

**Statement of Commissioner Maureen K. Ohlhausen
Concurring in Part and Dissenting in Part
In the Matter of California Naturel, Inc.
Docket No. 9370
December 5, 2016**

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

Prior to early 2016, California Naturel expressly marketed its sunscreen as an “all natural” product and stated that it “uses only the purest, most luxurious and effective ingredients found in nature.” The company does not dispute that it made these claims and admits that its sunscreen contained a substantial amount (eight percent) of a synthetic ingredient, dimethicone. Based on these undisputed facts, I agree with my colleagues that those unqualified “all natural” claims were false and misleading in violation of Sections 5 and 12 of the FTC Act at the time they were made. I also agree that the recent addition by California Naturel of a disclaimer on its website does not excuse deception that has already occurred. *See, e.g., Libbey-Owens-Ford Glass Co. v. FTC*, 352 F.2d 415, 418 (6th Cir. 1965). Thus, I would grant summary judgment and impose a remedial order solely on this basis.¹

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

Further, the question whether California Naturel’s subsequent disclaimers and product stickers provided adequate disclosure would be a fact question that the Commission should not resolve on summary decision. Some courts have granted summary judgment in matters where disclaimers were in fine print and distant from the challenged claims. *See, e.g., FTC v. Cyberspace.com, LLC*, 453 F.3d 1196 (2006). But other courts have denied summary judgment where there is a genuinely disputed factual issue about whether disclaimers are prominent and

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

easily visible. *See, e.g., FTC v. Dalbey*, No. 11-cv-1396, 2013 WL 934986 (D. Colo. Mar. 11, 2013). As noted above, the standard for summary decision requires us to resolve all factual ambiguities and draw all justifiable inferences in the light most favorable to California Naturel, the party opposing the motion. Given this standard and the facts as presented, I believe the question of whether the later-added disclosure and new product stickers adequately qualified the “all natural” claim is a genuinely disputed material fact and thus not appropriate for summary decision in this matter.

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