business is the same as that of Sunday Riley Skincare.

Complaint

3. Respondents have manufactured, advertised, labeled, offered for sale, sold, and distributed Sunday Riley brand cosmetic products to consumers, including Luna Sleeping Night Oil, Good Genes All-In-One Lactic Acid Treatment, Blue Moon Tranquility Cleansing Balm, Start Over Active Eye Gel Cream, Bionic Anti-Aging Cream, C.E.O. Rapid Flash Brightening Serum, Effortless Breathable Tinted Primer, Tidal Brightening Facial Cream, Power Couple Duo: Total Transformation Kit, Martian Mattifying Melting Water-Gel Toner, U.F.O. Ultra-Clarifying Face Oil, Saturn Sulfur Acne Treatment Mask, and the Space Race Kit.

4. The acts and practices of Respondents alleged in this complaint have been in or affecting commerce, as “commerce” is defined in Section 4 of the Federal Trade Commission Act.

Course of Conduct

5. Respondents have sold their Sunday Riley brand cosmetic products through Sephora, a multinational chain of personal care and beauty stores.

6. Sunday Riley brand cosmetic products sold through Sephora range in price from \$22 for a 0.5-ounce jar of Tidal Brightening Facial Cream to \$158 for a 1.7-ounce bottle of Good Genes All-In-One Lactic Acid Treatment.

7. Sephora provides consumers the opportunity to leave customer reviews of products sold on its website, www.sephora.com. Reviews provide a forum for sharing authentic feedback about products.

8. On multiple occasions between November 2015 and August 2017, Sunday Riley Skincare managers, including Respondent Sunday Riley, posted reviews of Sunday Riley brand cosmetic products on the Sephora website using fake accounts created just for that purpose or requested that other employees do so.

9. When Sephora removed fake reviews written by Sunday Riley Skincare employees, Sunday Riley Skincare employees suspected this was because Sephora recognized the reviews as coming from Sunday Riley Skincare’s IP address. In response, Sunday Riley Skincare obtained, in the words of one manager, “an Express VPN account [to] ... allow us to hide our IP address and location when we write reviews.” A VPN (Virtual Private Network) is a service that lets users access the Internet privately by routing their connections through a server and hiding their online actions.

10. Calls for employees to write reviews were associated with, but not limited to, the launches of new products. In July 2016, Respondent Sunday Riley wrote to her staff:

I would like everyone to create 3 accounts on Sephora.com, registered as a different identities.

This is how you do it:

Complaint

1. Create a new persona. Choose their name, city, skin type.
2. Setup a new email on gmail
3. Before going onto Sephora.com, clear your cookie history EACH TIME ...
4. Connect to the internet ONLY using the VPN. Make sure to choose a city of origin that goes along with where your character lives. ...
5. Leave a review – make sure to NOT compare the product to other products, to not use foul language, and to be very enthusiastic without looking like a plant. Always leave 5 stars.
6. Review a few other products as well – no skincare. Only review makeup, color, hair.
7. Leave a review for a different product every other day so you build up history. You can also use this identity on Beauty Board.
8. You will need to clear cookies and use the VPN every time, or your account will be flagged.
9. Focus on Martian, UFO, Tidal, Power Couple, Good Genes, Luna.

The other thing, if you see a negative review – DISLIKE it. After enough dislikes, it is removed. This directly translates to sales!!

Tidal and Good Genes are 4.2 and I would like to see them at 4.8+. UFO and Martian are at 4.9 – let's keep it that way!

11. In December 2016, the Sunday Riley Skincare Account Manager responsible for Sephora wrote to other managers and employees:

Now that CEO is up, we need to make sure the reviews for clients stay positive.

I think someone created a profile yesterday and already wrote a review, only thing is it was a little pre-mature as the product only launched yesterday and wouldn't have arrived same day. **Credibility is key to the reviews!**

If everyone could write *at least* 3 reviews for CEO between Friday and next Tuesday.

12. In August 2017, the Sunday Riley Skincare Account Manager responsible for Sephora wrote to other managers and employees:

Now that Saturn is up and Space Race coming up next week, we need to make sure the reviews for clients stay positive and help generate and [sic] confidence in the products.

Credibility is key to the reviews!

Complaint

If everyone could write *at least* 3 reviews for Saturn over the next week, and some for Space Race the week after. I would encourage you to create profiles ASAP and write a couple reviews on a makeup, hair or nail product to build a profile history. Please make sure to follow the guidelines for VPN (see below) as this is essential so the reviews don't get traced back to our IP address.

When reviewing Saturn please address things like how cooling it felt, the green color, the non-drying mask effect, radiance boosting, got rid of your acne after a couple uses. The biggest points of difference for this mask and other acne masks are how this mask increases radiance and doesn't dry out the skin like all other acne masks do. It helps to make yourself seem relatable – like you know how hard acne is and you've tried everything, and this one actually works or mention things like yes, it's a little more expensive, but works incredible [sic] well compared to the cheaper masks out there. If you need any help with things to come up with to say, feel to ask myself, Sunday, or Addison. As reviews come in, read them too. If you notice someone saying things like I didn't like "x" about it, write a review that says the opposite. The power of reviews is mighty, people look to what others are saying to persuade them and answer potential questions they have.

13. In April 2018, Sunday Riley Skincare managers asked interns to create fake Sephora accounts in order to write reviews of Sunday Riley Skincare products, which they did.

Count I**False or Misleading Endorsement Claims**

14. Through the means described in Paragraphs 8 through 13, Respondents have represented, directly or indirectly, expressly or by implication, that certain reviews of Sunday Riley brand products on the Sephora website reflected the independent experiences or opinions of impartial ordinary users of the products.

15. In fact, numerous reviews of Sunday Riley brand products on the Sephora website did not reflect the independent experiences or opinions of impartial ordinary users of the products because they were written by Sunday Riley and her employees. Therefore, the representations set forth in Paragraph 14 are false or misleading.

Count II**Deceptive Failure to Disclose Material Connections with Endorsers**

16. Through the means described in Paragraphs 8 through 13, Respondents have represented, directly or indirectly, expressly or by implication, that certain reviews of Sunday

Decision and Order

Riley brand products on the Sephora website reflected the experiences or opinions of users of the products.

17. In numerous instances in which Respondents made the representation set forth in Paragraph 16, they failed to disclose that the online consumer reviews were written by Sunday Riley or her employees. This fact would be material to consumers in evaluating the reviews of Sunday Riley brand products in connection with a purchase or use decision.

19. Respondents' failure to disclose the material information described in Paragraph 17, in light of the representations made in Paragraph 16, is a deceptive act or practice.

Violations of Section 5

21. The acts and practices of Respondents 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 sixth day of November 2020, has issued this Complaint against Respondents.

By the Commission, Commissioners Chopra and Slaughter dissenting.

DECISION

The Federal Trade Commission ("Commission") initiated an investigation of certain acts and practices of the Respondents named in the caption. The Commission's Bureau of Consumer Protection ("BCP") prepared and furnished to Respondents 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 Respondents with violations of the Federal Trade Commission Act.

Respondents and BCP thereafter executed an Agreement Containing Consent Order ("Consent Agreement"). The Consent Agreement includes: 1) statements by Respondents that they neither admit nor deny any of the allegations in the Complaint, except as specifically stated in this Decision and Order, and that only for purposes of this action, they admit 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 Respondents have violated the Federal Trade Commission Act, and that a Complaint should issue stating its charges in that respect. The Commission accepted the executed Consent

Decision and Order

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 Section 2.34 of its Rules, 16 C.F.R. § 2.34. Now, in further conformity with the procedure prescribed in Rule 2.34, the Commission issues its Complaint, makes the following Findings, and issues the following Order:

Findings

1. The Respondents are:
 - a. Respondent Sunday Riley Modern Skincare, LLC, a Texas limited liability company with its principal office or place of business at 4444 Westheimer Road, Suite G305, Houston, Texas 77027-4455.
 - b. Respondent Sunday Riley, an officer of Corporate Respondent, Sunday Riley Modern Skincare, LLC. Individually or in concert with others, she formulates, directs, or controls the policies, acts, or practices of Sunday Riley Modern Skincare, LLC. Her principal office or place of business is the same as that of Sunday Riley Modern Skincare, LLC.
2. The Commission has jurisdiction over the subject matter of this proceeding and over the Respondents, and the proceeding is in the public interest.

ORDER**Definitions**

For purposes of this Order, the following definitions apply:

- A. “Clearly and Conspicuously” 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 text or other visual elements so that it is easily noticed, read, and understood.

Decision and Order

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. The disclosure must use diction and syntax understandable to ordinary consumers and must appear in each language in which the triggering representation appears.
 6. The disclosure must comply with these requirements in each medium through which it is received, including all electronic devices and face-to-face communications.
 7. The disclosure must not be contradicted or mitigated by, or inconsistent with, anything else in the communication.
 8. 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. “Close Proximity” means that the disclosure is very near the triggering representation. For example, a disclosure made through a hyperlink, pop-up, interstitial, or other similar technique is not in close proximity to the triggering representation.
- C. “Respondents” means the Corporate Respondent and the Individual Respondent, individually, collectively, or in any combination.
1. “Corporate Respondent” means Sunday Riley Modern Skincare, LLC, a limited liability company, and its successors and assigns.
 2. “Individual Respondent” means Sunday Riley.
- D. “Unexpected Material Connection” means any relationship that might materially affect the weight or credibility of a testimonial or endorsement and that would not reasonably be expected by consumers.

Provisions**I. Prohibited Representations Regarding Endorsements**

IT IS ORDERED that Respondents, and Respondents’ 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

Decision and Order

advertising, promotion, offering for sale, or sale of any product must not make any misrepresentation, expressly or by implication, about the status of any endorser or person providing a review of the product, including a misrepresentation that the endorser or reviewer is an independent or ordinary user of the product.

II. Required Disclosure of Material Connections

IT IS FURTHER ORDERED that Respondents, and Respondents' 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 advertising, promotion, offering for sale, or sale of any product must not make any representation, expressly or by implication, about any consumer or other endorser of such product without disclosing, Clearly and Conspicuously, and in Close Proximity to that representation, any Unexpected Material Connection between such endorser and (1) any Respondent; or (2) any other individual or entity affiliated with the product.

III. Notification of Disclosure Responsibilities

IT IS FURTHER ORDERED that Respondents provide each employee, agent, and representative with a clear statement of his or her responsibilities to disclose clearly and conspicuously and in close proximity to any endorsement in any online review, social media posting, or other communication endorsing any Respondent's product, the employee's, agent's, or representative's connection to the product, and obtaining from each such recipient a signed and dated statement acknowledging receipt of that statement and expressly agreeing to comply with it. Delivery and acknowledgement must occur within 10 days after the effective date of this Order for current employees, agents, and representatives. For all others, delivery and acknowledgement must occur before they assume their responsibilities.

IV. Acknowledgments of the Order

IT IS FURTHER ORDERED that Respondents obtain acknowledgments of receipt of this Order:

- A. Each Respondent, within 10 days after the effective date of this Order, must submit to the Commission an acknowledgment of receipt of this Order sworn under penalty of perjury.
- B. Individual Respondent, for any business that such Respondent, individually or collectively with any other Respondent, is the majority owner or controls directly or indirectly, and Corporate Respondent must deliver a copy of this Order to: (1) all principals, officers, directors, and LLC managers and members; (2) all employees having managerial responsibilities for conduct related to the subject matter of the Order and all agents and representatives who participate in conduct related to the subject matter of the Order; and (3) any business entity resulting from any change in structure as set forth in the Provision titled Compliance Reports and Notices. Delivery must occur within 10 days after the effective date

Decision and Order

of this Order for current personnel. For all others, delivery must occur before they assume their responsibilities.

- C. From each individual or entity to which a Respondent delivered a copy of this Order, that Respondent must obtain, within 30 days, a signed and dated acknowledgment of receipt of this Order.

V. Compliance Reports and Notices

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

- A. One year after the issuance date of this Order, each Respondent must submit a compliance report, sworn under penalty of perjury, in which:
1. Each 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 the involvement of any other Respondent (which Individual Respondents must describe if they know or should know due to their own involvement); (d) describe in detail whether and how that Respondent is in compliance with each Provision of this Order, including a discussion of all of the changes the Respondent made to comply with the Order; and (e) provide a copy of each Acknowledgment of the Order obtained pursuant to this Order, unless previously submitted to the Commission.
 2. Additionally, Individual Respondent must: (a) identify all her telephone numbers and all her physical, postal, email and Internet addresses, including all residences; (b) identify all her business activities, including any business for which such Respondent performs services whether as an employee or otherwise and any entity in which such Respondent has any ownership interest; and (c) describe in detail such Respondent's involvement in each such business activity, including title, role, responsibilities, participation, authority, control, and any ownership.
- B. Each Respondent must submit a compliance notice, sworn under penalty of perjury, within 14 days of any change in the following:
1. Each Respondent must submit notice of any change in: (a) any designated point of contact; or (b) the structure of any Corporate Respondent or any entity that Respondent has any ownership interest in or controls directly or

Decision and Order

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.

2. Additionally, Individual Respondent must submit notice of any change in:
(a) name, including alias or fictitious name, or residence address; or (b) title or role in any business activity, including (i) any business for which such Respondent performs services whether as an employee or otherwise and (ii) any entity in which such Respondent has any ownership interest and over which such Respondent has direct or indirect control. For each such business activity, also identify its name, physical address, and any Internet address.
- C. Each Respondent must submit notice of the filing of any bankruptcy petition, insolvency proceeding, or similar proceeding by or against such 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, D.C. 20580. The subject line must begin: In re *Sunday Riley Modern Skincare, LLC*.

VI. Recordkeeping

IT IS FURTHER ORDERED that Respondents 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, Corporate Respondent and Individual Respondent, for any business that such Respondent, individually or collectively with any other Respondent, is a majority owner or controls directly or indirectly, 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;

Decision and Order

addresses; telephone numbers; job title or position; dates of service; and (if applicable) the reason for termination;

- C. copies or records of all consumer or other complaints relating to the independence or veracity of any product reviewer or endorser or the disclosure of Unexpected Material Connections by any endorser, whether received directly or indirectly, such as through a third party, and any response;
- E. all records necessary to demonstrate full compliance with each provision of this Order, including all submissions to the Commission;
- F. a copy of each unique advertisement or other marketing material, including product reviews and social media endorsements, making a representation subject to this Order; and
- G. for 5 years from the date created or received, all records, whether prepared by or on behalf of Respondents, that tend to show any lack of compliance by Respondents with this Order.

VII. Compliance Monitoring

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

- A. Within 10 days of receipt of a written request from a representative of the Commission, each 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 each Respondent. Respondents must permit representatives of the Commission to interview anyone affiliated with any 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 Respondents or any individual or entity affiliated with Respondents, 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.
- D. Upon written request from a representative of the Commission, any consumer reporting agency must furnish consumer reports concerning the Individual Respondent, pursuant to Section 604(2) of the Fair Credit Reporting Act, 15 U.S.C. § 1681b(a)(2).

Statement of the Commission

VIII. 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 November 6, 2040, 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's application to any Respondent that is not named as a defendant in such complaint; and
- C. 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, Commissioners Chopra and Slaughter dissenting.

STATEMENT OF CHAIRMAN JOSEPH J. SIMONS AND COMMISSIONERS NOAH JOSHUA PHILLIPS AND CHRISTINE S. WILSON

Today we announce finalization of a consent agreement against Sunday Riley Modern Skincare and its owner, Ms. Sunday Riley. This case is one of several recent FTC enforcement actions challenging fake or deceptive online reviews or endorsements for products and services.¹ These and similar cases seek to ensure that false and deceptive information is removed from the marketplace, enabling consumers to make informed purchasing decisions based on truthful and accurate information. In this case, the Commission's complaint alleges that Ms. Riley and her company polluted the online marketplace by writing and publishing fake positive reviews for

¹ *FTC v. Devumi, LLC*, No. 9: 19-cv-81419-RKA (S.D. Fla. 2019), <https://www.ftc.gov/enforcement/cases-proceedings/182-3066/devumi-llc>; *FTC v. Teami, LLC*, No. 8:20-cv-518-VMC-TGW(M.D. Fla. 2020), <https://www.ftc.gov/enforcement/cases-proceedings/182-3174/teami-llc>.

Statement of the Commission

Sunday Riley Modern Skincare products - conduct that would amount to clear violations of the FTC Act. The Commission's order holds Ms. Riley personally liable, prohibits both Ms. Riley and Sunday Riley Modern Skincare from making future misrepresentations (including through fake reviews), and requires them to instruct employees and agents about their legal responsibilities. Each violation of the order could result in a civil penalty of up to \$42,530. There is no reason to believe that the Commission's order will not protect consumers from further misconduct or that the potential for civil penalties will not deter future violations.

Every case presents unique circumstances, and there are many factors that must be considered in determining what constitutes an appropriate settlement. The primary factor is the law. For example, to obtain monetary relief, the Commission must have a viable legal basis to demonstrate consumer injury or ill-gotten gains from the alleged violations. In some cases, such as frauds where the consumer receives no value, this calculation may be obvious. In others, including *Sunday Riley*, a legally defensible calculation of ill-gotten gains may be difficult. In such cases, the expenditure of resources needed to develop an adequate evidentiary basis reasonably to approximate ill-gotten gains may substantially outweigh any benefits to consumers and the market. We believe the Commission's order strikes the right balance.

The relief obtained in this case is consequential and will provide both specific and general deterrence. The administrative order binds Sunday Riley and its CEO. It constrains their future behavior by imposing limitations on their conduct, with the threat of civil penalties for violations. When evaluating relief we also must consider the cost and effect of the other sanctions imposed in the context of an enforcement action, such as the costs and constraints of complying with the injunction; the fencing in of otherwise legal conduct; the reputational effect of the order; the threat of follow-on actions by shareholders, private plaintiffs and other regulators; and other collateral consequences, such as the effect on relationships with business partners, vendors, investors, and regulators. All of these non-monetary sanctions can have substantial deterrent effect on violative behavior. Our dissenting colleagues focus on the lack of monetary relief, dismissing the efficacy both of injunctive relief and the naming of the CEO in this matter. This latter position is particularly curious given that, in other matters, they touted naming CEOs as the *sine qua non* for accountability.² This action sends a clear message to other companies that the FTC will not tolerate fake reviews, and underscores the applicable legal standards to follow to avoid running afoul of the law.³

2 See, e.g., Dissenting Statement of Commissioner Rohit Chopra, In the Matter of Facebook (July 2019), https://www.ftc.gov/system/files/documents/public_statements/1536911/chopra_dissenting_statement_on_facebook_7-24-19.pdf; Dissenting Statement of Commissioner Rebecca Kelly Slaughter, In the Matter of Facebook (July 2019), https://www.ftc.gov/system/files/documents/public_statements/1536918/182_3109_slaughter_statement_on_facebook_7-24-19.pdf; Joint Statement of Commissioner Rohit Chopra and Commissioner Rebecca Kelly Slaughter, In the Matter of Musical.ly (now known as Tik Tok), https://www.ftc.gov/system/files/documents/public_statements/1463167/chopra_and_slaughter_musically_tiktok_joint_statement_2-27-19_0.pdf.

3 Press coverage following the announcement of the Sunday Riley matter referred to an "FTC crackdown" and noted, for example, that "it would be naïve for companies to not start adjusting. See James Brumley "What Might The FTC's Crackdown On Deceptive Online Marketing Mean for Social Media Companies?" THE MOTLEY FOOL (Oct. 29, 2019), <https://www.fool.com/investing/2019/10/29/what-might-the-ftcs-crackdown-on-deceptive-online>

Statement of the Commission

Fake and manipulated user reviews contaminate the online marketplace and inhibit informed decision-making by consumers. The FTC is intent on addressing this distortion of the marketplace, and is currently examining, among other things, how fake reviews affect consumer purchasing behavior; what platforms and other relevant market players are doing - and what they could be doing better - to combat fake reviews; and additional actions the FTC can take to address this problem beyond important law enforcement actions like this one. Advertisers and retailers should not doubt our resolve. Fake reviews, ratings, and rankings that pollute the digital marketplace are a high priority for the FTC, and we will continue to be active in this area. We also are mindful that true deterrence is not achieved via any single order but through concerted law enforcement campaigns. While this case standing alone will not cure advertisers of the urge to post fake reviews, it is part of a broader campaign to ensure that consumers are able to make purchasing decisions based on truthful and accurate information.

.aspx; see also Klein, David, “Social Media Influencer Marketing And FTC Enforcement” MONDAQ (March 26, 2020) (noting that “[g]iven the potential for large fines *and negative press*, companies must be aware of their obligations to ensure that their influencer marketing campaigns comply with applicable law.”) (italics added), <https://www.mondaq.com/unitedstates/Media-Telecoms-IT-Entertainment/907658/Social-Media-Influencer-Marketing-And-FTC-Enforcement>.

Dissenting Statement

**STATEMENT OF COMMISSIONER ROHIT CHOPRA
JOINED BY COMMISSIONER REBECCA KELLY SLAUGHTER****Summary**

- The FTC is doubling down on its no-money, no-fault settlement with Sunday Riley, who was charged with egregious fake review fraud. This weak settlement is a serious setback for the Commission's credibility as a watchdog over digital markets.
- To defend this settlement, the Commissioners supporting this outcome claim they had no basis to seek more than \$0. Their analytical approach favors the fraudster, and it will undermine our mission in future cases.
- The Commission can end its no-consequences settlement policy by publishing a Policy Statement on Equitable Monetary Remedies, restating legal precedent into formal rules, and designating specific misconduct as penalty offenses through an unused FTC Act authority.

Introduction

With millions of retailers closed during the pandemic, Americans are relying more than ever on online reviews to compare products. Fake reviews are polluting digital marketplaces, harming consumers and honest sellers.

Fake review fraud is illegal, and the FTC has a responsibility to combat it. In the fake review fraud case before us today, Chairman Simons, Commissioner Phillips, and Commissioner Wilson have voted to finalize a settlement with a popular cosmetics company, Sunday Riley. The settlement includes no redress, no disgorgement of ill-gotten gains, no notice to consumers, and no admission of wrongdoing. Instead, Sunday Riley is merely being ordered to not break the law again.

Unsurprisingly, little has changed for Sunday Riley. Sephora, where Sunday Riley is alleged to have committed its fraud, continues to be a major sales channel. United Airlines retains its high-profile exclusive deal with Sunday Riley.¹ Influencers continue to promote the brand, which recently launched a new product line.²

Despite almost unanimous opposition to the proposed settlement, Chairman Simons, Commissioner Phillips, and Commissioner Wilson are voting to finalize it without changes. Rather than taking action today, they kick the can down the road and suggest the Commission

1 See *Amenity Kits*, UNITED AIRLINES, <https://www.united.com/ual/en/us/fly/travel/inflight/amenity-kits.html> (last visited on Oct. 6, 2020).

2 See Madge Maril, *The New Sunday Riley Clean Rinse Serum Is A Chemical Exfoliator – For Your Scalp*, THE ZOE REPORT (Apr. 23, 2020), <https://www.thezoereport.com/p/the-new-sunday-riley-clean-rinse-serum-is-a-chemical-exfoliator-for-your-scalp-22841796>.

Dissenting Statement

will one day take this problem more seriously. But it is not every day that whistleblowers come forward to reveal massive fake review fraud. This case was an opportunity for the Commission to signal that disinformation campaigns have costs. Instead, they're sending a clear signal that the cost is \$0.

The Commission's insistence on seeking only a number that was 100 percent accurate led us to seek a number that was 100 percent inaccurate. This was not our only option. As I described in my original statement on this matter, empirical literature shows that positive reviews can materially and measurably increase sales. When a newly launched product attracts a slew of positive reviews, this can lead to a herd effect that generates massive revenue, because these reviews may affect how e-commerce platform algorithms prioritize listings. Given these effects, the Commission was in a strong position to estimate ill-gotten gains. But rather than relying on evidence and analysis, Chairman Simons, Commissioner Phillips, and Commissioner Wilson relied on a less rigorous approach that favors the fraudster.

The Commission's decision sends the unfortunate message to other fake review fraudsters that they, too, might be able to extract a no-consequences settlement from the FTC. In matters involving dishonest or fraudulent conduct, I do not support seeking nothing in settlement negotiations. To be credible as a digital regulator, we must change this approach.

Background on Sunday Riley's Scam and the No-Consequences Settlement

Sunday Riley is a successful cosmetics brand founded and operated by Ms. Sunday Riley. As detailed in the Commission's allegations, in 2018, Ms. Riley orchestrated an elaborate scheme to generate fake reviews of her firm's high-end skincare products, a practice that harms both consumers and honest competitors. To address these allegations of egregious lawbreaking, Chairman Simons, Commissioner Phillips, and Commissioner Wilson subsequently voted to propose a settlement under which Sunday Riley agreed to not break the law again, and to simply submit periodic paperwork.

During the public comment period that followed the settlement proposal, consumers pleaded with the Commission to do more to hold the company and its CEO accountable.³ Numerous commenters detailed their personal experiences relying on reviews to purchase Sunday Riley products. One commenter warned that this order further diminishes their confidence in ordering skincare products online, and another commenter, a retail employee, observed that, when consumers lose trust, all sellers suffer.⁴ Many called the settlement a "slap

3 Comments are available at *Fed. Trade Comm'n., Sunday Riley Modern Skincare, LLC; Analysis To Aid Public Comment*, Docket ID FTC-2019-0086 (Oct. 25, 2019), <https://www.regulations.gov/document?D=FTC-2019-0086-0001> [Hereinafter Sunday Riley AAPC].

4 See Audrey Cooper, Comment No. 06 on Sunday Riley AAPC, FTC File No. 1923008 (Oct. 29, 2019), <https://www.regulations.gov/document?D=FTC-2019-0086-0006>; Ivy M., Comment No. 08 on Sunday Riley AAPC, FTC File No. 1923008 (Oct. 29, 2019), <https://www.regulations.gov/document?D=FTC-2019-0086-0008>; Anonymous Consumer, Comment No. 10 on Sunday Riley AAPC, FTC File No. 1923008 (Oct. 30, 2019), <https://www.regulations.gov/document?D=FTC-2019-0086-0010>; Nupur Patel, Comment No. 21 on Sunday Riley AAPC, FTC File No. 1923008 (Nov. 1, 2019), <https://www.regulations.gov/document?D=FTC-2019-0086-0021>;

Dissenting Statement

on the wrist” and argued it would be a “green light” for further fake review fraud.⁵ An objection filed by Consumer Reports noted that Sunday Riley “will face no real consequences for its actions” and detailed the Commission’s clear legal authority to go beyond the proposed no-money, no-fault order.⁶

Rejecting these nearly unanimous comments, the agency is doubling down on its deficient approach, with Chairman Simons, Commissioner Phillips, and Commissioner Wilson voting to finalize the proposed no-money, no-fault settlement without changes. They tout the paperwork the order requires, while warning that, if Ms. Riley and her company are charged with breaking the law *again*, they may face an actual penalty. This approach does little to deter digital deception, and the Commission can and must do better.

Commission’s Authority to Seek Equitable Monetary Relief

The objection filed by Consumer Reports was correct in arguing that the Commission can seek monetary relief in cases such as this one. For companies engaged in deceptive advertising, full redress is an appropriate starting point for estimating restitution, with wrongdoers bearing the burden of showing which sales were untainted by deception.⁷ Any uncertainty in this

Anonymous Consumer, Comment No. 22 on Sunday Riley AAPC, FTC File No. 1923008 (Nov 4, 2019), <https://www.regulations.gov/document?D=FTC-2019-0086-0022>.

⁵ See Jeffrey Heft, Comment No. 03 on Sunday Riley AAPC, FTC File No. 1923008 (Oct. 28, 2019), <https://www.regulations.gov/document?D=FTC-2019-0086-0003>; Anonymous Consumer, Comment No. 04 on Sunday Riley AAPC, FTC File No. 1923008 (Oct. 28, 2019), <https://www.regulations.gov/document?D=FTC-2019-0086-0004>; Terri Morgenson, Comment No. 5 on Sunday Riley AAPC, FTC File No. 1923008 (Oct. 28, 2019), <https://www.regulations.gov/document?D=FTC-2019-0086-0005>; Anonymous Consumer, Comment No. 10 on Sunday Riley AAPC, FTC File No. 1923008 (Oct. 30, 2019), <https://www.regulations.gov/document?D=FTC-2019-0086-0010>; Anonymous Consumer, Comment No. 11 on Sunday Riley AAPC, FTC File No. 1923008 (Oct. 30, 2019), <https://www.regulations.gov/document?D=FTC-2019-0086-0011>; Kristina, Comment No. 16 on Sunday Riley AAPC, FTC File No. 1923008 (Oct. 30, 2019), <https://www.regulations.gov/document?D=FTC-2019-0086-0016>; Linda Pan, Comment No. 20 on Sunday Riley AAPC, FTC File No. 1923008 (Nov. 1, 2019), <https://www.regulations.gov/document?D=FTC-2019-0086-0020>; Victoria Bums, Comment No. 28 on Sunday Riley AAPC, FTC File No. 1923008 (Nov. 18, 2019), <https://www.regulations.gov/document?D=FTC-2019-0086-0028>; Anonymous Consumer, Comment No. 32 on Sunday Riley AAPC, FTC File No. 1923008 (Nov. 18, 2019), <https://www.regulations.gov/document?D=FTC-2019-0086-0032>; Anonymous Consumer, Comment No. 42 on Sunday Riley AAPC, FTC File No. 1923008 (Nov. 25, 2019), <https://www.regulations.gov/document?D=FTC-2019-0086-0042>; Sophia Brunetti, Comment No. 45 on Sunday Riley AAPC, FTC File No. 1923008 (Nov. 27, 2019), <https://www.regulations.gov/document?D=FTC-2019-0086-0045>.

⁶ Consumer Reports added that “[a]llowing companies to engage in and profit from egregious behaviors with merely a prospect of penalties if caught a second time and some limited recordkeeping responsibilities will hardly strike fear in the heart of potential fraudsters. Given the Commission’s limited staff and capacity to police an \$18 trillion economy, unscrupulous actors know there is a relatively low chance of getting caught by the FTC. Those that do shouldn’t get what amounts to a “Get Out of Jail Free” card for their first offense.” See Maureen Mahoney on Behalf of Consumer Reports, Comment No. 46 on Sunday Riley AAPC, FTC File No. 1923008 (Nov. 27, 2019), <https://www.regulations.gov/document?D=FTC-2019-0086-0046>.

⁷ Generally, if the Commission can establish that materially false claims were widely disseminated, the starting point for calculating restitution is the total revenue of the enterprise. See, e.g., *FTC v. Kuykendall*, 371 F.3d 745, 764 (10th Cir. 2004) (holding, in a contempt action, that, after the Commission establishes a presumption of reliance,

Dissenting Statement

estimation is to be resolved not against consumers but against “the wrongdoer whose illegal conduct created the uncertainty.”⁸

Because the agency can seek monetary relief in federal court, through either Section 13(b) or Section 19, past Commissions have been able to recover funds in cases involving fake reviews without time-consuming litigation.⁹ In 2011, the FTC charged Legacy Learning Systems with using fake reviews, in the form of undisclosed paid endorsements, to sell DVDs.¹⁰ The Commission settled the matter for \$250,000, or approximately five percent of sales attributable to affiliates who posted reviews, in spite of the fact that the DVDs worked as advertised, that the reviews were posted by third parties, and that our complaint did not detail which consumers, if any, relied on the reviews.¹¹

We obtained this judgment with the same authority we have today, employing the same legal theory we are employing today, in the same forum we are using today. The only thing that has changed is the five Commissioners responsible for the decision.

A More Permissive Approach to Fake Reviews

While our authority remains the same as it was in 2011, Chairman Simons, Commissioner Phillips, and Commissioner Wilson are signaling a shift in the FTC’s approach to policing fake reviews. Ordinarily, as discussed above, the Commission approximates disgorgement based on a firm’s total revenue connected to the illegal practice, which incentivizes the firm to rebut that approximation with more granular data. But here, Chairman Simons,

“the district court may use the Defendants’ gross receipts as a starting point” for awarding monetary relief). In my view, there is no doubt that Sunday Riley’s fake reviews met this standard – a view confirmed by the comments received by the Commission in response to this proposed settlement.

8 *FTC v. Commerce Planet, Inc.*, 815 F.3d 593, 603 (9th Cir. 2016) (internal quotation marks omitted). This also makes sense as a matter of policy, since resolving uncertainty in favor of wrongdoers only incentivizes them to keep poor records.

9 It has taken the Commission nearly a year to finalize this settlement, and, in the intervening months, the Supreme Court has granted certiorari to challenges to the FTC’s authority under Section 13(b), while issuing a ruling in *Liu v. SEC* that raised questions about whether “legitimate expenses” should offset disgorgement orders. *See Liu v. SEC*, 140 S. Ct. 1936, 1946 (2020). The majority does not argue that the Commission lacked authority to seek monetary relief in this matter, nor does it argue that the expenses incurred in furthering this scheme would be seen as legitimate.

10 Press Release, Fed. Trade Comm’n, Firm to Pay FTC \$250,000 to Settle Charges That It Used Misleading Online “Consumer” and “Independent” Reviews (Mar. 15, 2011), <https://www.ftc.gov/news-events/press-releases/2011/03/firm-pay-ftc-250000-settle-charges-it-used-misleading-online>.

11 *See* Compl. ¶ 8, *In re Legacy Learning Sys. Inc.*, Docket No. C-4323 (2011), <https://www.ftc.gov/sites/default/files/documents/cases/2011/06/110610legacylearningcmpt.pdf>. Importantly, Legacy Learning Systems required its affiliates to comply with FTC guidelines, and some of the fake reviews at issue actually included disclosures of their authors’ material connections. These disclosures, as well as Legacy’s monitoring, were charged to be insufficient, but still represent a greater effort at ensuring compliance than what was undertaken by Sunday Riley. *See id.* 9.

Dissenting Statement

Commissioner Phillips, and Commissioner Wilson abandon this time-tested and judicially recognized approach, announcing it would be inappropriate to even *approximate* Sunday Riley’s illegal profits. The predictable result of this new approach is a windfall for fake review fraudsters, who can count on their misconduct carrying no real costs.¹²

Chairman Simons, Commissioner Phillips, and Commissioner Wilson claim this settlement imposes certain hidden costs, but they seem to rely on speculation. They suggest the settlement may have a “reputational effect,”¹³ but they cite no data or analysis, and it is unclear why they assume that news reports would affect Sunday Riley’s sales, while the consumer reviews at issue in this case would not.¹⁴ They claim that Sunday Riley may face collateral consequences from business partners, but the company continues to be promoted on Sephora,¹⁵ and it remains the “signature skincare partner” of United Airlines.¹⁶ Finally, they suggest Sunday Riley could face consequences from other regulators, but that should not justify a no-consequences settlement by *this* regulator.¹⁷

Ultimately, even if there were concern that seeking full redress is excessive, is the logical conclusion to then ask for zero? As I noted when this matter was proposed for public comment, there is extensive literature on the impact of fake reviews,¹⁸ and the Commission has authority to

12 Chairman Simons, Commissioner Phillips, and Commissioner Wilson may not believe Sunday Riley’s alleged scheme was profitable, but Sunday Riley and her employees certainly did. *See* Compl. ¶ 10, *In the Matter of Sunday Riley Modern Skincare, LLC*, File No. 1923008 (2019) (quoting Sunday Riley as claiming review manipulation “directly translates to sales”); *Id.* ¶ 12 (quoting a Sunday Riley Account Manager instructing employees that “[t]he power of reviews is mighty”).

13 Statement of Chairman Joseph J. Simons and Commissioners Noah Joshua Phillips and Christine S. Wilson *In re* Sunday Riley Modern Skincare, LLC, Fed. Trade Comm’n File No. 1923008 (Nov. 6, 2020).

14 If imposing reputational costs is important to the majority, it is unclear why they did not require Sunday Riley to notify its customers of the fraud or forbid the company from manipulating search results to suppress information about this action. Relying solely on news reports to justify no-money settlements ignores the elaborate steps companies can take to “manage” their reputations, just as they “manage” consumer reviews. *See* Craig Silverman, *How To Game Google To Make Negative Results Disappear*, BUZZFEED NEWS (June 27, 2019), <https://www.buzzfeednews.com/article/craigsilverman/google-search-manipulation-online-reputation-expert> (reporting on a “global reputation management industry offering to cover up past arrests, poor customer reviews, allegations of fraud, and other character-killing online content.”).

15 *Sunday Riley*, SEPHORA, <https://www.sephora.com/brand/sunday-riley> (last visited on Oct. 6, 2020).

16 *Supra* note 1.

17 The majority also misunderstands the role of individual liability, suggesting that this matter should be compared to the Commission’s 2019 settlement with Facebook, where no individuals were charged. But one mistake does not justify another. In this matter, the Commission’s complaint cited specific emails that Sunday Riley sent her staff, which provided an ample basis for charging her personally. In Facebook, the Commission opted to not interview Facebook’s CEO, so it is unknown whether similar evidence existed. In every case, the decision of whether to name an individual should be based on the facts and circumstances, not on the size or clout of a firm.

18 *See, e.g.*, Georgios Askalidis & Edward C. Malthouse, *The Value of Online Customer Reviews*, RECSYS’16: PROCEEDINGS OF THE 10TH ACM CONFERENCE ON RECOMMENDER SYSTEMS 155-58 (2016), <https://dl.acm.org/citation.cfm?id=2959181> (finding that “the conversion rate of a product can increase by as much

Dissenting Statement

compel production of granular sales data from both Sunday Riley and Sephora if necessary. I am confident we could have developed a reasonable estimate of harm and ill-gotten gains, as we did in 2011, rather than presuming fake reviews are harmless or applying a different legal standard because Sunday Riley's conduct doesn't resemble that of other FTC defendants.

If Commissioners believe that moving the agency toward a more lenient approach against fake reviews is in the public interest, they should state as much. Alternatively, they could acknowledge that this settlement was mistaken and commit that they will change course. But claiming it was unrealistic to go beyond a no-money, no-fault order is not credible, and it will undermine us in future cases.¹⁹

Ending No-Consequences Settlements

As detailed in the comments in the official public docket and in my initial statement, the majority's approach does not bode well for honest businesses looking to compete online. Sunday Riley's alleged conduct was illegal, indefensible, and wrong – but it was also understandable. As explained by one leading e-commerce consultant, “Incentives are incredibly high for brands to create fake reviews or incentivize reviews,” and many brands feel, “If I don't do this, then I'm not staying level with my competition, I'm literally just falling behind.”²⁰

While the incentives to post fake reviews and engage in disinformation tactics are very high, the likelihood of getting caught and facing consequences appears to be very low. It may be common for platforms to remove fake reviews, but it is unclear – and entirely discretionary – how and whether platforms hold perpetrators accountable. In this case, for example, there are allegations that at some point, Sephora detected Sunday Riley's scheme, leading the retailer to delete certain reviews.²¹ But, as alleged in the complaint, Sunday Riley simply adjusted its tactics, directing employees to conceal their IP addresses to evade further detection.²² It is

as 270 percent as it accumulates reviews with the first 5 reviews driving the bulk of the aforementioned increase” and that “the existence of reviews provides valuable signals to the customers, increasing their propensity to purchase”); Lev Muchnik et al., *Social Influence Bias: A Randomized Experiment*, 341 SCI. 647, 649 (2013), <https://science.sciencemag.org/content/341/6146/647> (finding that, for a given product, a single initial positive “up-vote” creates an accumulating herd effect that results in a 25 percent higher average rating for that item at the end of a 5-month observation window compared to an initial negative “down-vote”).

19 Importantly, Chairman Simons, Commissioner Phillips, and Commissioner Wilson do not dispute the complaint's allegation that the company and its CEO broke the law. Indeed, Sunday Riley's alleged conduct likely violated the penalty statutes of many individual states. If the majority was genuinely concerned about the litigation risk under the FTC Act of seeking monetary relief, we could have simply enlisted states with their own penalty claims.

20 Sapna Maheshwari, *When Is a Star Not Always a Star? When It's an Online Review*, N.Y. TIMES (Nov. 28, 2019), <https://www.nytimes.com/2019/11/28/business/online-reviews-fake.html>.

21 Sunday Riley Compl., *supra* note 12, ¶ 9.

22 *Id.*

Dissenting Statement

unclear whether Sephora took any further action, and Sunday Riley's scheme became public only when a whistleblower came forward.²³

Given this spotty private policing, it is critical that, in the rare circumstances when law enforcement steps in, we send an unambiguous message that posting fake reviews is not worth the risk. Today's no-money order, I fear, will have the opposite effect, sending the message that if you get caught *and* attract law enforcement scrutiny, the price you'll pay is zero.²⁴

The problems with no-money orders were once widely understood. More than four decades ago, Robert Pitofsky, who would go on to serve on the Commission twice, including as its Chair, called no-money cease-and-desist orders "scandalously weak."²⁵ He, too, argued that they did little to deter wrongdoing and nothing to redress victims.²⁶ Yet the Commission continues to rely on them, even in cases, like this one, involving allegations of clear dishonesty and fraud.

When companies engage in egregious misconduct, a no-money, no-fault settlement is ineffective, especially when there appear to be no material disputes of fact or law. The Commission should formally signal that it is terminating its no-money, no-fault settlement approach for dishonest or fraudulent conduct by:

- **Publishing a Policy Statement on Equitable Monetary Remedies:** The Commission should issue a Policy Statement on Equitable Monetary Remedies. At a minimum, it should establish a rebuttable presumption that the Commission will not pursue no-money settlements in cases involving dishonesty or fraud.²⁷ This will help establish consistency

23 See u/throwawayacctSRiley, *Sunday Riley Employee: We Write Fake Sephora Reviews*, REDDIT (Oct. 15, 2018, 4:21 PM), https://www.reddit.com/r/SkincareAddiction/comments/9ogete/psa_sunday_riley_employee_we_write_fake_sephora/.

24 This view echoes that of Fakespot chief executive Saoud Khalifah, who warned, following the announcement of this settlement, that "[n]ow, everybody is like, O.K., if that's the penalty, then why not write more fake reviews and pump ourselves through the roof?" *Supra* note 20.

25 Irving Scher et al., *Part II-FTC Improvement Act*, 45 ANTITRUST L.J. 96, 117 (1976).

26 Here's how Pitofsky described the effects of no-money orders on the broader marketplace:

Businessmen engaged in fraudulent practices knew in advance that the worst that could happen to them in most cases would be that if a fraud were detected, and if the Commission decided to proceed against that company as opposed to hundreds of other companies engaged in similar practices, and if the complaint ever proceeded to a conclusion, they would then be asked to discontinue the practice. In effect, the most significant deterrent to engaging in fraudulent practices in those days was the considerable lawyers' fees that would be generated by a Commission investigation.

Id.

27 See Statement of Commissioner Rohit Chopra In re Truly Organic, Fed. Trade Comm'n File No. 1923077 (Sept. 19, 2019), <https://www.ftc.gov/public-statements/2019/09/statement-commissioner-rohit-chopra-matter-truly-organic> (calling on the Commission to issue a policy statement on equitable monetary remedies). Importantly, there

Dissenting Statement

in our enforcement program, ensuring that fraud carries consequences regardless of whether it is committed by a fly-by-night operation or by an established firm like Sunday Riley.

- **Restate Existing Legal Precedent into Rules:** The FTC is authorized to prohibit prevalent unfair or deceptive practices through rules, and to seek civil penalties against violators.²⁸ These rules need not impose any substantive obligation on market participants, and can instead simply restate existing law. For example, the FTC is currently undertaking a rulemaking to consider codifying its existing Made in USA guidance, which would help increase accountability for those who abuse the label.²⁹ In this area, the Commission can codify basic tenets of the FTC Endorsement Guides – in particular, the requirement that endorsers disclose material connections to sellers – into a rule. This would impose zero regulatory burden on market participants, while ensuring real accountability for those who cheat.³⁰
- **Designate Specific Misconduct as Penalty Offenses:** The Commission need not wait to issue a rule to seek civil penalties against fake review fraudsters and other wrongdoers. The Commission has authority under Section 5(m)(1)(B) of the FTC Act to seek penalties against parties who engage in conduct known to have been previously condemned by the Commission.³¹ The practice of endorsing products without disclosing material connections was condemned decades ago,³² and the Commission can act almost immediately to trigger substantial penalties against the worst violators.

are many cases that do not involve dishonesty or fraud – such as cases involving unfair practices – where monetary relief is also appropriate.

28 See 15 U.S.C. § 57a.

29 Press Release, Fed. Trade Comm’n, FTC Issues Staff Report on Made in USA Workshop, Seeks Comment on Related Proposed Rulemaking for Labeling Rule (June 22, 2020), <https://www.ftc.gov/news-events/press-releases/2020/06/ftc-issues-staff-report-on-made-in-usa-workshop>.

30 See Statement of Commissioner Rohit Chopra Regarding the Endorsement Guides Review, Fed. Trade Comm’n File No. P204500 (Feb. 12, 2020), <https://www.ftc.gov/public-statements/2020/02/statement-commissioner-rohit-chopra-regarding-endorsement-guides-review>. This would also reduce gamesmanship by fraudsters around our Section 13(b) authority.

31 The Commission can resurrect Section 5(m)(1)(B), the Penalty Offense Authority, to increase deterrence, reduce gamesmanship around Section 13(b), and promote market-wide compliance. See Rohit Chopra & Samuel A.A. Levine, *The Case for Resurrecting the FTC Act’s Penalty Offense Authority* (Oct. 29, 2020), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3721256.

32 Forty years ago, the Commission issued an order in *Cliffdale Associates* finding that it was deceptive under Section 5 to portray endorsements as objective when in fact they were written by the seller’s paid agents. See *In the Matter of Cliffdale Assocs., Inc.*, 103 F.T.C. 110 (1984). The Commission could provide notice of this and other relevant orders to market participants, which would expose them to stiff civil penalties if they engage in fake review fraud or similar disinformation tactics.

Analysis to Aid Public Comment

Conclusion

With disinformation pervading the digital world and fake reviews polluting online marketplaces, the Commission's decision to finalize this flawed settlement is more than a missed opportunity. It is a serious setback for online shoppers, honest sellers, and the Commission's credibility.

Rare is there a case as egregious as this one, with a whistleblower accusing a company of fraud in a public Reddit post. Despite clear authority to send a strong message through this case, the Commission is instead sending the message that there are no real consequences for online disinformation and fake review scams. This does not protect consumers. For these reasons, I respectfully dissent.

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 Sunday Riley Modern Skincare, LLC ("Sunday Riley Skincare") and its Chief Executive Officer, Ms. Sunday Riley (collectively "respondents").

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

This matter involves the respondents' marketing of their Sunday Riley brand cosmetic products. The respondents have sold their cosmetic products through Sephora's website, www.sephora.com, which provides consumers the opportunity to leave product reviews. According to the complaint, on multiple occasions, Sunday Riley Skincare managers, including Ms. Riley, posted reviews of Sunday Riley brand cosmetic products on the Sephora website using fake accounts created just for that purpose or requested that other employees do so. The complaint alleges that the respondents violated Section 5(a) of the FTC Act by misrepresenting that certain reviews of Sunday Riley brand products on the Sephora website reflected the independent experiences or opinions of impartial ordinary users of the products, when they were written by Ms. Riley and her employees. The complaint further alleges that the respondents deceptively failed to disclose that certain online consumer reviews were written by Ms. Riley or her employees.

The order contains provisions designed to prevent the respondents from engaging in similar acts and practices in the future.

Analysis to Aid Public Comment

Provision I prohibits the respondents, in connection with the sale of any product, from misrepresenting the status of any endorser or person providing a review of the product, including misrepresenting that the endorser or reviewer is an independent or ordinary user of the product.

Provision II prohibits the respondents from making any representation about any consumer or other endorser of a product without disclosing, clearly and conspicuously, and in close proximity to that representation, any unexpected material connection between the consumer or endorser and (1) any respondent, or (2) any other individual or entity affiliated with the product. The order defines the terms “clearly and conspicuously,” “close proximity,” and “unexpected material connection.”

Provision III requires that the respondents instruct their employees, officers, and agents as to their responsibilities for disclosing their connections to any respondent’s product they endorse and that the respondents obtain signed acknowledgements from them. **Provision IV** mandates that the respondents acknowledge receipt of the order, distribute the order to principals, officers, and certain employees and agents, and obtain signed acknowledgments from them. **Provision V** requires that the respondents submit compliance reports to the FTC one year after the order’s issuance and submit notifications when certain events occur. **Provision VI** requires the respondents to create certain records for twenty years and retain them for five years. **Provision VII** provides for the FTC’s continued compliance monitoring of the respondents’ activity during the order’s effective dates. **Provision VIII** provides the effective dates of the order, including that, with exceptions, the order will terminate in 20 years.

The purpose of this analysis is to facilitate public comment on the order, and it is not intended to constitute an official interpretation of the complaint or order, or to modify the order’s terms in any way.

Complaint

IN THE MATTER OF

**STRYKER CORPORATION,
AND
WRIGHT MEDICAL GROUP N.V.****CONSENT ORDER, ETC. IN REGARD TO ALLEGED VIOLATIONS OF SECTION 5 OF THE FEDERAL
TRADE COMMISSION ACT AND SECTION 7 OF THE CLAYTON ACT***Docket No. C-4728; File No. 201 0014**Complaint, November 3, 2020 – Decision, December 11, 2020*

This consent order addresses the \$4 billion acquisition by Stryker Corporation of certain assets of Wright Medical Group N.V. The complaint alleges that the proposed Acquisition, if consummated, would violate Section 7 of the Clayton Act and Section 5 of the Federal Trade Commission Act by substantially lessening competition in the U.S. markets for total ankle replacements and finger joint implants. The consent order requires Stryker to divest all rights and assets related to its total ankle replacement and finger joint implant businesses to DJO Global, Inc.

Participants

For the *Commission*: Jeff Dahnke, Yan Gao, Sebastian Lorigo, Jacqueline Mendel, and Jonathan Ripa.

For the *Respondents*: Clifford Aronson, Skadden, Arps, Slate, Meagher & Flom LLP; Michael McFalls, Ropes & Gray LLP.

COMPLAINT

Pursuant to the Clayton Act and the Federal Trade Commission Act (“FTC Act”), and its authority thereunder, the Federal Trade Commission (“Commission”), having reason to believe that Respondent Stryker Corporation (“Stryker”), a corporation subject to the jurisdiction of the Commission, has made an offer to acquire all of the voting securities of Wright Medical Group N.V., Inc. (“Wright”), a company subject to the jurisdiction of the Commission, in violation of Section 5 of the FTC Act, as amended, 15 U.S.C. § 45, and that such acquisition, if consummated, would violate Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the FTC Act, as amended, 15 U.S.C. § 45, and it appearing to the Commission that a proceeding in respect thereof would be in the public interest, hereby issues its Complaint, stating its charges as follows:

I. RESPONDENT

1. Respondent Stryker is a corporation organized, existing, and doing business under, and by virtue of the laws of, the state of Michigan with its executive offices and principal place of business located at 2825 Airview Boulevard, Kalamazoo, Michigan 49002. Stryker is engaged in the development, manufacture, sale, and distribution of medical devices used in a broad range of medical specialties.